Appeal 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,

Movants – Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
CIVIL CASE NO.: SACV07-1434 JVS (ANX)

APPELLANTS – CROSS-APPELLEES OPENING BRIEF

ADVOCATES FOR FAITH AND FREEDOM
Robert H. Tyler, CA Bar No. 179572
Jennifer L. Monk, CA Bar No. 245512
24910 Las Brisas Road, Suite 110
Murrieta, California 92562
Telephone: (951) 304-7583
Facsimile: (951) 600-4996
rtyler@faith-freedom.com
jmonk@faith-freedom.com

Attorneys for Plaintiffs – Appellants –Cross-Appellees

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

INTRODUCTION

Plaintiff Chad Farnan ("Chad"), a then fifteen-year old high school student, took an advanced placement ("AP") European history class in order to enhance his opportunities to attend a prestigious college, and was routinely subjected to a plethora of derogatory and hostile comments towards religion, particularly Christianity, that Dr. James Corbett ("Corbett") inserted into Chad's classroom experience. Corbett chose to teach in a manner that fell far short of the neutrality that is required by the First Amendment of the United States Constitution. In doing so, he created a classroom environment that was impermissibly hostile towards religion. If permitted to continue teaching in this manner, he will continue to violate the constitutionally protected rights of his students to be free from government expressions of hostility towards religion.

It is a well-established principle under the existing precedent that the Establishment Clause requires neutrality, which is to say that a government actor cannot either endorse or disapprove of religion. "[H]ostility toward any religion or toward all religions is as much forbidden by the Constitution as is an official establishment of religion." *Wallace v. Jaffree*, 472 U.S. 38, 85 (1985) (Burger, C.J., dissenting). Accordingly, while it is abundantly clear that teachers cannot use their classroom as a pulpit from which they

proselytize, it is equally unambiguous that teachers, including Corbett, violate the Establishment Clause when they use the classroom to repeatedly express disapproval of religion, religious faith, and the resulting worldviews.

STATEMENT OF JURISDICTION

Chad sued under 42 U.S.C. §§ 1983 and 1988 challenging a myriad of statements made by Corbett under the First and Fourteenth Amendments to the United States Constitution. (Excerpts of Record ("ER") Tab 19, p. 350.) The District Court had federal question jurisdiction under 28 U.S.C. §§ 1331 and 1343. (ER 19, p. 349–360.)

On May 1, 2009, following cross-motions for summary judgment, the District Court (1) granted summary judgment in Chad's favor on the single cause of action as to Corbett with respect to a single statement; (2) granted summary judgment in favor of Capistrano Unified School District ("School District") and the California Teachers Association and the Capistrano Unified Education Association ("Union Intervenors") with respect to all other statements and with respect to the School District's liability. (ER 4.) On July 27, 2009, following additional briefing by all parties and a motion to amend the answer by the Defendants to insert qualified immunity, the District Court denied injunctive relief and declaratory relief. (ER 3.) On

September 15, 2009, the District Court granted leave to amend the answer to add qualified immunity and granted qualified immunity as to Corbett as an individual defendant. (ER 2.) Chad timely filed a Notice of Appeal on October 26, 2009 as to all defendants. (ER 5.) Corbett timely filed a Notice of Appeal on October 26, 2009. Chad is appealing the denial of his as-applied challenge with respect to all statements, except for the single statement the District Court found to be a violation of the Establishment Clause, the District Court's denial of declaratory relief, and the District Court's grant of leave to file an amended answer to add qualified immunity and the grant of qualified immunity to Corbett as an individual. (ER 5.) This Court has jurisdiction of this appeal under 28 U.S.C. § 1291.

STANDARD OF REVIEW

Each of the issues presented in this appeal are reviewed de novo, with the exception of the district court's decision to grant Corbett leave to file an amended answer, which is reviewed for an abuse of discretion. First, a district court's grant of summary judgment is review de novo. *Blankenhorn v. City of Orange*, 485 F.3d 463, 470 (9th Cir. 2007) (citation omitted). In evaluating the evidence, all facts and reasonable inferences should be construed in favor of the non-moving party. *Id*. (citation omitted). The district court's ruling must be overturned if there are any genuine issues

of material fact or if the lower court incorrectly applied substantive law. *Id.* (citation omitted).

Similarly, a district court's decision denying declaratory relief presents a legal question and is therefore reviewed de novo. *See Wagner v. Professional Engineers in Cal. Gov't., 354 F.3d 1036, 1040 (9th Cir. 2004); Ablang v. Reno, 52 F.3d 801, 803 (9th Cir. 1995).* Further, a defendant's claim of qualified immunity presents a legal question, and is also reviewed de novo. *Elder v. Holloway*, 510 U.S. 510, 516 (1994) ("*Elder*") (citations omitted).

Finally, a district court's decision to permit a party to amend its answer is reviewed for an abuse of discretion. *Wardrip v. Hall*, 548 F.3d 729, 732 (9th Cir. 2008).

STATEMENT OF THE ISSUES

1. Whether Corbett's statements when jointly considered created an environment impermissibly hostile toward religion in violation of the Establishment Clause?

2. Whether Corbett's statements when taken individually, other than the single statement found to have violated the Establishment Clause, should also have been found to be impermissibly hostile toward religion in violation of the Establishment Clause?

3. Whether Corbett was appropriately granted leave to file an amended answer to assert qualified immunity after the District Court's final ruling on the merits of the case?

4. Whether Corbett as an individual defendant is entitled to qualified immunity from Chad's claim for nominal damages?

5. Whether Chad is entitled to declaratory relief?

STATEMENT OF THE CASE

Chad filed a complaint on or about December 13, 2007, seeking declaratory and injunctive relief, and damages, as a result of alleged violations of the Establishment Clause of the U.S. Constitution. The complaint requested that the Court enjoin Defendants School District and Corbett, in both his official and individual capacity (collectively, "Defendants"), from displaying a hostility towards religion or favoring irreligion over religion, enter a judgment stating that the Defendants' policy or practice was hostile towards religion, and award nominal damages. On or about January 15, 2008, Chad filed a first amended complaint making slight modifications to the complaint. (ER 19, pp. 349-360.)

On or about February 13, 2009, Defendants filed a motion to dismiss. The motion to dismiss was heard on March 10, 2008, before the Honorable

James V. Selna of the Central District of California, and the Court denied the same.

On or about March 21, 2008, a motion to intervene was filed by the Union Intervenors. The motion to intervene was heard on April 28, 2008, before the Honorable James V. Selna of the Central District of California, and the Court granted the intervention.

On or about March 9, 2009, Defendants filed a motion for summary judgment. On that same day, Chad filed a motion for summary judgment. Further, Union Interveners also filed a motion for summary judgment. The cross motions for summary judgment were heard together before the Honorable James V. Selna of the Central District of California on April 6, 2009, and the matter was taken under submission. On May 1, 2009, the Court entered a final ruling in favor of Chad granting summary judgment as to a single statement reviewed by the court, and granting summary judgment to Defendant Capistrano Unified School District and Defendant Interveners as to all other statements reviewed by the Court. (ER 4, p. 90.)

On July 24, 2009, Defendants filed a motion to file amended answer to assert the additional affirmative defense of qualified immunity. After supplemental briefing was submitted by the parties regarding qualified immunity, the matter was heard before the Honorable James V. Selna of the

Central District of California on August 31, 2009. The Court granted the motion to file amended answer and granted the motion for qualified immunity on September 15, 2009. (ER 2, p. 34.)

On July 27, 2009, the Honorable James V. Selna of the Central District of California entered an order denying Chad's request for both injunctive and declaratory relief. (ER 3, p. 56.) On September 24, 2009, the District Court entered final judgment. (ER 1.) The parties filed cross appeals on October 26, 2009. (ER 5.) On July 19, 2009, Chad filed a motion to dismiss his appeal as to the School District and Corbett in his official capacity, only.

STATEMENT OF FACTS

Corbett is a high school teacher at Capistrano Valley High School in the Capistrano Unified School District. (ER 16, p. 339.) He teaches AP European history at Capistrano Valley High School. (ER 16, p. 339.) Corbett is the only AP European history teacher at Capistrano Valley High School. (ER 16, p. 339.)

Chad was a 15-year-old sophomore at Capistrano Valley High School in Fall 2007. (ER 16, p. 339.) He was an honors student whose goal was to attend either the University of Southern California or the University of California at Los Angeles. (ER 16, p. 339.) He is also a

Christian who adheres firmly to the Christian faith and practices its tenets. (ER 16, p. 339).

Prior to the start of the 2007 school year, Chad's school counselor informed him that in order to possibly attain admission to either the University of Southern California or the University of California at Los Angeles, both highly selective schools, it is necessary to take AP European history. (ER 16, p. 339.) Accordingly, Chad enrolled in the class and began attending Corbett's class at the beginning of the Fall 2007 semester. (ER 16, p. 339.) Because of Corbett's choice to spend a majority of class time discussing topics other than European history, Chad found the class to be very challenging. (ER 16, p. 339.) As a result, for educational purposes, Chad began to record Corbett's lectures. (ER 16, p. 339.)

On a regular basis during the Fall 2007 semester, Corbett discussed a wide variety of topics not related to AP European history. (ER 16, p. 340.) While teaching the subject of the class and while discussing various other topics, Corbett made statements and expressed viewpoints that were derogatory, disparaging, and belittling regarding religion and Christianity in particular. (ER 16, p. 340.) Corbett chose to focus on indoctrinating his captive audience with his own anti-Christian dogma. (ER 16, p. 340.)

Corbett made the following statements during one single class period, October 19, 2007, while teaching the AP European history class at Capistrano Valley High School. (ER 16, p. 341.) While these statements are illustrative of just one day in Corbett's class, they certainly provide an example of the type of hostility towards Christianity present in Corbett's classroom on a daily basis.

a. "How do you get the peasants to oppose something that is in their best interest? Religion. You have to have something that is irrational to counter that rational approach. . . . [W]hen you put on your Jesus glasses, you can't see the truth." (ER 12, pp. 255-56.)

b. "Now, the Boy Scouts have said, unless you're willing to love God, and unless you're willing to – unless you're not gay, um – they are saying, being gay excludes you. Not believing God or not professing a belief in God also excludes you. . . . But you see, until they started these rules, Boy Scouts used to – or Boy Scout troops usually met at schools, and places like that, parks, government buildings. They can't do that anymore. They can't do that anymore, because now they are, in their own mind, a homophobic and a racist organization.

It's that simple. . . . It's call[ed] separation of church and state. The Boy Scouts can't have it both ways. If they want to be an exclusive, Christian organization or an exclusive, God-fearing organization, then they can't receive any more support from the state, and shouldn't." (ER 12, pp. 235-36.)

c. "People – in the industrialized world the people least likely to go to church are the Swedes. The people in the industrialized world most likely to go to church are the Americans. America has the highest crime rate of all industrialized nations, and Sweden has the lowest. The next time somebody tells you religion is connected with morality, you might want to ask them about that. Um, and let's see. Is there something else on that? No." (ER 12, pp. 236-37.)

d. " . . . . [C]onservatives don't want women to avoid pregnancies. That's interfering with God's work. You got to stay pregnant, barefoot, and in the kitchen and have babies until your body collapses. All over the world, doesn't matter where you go, the conservatives want control over women's reproductive capacity. Everywhere in the world. From conservative Christians in this country to, um, Muslim

fundamentalists in Afghanistan. It's the same. It's stunning how vitally interested they are in controlling women." (ER 12, pp. 242-43.)

e. "Um, freedom of expression, freedom of censorship. . . . It does put me in mind of the culture wars that are going on in the United States today. I mean, here is Joseph II. He's trying, for example, to end serfdom. . . . They had no rights to speak of at all. He doesn't just go that far. I mean, he tries to get them land. He tries to set them – I mean, um – he really has the interest of this class of people at heart, and the – the reforms that he makes really are going to make the lives of these peasants massively better. So why do the peasants oppose him? . . . Because he also tried to reform religion, and the peasants love their church. It's the same thing here. You know, you go down to Georgia, Alabama, Mississippi, all these states that are as red as they could possibly be, as right-wing Republican as you could possibly be. When you first present these people with the economic policies of the Democratic party, they are all Democrats. Virtually all the social programs, they like. They lead the Democratic party on

social issues. That's it. Social issues, can you imagine what they're saying on Rush Limbaugh now? About, 'Middle school people in New England giving people birth control pills. My God. What next?' I love Rush Limbaugh. A fat, pain in the ass liar. And, boy, is he a liar. Unbelievable. Um, anyway, the guaranteed freedom of religion for Jewish people, that upset a lot of Catholics, um, Protestants. That upset a lot of Catholics, trying to get people to tolerate other religions. But, come on. The church is there. The local priest is there telling them, 'Joseph II is satanic. He's like those Democrats that will be around in another 300 years.'" (ER 12, pp. 245-47.)

f. "So we know what rehabilitation works and that punishment doesn't, and yet we go on punishing. It really has a lot to do with these same culture wars we're talking about. This whole Biblical notion: Sinners need to be punished. And so you get massively more Draconian punishment in the South where religion is much more central to society than you do anyplace else. And, of course, the Southerners get really upset, as what they see as lenient behavior in the North. You know, we're

going to solve this problem. Except, guess what? What part of the country has the highest murder rate? The South. What part of the country has the highest rape rate? The South. What part of the country has the highest . . . church attendance? The South. Oh, wait a minute. You mean there is not a correlation between these things? No, there isn't. Um, in fact, there is an inverse correlation. In those places where people go to church the least, the crime was the most. And that's not just Sweden and the United States. That's Pennsylvania and Georgia. It's not even true." (ER 12, p. 254.)

Corbett made the additional following statements during the Fall 2007 semester, while teaching the AP European history class at Capistrano Valley High School. (ER 16, p. 341.)

a. "Um, and I was explaining this to the class, and I asked the question, um, you know, "What do you think of somebody who thinks it's necessary to lie in order to make a religious point? . . . And, um, this kid is in the class, and, as I say, a Christian fundamentalist kid who wanted to be a minister…And, um, he was actually set on going - - I mean, if your parents go there, please, you know, don't be too insulted.

b. "Yeah, I mean, because balance is just one of those buzz words for the right-wingers to try and get nonsense included along with the truth. That's what I'm interested in. I'm interested in the facts. I'm interested in that which can be reasonably believed to be true because it is based in fact and in reason…As I pointed out to this parent, I said, you know for example – he said, 'Do you give both sides.' When there are two sides, sure. But most of the time the two sides are not equal." (ER 15, pp. 293-94.)

c. "As a matter of fact, you know – um, so, no, I am not trying to achieve balance. And, again, as I said, it's a code word for the right-wing demanding that nonsense be presented equally with that which is proven by evidence to be, you know, a possibility true." (ER 15, p. 297.)

d. "Um, see, people believed before the scientific revolution that the Bible was literal and that anything that happened, God did it. They didn't understand. They didn't have the scientific method. They didn't approach truth. The explanation to everything literally was that God did it. And the ultimate authority, who was (inaudible). The ultimate authority was the Bible. And, for example you have (singing) Joshua fought the battle of Jericho, Jericho, Jericho. Joshua fought the battle of Jericho, and the walls came tumbling down. Because the sun stopped in the sky. Well, if the Bible says the sun stopped, the sun must have stopped. Of course, those Chinese astronomers who were watching the same sun didn't notice this phenomenon. But if it's in the Bible, it must be true…So there you go. They believe the Bible literally…So, you know, understand that we have this sort of mindless centric notion, right? And these people didn't even know about it – get it out. They didn't even know about the Western Hemisphere. So they thought Jerusalem is in the center of the world. Because for God, Jerusalem is the most important place. Mankind is

the center of God's creation. We're in the center of the world." (ER 15, pp. 302-03.)

e. "So - - and presumably - - and think how humbling it's going to be, you know, when all these people who have been talking about Adam and Eve and creation and all of this stuff for all that time when eventually something happens, and they find out that there are people on another planet, six billion light years away, who don't look like us, worshipping huge geckos…You have (inaudible) people who are deep believers and find out that maybe we're not so important. Aristotle was a physicist. He said, 'no movement without movers.' And he argued that, you know, there sort of has to be a God. Of course that's nonsense. I mean, that's what you call deductive reasoning, you know. And you hear it all the time with people who say, 'Well, if all of this stuff that makes up the universe is here, something must have created it.' Faulty logic. Very faulty logic." (ER 15, pp. 304-05.)

f. "Yeah. The answer is - - the other possibility is it's always been here. Those are the two possibilities: it [the universe] was created out of nothing or it's always been here. Your call

as to which one of those notions is scientific and which one is magic. [Inaudible] the spaghetti monster behind the moon. I mean, all I'm saying is that, you know, the people who want to make the argument that God did it, there is as much evidence that God did it as there is that there is a gigantic spaghetti monster living behind the moon who did it. See, so - -." (ER 15, pp. 305-06.)

g. "Therefore, no creation, unless you invoke magic. Science doesn't invoke magic. If we can't explain something, we do not uphold that position. It's not, ooh, then magic. That's not the way we work. If we can't find a rational explanation, we go looking for other rational explanations. We do not invoke a supernatural every time we get stymied. It's okay for religious people to, you know, or a magician (inaudible). There may be a distinction, but there is no difference. What was it that Mark Twain said? 'Religion was invented when the first con man met the first fool.'" (ER 15, p. 306.)

h. "Contrast that with creationists. They never try to disprove creationism. They're all running around trying to prove it.

That's deduction. It's not science. Scientifically, it's nonsense." (ER 15, p. 312.)

i. Today, the Republican party has brought Jesus into the political arena. And now, again, since I gave you that little lesson, they did a public opinion poll, and they found out that 57 percent of Americans had a negative view of Mormons and would under no circumstances vote for a Mormon president. (ER 15, p. 323.)

j. "But that's the consequence. That's the consequence of bringing religion into politics. You know, I agree we should have separation of church and state. And there is nothing - - but you can't - - you know, you can't tell religion that they're not allowed to - - you can't tell people that they're not allowed to consider a man's religion. I mean, a lot of Americans wouldn't vote for a Satanist either. On the other hand, we've had many presidents who were not Christians. It's only been in recent years that you have to love Jesus if you're going to get elected." (ER 15, pp. 324-25.)

k. "And, remember, in early Christianity there was no central authority…And what's more, they all used different Bibles.

The Bible was not standardized until the fourth century. Just an aside. And it was standardized because the Roman empire adopted Christianity. And the Rome empire is a community of obedience. So they had to have one book that everybody followed. That's why they wrote the Bible." (ER 7, pp. 120-121.)

l. "And I might add, you know, this idea is - - it's apparent in America today. You know, we still - - we allow people in this country to take the point of view, well, this is a democracy. If the people of Alabama want to vote to have Christianity be their religion and have Christianity taught in church, well, it's all right. It's a democracy. And if that's what the majority wants, then isn't that democracy? And the answer is no, it's not. Democracy respects the rights of minority group members…And, um, that's why people like me object when a city wants to put a manger scene in a city park. I say, 'Excuse me.' I may not agree with that particular religion, and I don't see why my tax money should go to support a picture or a setup in a park that goes against my own religious beliefs. By the way, I do have one religious belief I'll tell you. I strongly

believe that people should not be like the Pharisees and pray on street corners where people can take notice. I think if they come to God, they should come to him in private." (ER 7, pp. 141-42.)

m. "(Inaudible) is becoming straight. Unless you're a religious fundamentalist, there is no way in the medical community to think that could be possible. There just isn't. You're going to be disappointed. (Inaudible) head of Family Planning (inaudible) for a minute. (Inaudible) head of Family Planning, who believes that contraceptives encourage promiscuity and should not be made available to unmarried people. Don't allow unmarried people to have contraceptives. That way the fear of pregnancy will keep women from fooling around…anybody who believes that is an idiot." (ER 9, pp. 177-78)

n. "See, the way these guys operate is they say, "I don't own anything." My 28 years (inaudible) and my Bentley - - this guy up here (inaudible) owns a Bentley and a Rolls-Royce. 'I don't own anything. It's all owned by the Lord." In other words, he says - - he told them, the church, 'I just live in the

house. You know, I do drive the Bentley." Because God's not using it, presumably, I guess. But they don't pay taxes. They don't pay taxes because churches are exempt. No taxation. And that's the problem…But you have to have regular (inaudible) meetings of your religion at your home and so on. It's just a scam. I'm just tired of - - you know personally, I'm just tired of religion getting the (inaudible) of God. I mean, I'm sorry. There's this big Saddleback Church down here that doesn't pay taxes. Somebody has to pay for the police protection that they get, for the roads that they get, for the stoplight that's out in front of their church, for the sewers that they use when they poop, for everything." (ER 8, pp. 156-57.)

o. "And you can't imagine the social control that you have, especially if it's over young people in that kind of a traditional community. In fact, I think I've had some fundamentalist pastor steal my idea…" (ER 11, p. 216.)

p. "Mr. Palozza used to be (inaudible) in biology. I was the editor of - - not the editor - - the advisor to the student newspaper at the time…In his classes, he was not telling the kids the scientific truth about evolution. He was hinting to

> kids in class that there's another explanation, and he invited kids to his home so they could hear the truth, the Biblical truth about all this…He sued me as the advisor to the paper for five million, as a matter of fact. He also, on another issue, sued several other members of the faculty here because he claimed he had the right under rules of academic freedom…it's not very true at the high school level, we have a curriculum regarding how one's supposed to teach children in class. It's the state curriculum. It doesn't include European History, so I have to make it up…The claim was that my editorial was false and he wasn't teaching religion, that creation science was all he ever taught, and, of course, for periods of time its religion…I will not leave John Palozza alone to propagandize kids with this religion, superstitious nonsense…he effectively was fired; although, frankly, you know, I think he should have been fired - - (inaudible) should have been fired from the district. He was just moved to a job where he could do less damage." (ER 10, pp. 195-200.)

Lynley Rosa, a substitute teacher for Capistrano Unified School District, is one of the parents and/or students who have complained

regarding Corbett's religious hostility expressed in his classroom. (ER 18, pp. 345-348.) Her son, Alec Pancarik, was enrolled in the AP European history class taught by Corbett during the Fall of 2007 at Capistrano Valley High School. (ER 18, p. 346.) Based upon conversations she had with her son, Ms. Rosa had the distinct impression and belief that Corbett was using his position to influence his students with anti-Christian, anti-Republican, and anti-American rhetoric. (ER 18, p. 346.) In fact, her son, stated that Corbett "would at times make fun" of Christianity. (ER 6, p. 100.)

Mrs. Rosa obtained Corbett's email and sent an email stating that her son was in the AP European history class and she and her husband would like to come in and talk to him about some concerns we were having. (ER 18, p. 347.) That day, her son sent her a text message on his cell phone and asked if she had emailed Corbett. (ER 18, p. 347.) She told her son that she had sent an email and asked how he knew of it. (ER 18, p. 347.) Her son informed her that Corbett opened the email and the entire class saw it on the overhead projector. (ER 18, p. 347.)

Mrs. Rosa and her husband met with Corbett several days later and expressed to Corbett they were not happy with his seemingly unbalanced comments regarding religion and politics, and expressed concern about the one-sided nature of what was being taught to their son. (ER 18, p. 347.)

She and her husband asked Corbett to clarify if he presented both sides of the issues he discussed. (ER 18, p. 347.) Corbett stated that he had conservative parents come in over the years regarding these issues and that she and her husband just needed to be open minded. (ER 18, p. 347.) They suggested that he at least present both sides of political and religious issues and that he be fair and balanced. (ER 18, pp. 347-348.) The next day, Corbett mocked Mrs. Rosa and her husband for asking that he be "fair and balanced." (ER 18, pp. 347-348.)

Approximately 5-6 weeks into the Fall 2007 semester, Mrs. Rosa pulled Alec from Corbett's class because she believed that her son was not sufficiently being taught AP European history and was instead being indoctrinated with anti-Christian rhetoric from a teacher that had a personal agenda. (ER 18, p. 348.)

Nevertheless, Corbett continued to spend a large portion of class time propagating his personal views to a captive audience, his high school history class. (ER 16, p. 340.) As a result of his ongoing comments, Christian students in the class, including Chad, felt ostracized and treated as second-class citizens. (ER 16, p. 340.) Chad was uncomfortable going to class, and withdrew from the class prior to the end of the first semester. (ER 16, p. 340.) He felt like Corbett created an atmosphere where he could

not effectively learn, both because of and regardless of his religious beliefs. (ER 16, p. 340.)

SUMMARY OF ARGUMENT

Throughout its decisions, the Supreme Court has consistently described the Establishment Clause as forbidding not only government action motivated by a desire to promote or "advance" a particular religion, but also actions that tend to "disapprove," "inhibit," or evince "hostility" toward a particular religion. Our Constitution prohibits government action that fosters a pervasive bias or hostility to religion, which could undermine the very neutrality the Establishment Clause requires. In Establishment Clause cases, the Supreme Court has often stated the principle that the First Amendment forbids disapproval of a particular religion or religion in general.

Corbett's statements regarding Christianity and religion in general undeniably show that he took action motivated by a desire to disapprove of or evince hostility toward religion. The scope of the district court opinion, finding that Corbett violated the Establishment Clause with only a single statement, is far too narrow.

Furthermore, the District Court erred in determining that Corbett could amend his answer without subjecting Chad to undue delay and

prejudice, particularly where the affirmative defense he sought to add, qualified immunity, should have been waived as a result of Corbett's failure to plead. Even more significantly, in light of Corbett's constitutional violation and the established status of the law regarding his actions, Corbett is not entitled to qualified immunity.

Lastly, the District Court erred in denying Chad declaratory relief by failing to acknowledge the importance of this type of relief to this case, the public, and to the law in general.

ARGUMENT

I. ALTHOUGH THE DISTRICT COURT CORRECTLY HELD THAT CORBETT WAS IMPERMISSIBLY HOSTILE TO RELIGION IN VIOLATION OF THE ESTABLISHMENT CLAUSE, IT ERRED BY IDENTIFYING ONLY ONE STATEMENT AS IMPERMISSIBLY HOSTILE

The District Court correctly determined that one of Corbett's statements in his AP European history class expressed disapproval of Christianity and was impermissibly hostile in violation of the Establishment Clause. (ER 4 p. 90.) The District Court referred to this statement as the "Peloza statement," where Corbett "explained to his class that Peloza, a teacher, 'was not telling the kids [Peloza's students] the scientific truth about

evolution.' Corbett also told his student that, in response to a request to give Peloza space in the newspaper to present his point of view, Corbett stated, 'I will not leave John Peloza alone to propagandize kids with this religious, superstitious nonsense.'" (ER 4, p. 71.) The District Court then concluded that "Corbett states an unequivocal belief that creationism is 'superstitious nonsense'" and that this statement constitutes improper disapproval of religion in violation of the Establishment Clause. (ER 4, p. 71.)

The District Court erred, however, in granting the School District and Union Intervenors' motions for summary judgment with respect to all other statements made by Corbett during the Fall 2007 semester. (ER 4, p. 90.) When the government acts with the ostensible and predominant purpose of [disapproving] religion, it violates that central Establishment Clause value of official religious neutrality, there being no neutrality when the *government's ostensible object is to take sides." McCreary County v. A.C.L.U.*, 545 U.S. 844, 860 (2005) (emphasis added). It is undeniable that Corbett "took a side" in his classroom.

The District Court failed to adequately consider the hostile environment and overall atmosphere that Corbett's myriad of slightly veiled and outright disapproving statements created, an environment that made strikingly and unconstitutionally clear what side Corbett was on. When

taken as a whole, and considered together as a string of comments and statements made day after day in a high school classroom, Corbett created and fostered an environment that was hostile towards religion and belies the very reason he stood in that classroom. Corbett used his classroom as a bully pulpit to force his captive audience to listen to his disapproval of Christianity, religious beliefs, conservative morals, and the religious right.

In addition to the hostile environment created by Corbett, he made many individual statements that exhibited his disapproval of religion. While the District Court did discuss statements other than the Peloza statement to determine whether they were impermissibly hostile, the court ultimately analyzed each one separately and inexplicably determined that each one, although perhaps offensive to individuals with conservative religious beliefs, were constitutionally permissible. (ER 4, pp. 77-84.) In a footnote, the District Court summarily noted that the "outcome does not change when each statement is viewed in light of the other statements, or when all the statements are viewed together." (ER 4, p. 70.)

In doing so, the District Court failed to properly acknowledge that neutrality in statements whether considered individually or when considered together is constitutionally mandated. "The Framers and the citizens of their time intended not only to protect the integrity of individual conscience in

religious matters, but to guard against the civic divisiveness that follows when the Government weighs in on one side of religious debate; nothing does a better job of roiling society." *McCreary County*, 545 U.S. at 876 (internal citation omitted). Thus, "the Framers intended the Establishment Clause to require governmental neutrality in matters of religion, including neutrality in *statements* acknowledging religion." *Id.* at 878 (emphasis added). Corbett did not remain neutral in all of his statements, and violated the Establishment Clause principles noted in *McCreary* and recognized throughout Supreme Court precedent.

A. The Facts Are Sufficiently Presented In Context To Answer The Relevant Constitutional Question

While the District Court went to great lengths to analyze Corbett's statements individually, it failed to adequately consider the basic constitutional question. Did Corbett's statements express disapproval of religion or create an impermissibly hostile classroom environment, from the standpoint of a reasonable person, in violation of the Establishment Clause? Corbett attempted to confuse and complicate this simple question, asserting arguments about the "context" and relying on inapplicable case law regarding academic freedom and curriculum disputes.

This case does not involve a curriculum dispute because Chad is challenging extemporaneous statements made inside the classroom and is not challenging the curriculum dictated by the State of California, the School District, or even Corbett himself. Furthermore, the transcripts were included in their entirety as exhibits, and have been likewise included in the excerpts of record filed concurrently herewith, in order to provide the Court with a full understanding of Corbett's curriculum, his teaching style, and the full context in which he made his statements.

A statement of facts identifying certain statements and pulling out excerpts is necessary in order to adequately identify the statements Chad believes exhibit Corbett's hostility or disapproval towards religion. It is not possible to include entire pages of the transcript in order to reflect the discussion before and after the comments, and for most of the statements there is no context within the confines of an AP European history class that would make them constitutionally permissible. Editing the statements for length and concentrating on statements that establish hostility does not alter the meaning of the statements. Plaintiffs are appropriately putting before this Court the most egregious statements made by Corbett, with all necessary evidence to review each statement in its entirety, and asking the Court to determine if a reasonable person would find them to be hostile.

"[H]ostility toward any religion or toward all religions is as much forbidden by the Constitution as is an official establishment of religion." *Wallace v. Jaffree*, 472 U.S. 38, 85 (1985) (Burger, C.J., dissenting). If this often recognized principle stands true, then Corbett should not be permitted to utter statements expressing hostility and disapproval toward religion or to create a hostile classroom environment.

B. A Reasonable Observer Would Conclude That The Message Communicated By Corbett Is One Of Disapproval Of Religion In Violation Of The Establishment Clause

In 1997, the Sixth Circuit encapsulated the *Lemon* test and other relevant Supreme Court precedent addressing hostility towards religion by identifying a simple question to be answered. *Chaudhuri v. Tennessee*, 130 F.3d 232, 237 (6th Cir. 1997). Recently, in 2007, the Ninth Circuit asked the same question when determining whether government action constituted an act of hostility towards religion with regards to the second prong of the *Lemon* test. *Vasquez v. Los Angeles ("Vasquez") County*, 487 F.3d 1246, 1257 (9th Cir. 2007). The applicable precedent establishes that unconstitutional hostility towards religion is determined by considering the perspective of a reasonable observer. *Id.* "[I]f a reasonable observer would

conclude that the message communicated is one of . . . disapproval of religion, then the challenged practice is unlawful." *Id*.

An Establishment Clause violation occurs where, as here, it is clear that the government's actions communicate a message of disapproval of religion. Supreme Court precedent reveals that "[the] First Amendment mandates government neutrality between . . . religion and nonreligion." *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968) ("*Epperson*"). The State certainly "may not establish a 'religion of secularism' in the sense of affirmatively opposing or showing hostility to religion." *Sch. Distr. of Abington Township v. Schempp*, 374 U.S. 203, 225 (1963) ("*Abington*"). Taking each statement alone, it is unreasonable to conclude that Corbett's "teaching" could be considered neutral. It is even more unreasonable when the comments are threaded together and considered in their totality throughout one class period and, beyond that, throughout the semester.

For months, Chad sat in an AP European history class learning little of the curriculum that Corbett has championed throughout this litigation, and instead learning much about Corbett's own viewpoint about religion, conservative religious beliefs, and the way those beliefs are expressed in the public square. Corbett's comments and diatribes have one common theme uniting them –an unconstitutional disapproval of Christianity and other

religions expressed by a government actor to a captive audience who have no choice but to listen or unfairly limit their college choices.

Corbett's numerous comments, some directly stating his disapproval of religion and others implicitly expressing his viewpoint, created an environment within the classroom that was impermissibly hostile towards religion. This hostile environment fell far short of the government mandate that requires "government neutrality between . . . religion and nonreligion." *Epperson*, 393 U.S. at 104. Given the breadth of Corbett's anti-religious comments, there are many statements, beyond the single statement the District Court found to be a violation. that stretch beyond the bounds of the First Amendment. The record shows that Corbett's comments are both disparaging of and belittling towards Christianity, extending well beyond a single statement or even an isolated class period; they were pervasive throughout the semester. (ER 16, pp. 338-341.)

Corbett did not deny the individual statements and did not challenge the admissibility of either the transcripts of the statements or the audio compact discs that were lodged with the District Court. Instead, Corbett appears to believe, for example, that when he "taught" that Aristotle argued that "there sort of has to be a God" and immediately followed that up with, "[o]f course that's nonsense," he was within the confines of the First

Amendment. (ER 15, p. 305.) Prior to Corbett's statement regarding Artistotle is an approximately three page long discussion where Corbett ridicules any literal interpretation of the Bible and provides theological commentary regarding God's relationship with man. (ER 15, p. 304.) Corbett's remarks go beyond the teaching of European history. He includes his personal theological commentary and disapproval rather than teach the objective material.

Throughout the course of the semester, Corbett "taught" a group of teenagers that you cannot approach truth if your explanation to everything was that God did it, that there is no difference between religious people and magicians, and, sarcastically, that a fundamentalist pastor stole Corbett's idea to have social control over children. (ER 11, p. 216.) For these comments, and the many others included above, a reasonable observer would find that Corbett as a government actor communicated a message, very strongly, of disapproval of religion. A reasonable observer could not determine that Corbett's message was anything but an unconstitutionally loud roar disapproving of religion.

C. When Applying The *Lemon* Test, Corbett's Actions Constitute A Violation Of The Establishment Clause

As previously noted, "[the] First Amendment mandates government neutrality between . . . religion and nonreligion." *Epperson*, 393 U.S. at 104; *see also Van Orden v. Perry*, 545 U.S. 677, 677-78 (2005) (stating that "[t]he state may "neither abdicate [its] responsibility to maintain a division between church and state nor evince a hostility to religion."). "The government neutrality required under the Establishment Clause is … violated as much by government disapproval of religion as it is by government approval of religion." *Vernon v. City of Los Angeles*, 27 F.3d 1385, 1396 (9th Cir. 1994) ("*Vernon*") (*citing Church of the Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 532 (1993) ("*Lukumi*")).

The government acts in accordance with the Establishment Clause when its conduct (1) has a secular purpose, (2) does not have as its principal or primary effect advancing or inhibiting religion, and (3) does not foster an excessive government entanglement with religion. *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971) ("*Lemon*"); *see also Vernon*, 27 F.3d at 1396-97. "Although Lemon is most frequently invoked in cases involving alleged governmental preferences to religion, the test also 'accommodates the analysis of a claim brought under a hostility to religion theory.'" *Vasquez*,

487 F.3d at 1255 (9th Cir. 2007) (quoting *Am. Family Ass'n, Inc. v. City and County of San Francisco*, 277 F.3d 1114, 1121 (9th Cir. 2002) ("*Am. Family Ass'n*")).

"[T]he challenged practice must survive *all* three prongs of the *Lemon* analysis in order to be held constitutional." *Lemon*, 403 U.S. at 612-613 (emphasis added). Corbett's practice of using an AP European history class as a bully pulpit to communicate disapproval of Christianity fails to survive the three prongs of the *Lemon* test and is therefore unconstitutional. Undoubtedly, the Defendants' decision to "teach" anti-Christian themes and foster a hostile environment, instead of teaching the curriculum of AP European history, falls far outside the boundaries of neutrality set by the Supreme Court. Whether considering the hostile environment Corbett created, the Peloza statement, or any of the multitude of other statements, Corbett's actions were egregious when one considers the constitutional boundaries.

1. Corbett's purpose is not secular

While it is arguable that Corbett's actions violate the purpose prong by endorsing secularism, which amounts to a religious belief system, it is not necessary to make this determination. In *Vasquez*, the Ninth Circuit considered whether Los Angeles County's purpose in removing a cross

from the city seal was either "anti-Christian" or "motivated by hostility toward Christianity." *Vasquez*, 487 F.3d at 1255. There, the Court found that the purpose was secular in nature because the County stated its purpose was to avoid an Establishment Clause violation. *Id*.

Corbett can make no such argument. His statements and comments are patently disapproving of religion. Corbett's motivation is clearly the expression of his own viewpoint regarding religion and Christianity to impressionable students, who are often still refining their own viewpoint on such topics. He is motivated to use his position as a public school teacher to teach his own personal biases and to push his own propaganda regarding creationism and fundamentalist Christians. His only purpose in making these statements is to make sure that the students who sit before him as a captive audience understand that religion is "irrational." (ER 12, p. 255.) He states it many times, and in many ways, both indirectly and directly. There is no secular purpose in fostering and creating an environment that is hostile towards religious beliefs in a high school classroom. Corbett's purpose is not secular, and therefore his actions violate the first prong of the *Lemon* test.

2. The primary effect of Corbett's actions inhibit religion

The second prong of the *Lemon* test mandates that the "principal or primary effect" of government conduct must "neither advance[] nor inhibit[] religion." *Lemon*, 403 U.S. at 612. Under this prong, the test is "whether it would be objectively reasonable for the government action to be construed as sending primarily a message of either endorsement *or disapproval* of religion." *Vernon*, 27 F.3d at 1398 (emphasis added). This inquiry is conducted from the perspective of a "reasonable observer" who is both informed and reasonable. *Am. Family Ass'n*, 277 F.3d at 1122.

While the District Court focused on the purpose behind Corbett's statement, the effect prong requires no such analysis. "The effect prong asks whether, irrespective of the government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval." *See Lynch v. Donnelly*, 465 U.S. 668, 690 (1984) (O'Connor J., concurring). Corbett consistently showed disapproval of religion throughout the course. He conveyed a message of disapproval through many egregious statements, and through the environment that he created.

For example, Corbett made the following statements, amongst other hostile statements, during just one class period: (1) "[W]hen you put on your Jesus glasses, you can't see the truth"; (ER 12, p. 256.) (2) "[f]rom

conservative Christians in this country to, um, Muslim fundamentalists in Afghanistan. It's the same. It's stunning how vitally interested they are in controlling women," (ER 12, p. 243.) and (3) "[t]he next time somebody tells you religion is connected with morality, you might want to ask them about that." (ER 12, p. 237.) During a 60-minute timeframe an entire class of largely 15 to 16- year-old kids were told by a government speaker that if you believe in Jesus, you are irrational and can't see the truth, that Christians and other religious groups are "vitally interested" in "controlling women," and that religion is not connected with morality. (ER 12, p. 243.)

While Corbett's statements are too numerous to list each of them here, each comment reveals his disapproval of religion from the perspective of a reasonable, informed observer. *Am. Family Ass'n*, 277 F.3d at 1122. His comments evince complete disdain for creationism (which he compares to "magic") and a fundamentalist Christian college (which he states has no academic integrity). (ER 15, p. 306.) Corbett additionally "taught" the students that Aristotle promoted *nonsense* when he argued that there has to be a God. He also "taught" the students that the Bible was written by the Romans, who did so in order to assure they had a book "that everybody followed." (ER 7, pp. 120-21.)

Further, he summed up his own disapproval of Christianity by giving what he indicated was a quote from Mark Twain: "Religion was invented when the first con man met the first fool." (ER 15, p. 306.) Finally, he told Chad Farnan, a Christian, and the classroom full of Chad's classmates that he had "one religious belief": "I strongly believe that people should not be like the Pharisees and pray on street corners where people can take notice." (ER 7, p. 142.)

A reasonable and informed observer would conclude that the government actor is sending a message of "disapproval of religion." *Vernon*, 27 F.3d at 1398; *see also Vasquez*, 487 F.3d at 1257. Considering that these "disapproving" comments and statements were made numerous times during class, creating an environment hostile of religion, the message of disapproval of Christianity becomes even stronger. Corbett's actions have the "primary effect" of advancing non-religion and inhibiting religion, thus failing *Lemon's* second prong. *See, e.g., Fairfax Covenant Church v. Fairfax County Sch. Bd.*, 811 F.Supp. 1137, 1141 (E.D.Va. 1993)[1] (charging religious organizations more to use public facilities than other similarly-situated groups had the "primary effect of advancing non-religion

[1] The Fourth Circuit upheld the unconstitutionality of the fee schedule without discussing whether it violated the Establishment Clause. *Fairfax Covenant Church*, 17 F.3d at 709.

and inhibiting religion" and therefore "violates the second prong of the *Lemon* test") (internal quotation marks and citation omitted).

3. Corbett's actions fostered an excessive government entanglement with religion

Corbett's actions also fail the third prong of the *Lemon* test because the statements made by Corbett are continual and incessant. Corbett's outright hostility has effectively served to foster "an excessive government entanglement with religion." *Lemon*, 403 U.S. at 613. Curriculum for AP European history evidences the fact that the course may constitutionally address religion from a historical perspective. It is not necessary, however, for the Defendants to express condemnation of religious thoughts or institutions in order to teach objective facts in history.

The continual and incessant disapproval of religion made evident through Corbett's affirmative statements, especially when not necessary in light of the curriculum standards and a common-sense understanding of European history, represent a deeper entanglement than what has previously been found to be at risk for excessive entanglement by the Supreme Court. *See Rosenberger v. Rector and Visitors of Univ. of VA*, 515 U.S. 819, 844-45 (1995) (University's policy requiring public officials to scan and interpret student publications based on the religious content "risk[s]

fostering a pervasive bias or hostility to religion"); *Bd. of Educ. of Westside Cmmty. Sch. v. Mergens*, 496 U.S. 226, 253 (1990) ("[A] denial of equal access to religious speech might well create greater entanglement problems in the form of invasive monitoring to prevent religious speech at meetings at which such speech might occur."); *Widmar v. Vincent*, 454 U.S. 263, 272 n.11 (1981) (policy requiring scrutiny of religious speech risked entanglement). Here, the government is not merely reviewing or monitoring religious speech, rather it is engaged in outright hostility towards religion through affirmative statements.

Further, in *Vasquez*, the Ninth Circuit noted that "one of the factors we examine in determining whether excessive entanglement has occurred is whether the challenged governmental action caused citizens to divide along political lines" or encouraged political divisiveness along religious lines. *Vasquez*, 487 F.3d at 1258. While it is only a factor, and cannot stand as an independent ground for excessive entanglement, it is a factor that is present here. *Id.* Even the limited portions of Corbett's lectures as provided above show that his actions cause the students to divide along liberal and conservative political lines by attaching Christianity and Jesus to the Republican Party ("Today, the Republican party has brought Jesus into the political arena. And now, again, since I gave you that little lesson, they did

a public opinion poll, and they found out that 57 percent of Americans had a negative view of Mormons and would under no circumstances vote for a Mormon president"). (ER 15, p. 323.)

Not only are Corbett's hostile comments and viewpoints unnecessary and inappropriate in light of the curriculum and the subject of the class, but they are also unnecessary and inappropriate in *any* subject or class within the public school system. Corbett has excessively entangled himself with religion by entwining anti-Christian themes into the "teaching" of a history class and the expression of unconcealed disapproval of religion throughout the semester. This amounts to unconstitutional entanglement.

D. Precedent Regarding A Teacher's Endorsement Of Religion Is Equally Applicable To Corbett's Hostility Towards Religion

School districts frequently prohibit teachers from expressing their Christian faith in the classroom. In those cases, teachers most often expressed their faith in a far less invasive way than Corbett has expressed his hostility. Courts generally have upheld the school district's prohibitions, and have held teachers to strict standards in determining the permissible role for religion in the classroom. These cases cannot be ignored when considering what actions constitute hostility towards religion.

They are relevant to this Courts determination as to when Corbett's comments become constitutionally impermissible under the Establishment Clause.

> While at the high school, whether he is in the classroom or outside of it during contract time, Peloza [the teacher] is not just any ordinary citizen. He is a teacher. He is one of those especially respected persons chosen to teach in the high school's classroom. He is clothed with the mantle of one who imparts knowledge and wisdom. His expressions of opinion are all the more believable because he is a teacher. The likelihood of high school students equating his views with those of the school is substantial. To permit him to discuss his religious beliefs with students during school time on school grounds would violate the Establishment Clause of the First Amendment.

Peloza v. Capistrano Unified School District, et al., 37 F.3d 517, 522 (9th Cir. 1994) ("*Peloza*") (per curium).

Corbett was a defendant in the *Peloza* lawsuit. *Id*. at 521-22. The court clearly stated the role of the teacher and held that permitting "him to discuss his religious beliefs with students during school time on school grounds would violate the Establishment Clause of the First Amendment." *Id*. The court declared unequivocally that high school students would likely equate the teacher's views with the school and that his expressions of opinion are all the more believable. *Id*. Here, the same standard should apply. Corbett's comments are constitutionally impermissible if they expressed hostility or disapproval of religion. He has the same

responsibility and the same role in the classroom as Mr. Peloza. The standard should not change when analyzing whether a teacher "endorsed" religion or showed "hostility" towards religion.

In *Roberts v. Madigan*, 921 F.2d 1047 (10th Cir. 1990), the Tenth Circuit held that a teacher could be prohibited from reading a Bible during silent reading period and having two books about Christianity in his in-class library because students could be left with the impression that Christianity was officially sanctioned. *Id.* In *Madigan*, the Court considered the propriety of a teacher who quietly read his Bible during silent reading time. *Id.* at 1048. He did not read it to the children or otherwise proselytize. *Id.* Tellingly, the Court held these actions could be prohibited as possible Establishment Clause violations. *Id.* at 1055-58.

Corbett's statements are far more pervasive and far more likely to leave students with the impression that the school officially disapproved of Christianity given the simple fact that he did not sit silently and read a book whose title expressed disapproval of Christianity. Instead, he verbalized his disapproval over the course of the semester. And, as the court told Corbett, the School District, and Mr. Peloza in the previous lawsuit, Corbett's opinion is all the more believable because of his role as a teacher. *Peloza*, 37 F.3d at 522. The stringent analysis that is so often applied in cases

involving endorsement of religion should also apply here regarding Corbett's hostility towards religion. *See e.g.*, *Madigan*, 921 F.2d at 1047; *Downing v. West Haven Bd. of Ed.*, 162 F.Supp.2d 19 (D. Conn. 2001) (holding a school district's decision to prohibit a public school teacher from wearing a t-shirt with the words "Jesus 2000" was permissible due to a possible violation of the Establishment Clause); *Bishop v. Aronov*, 926 F.2d 1066, 1077-78 (11th Cir. 1991) (holding a university validly prohibited a professor from interjecting religious remarks into his classes due to the resulting Establishment Clause violation); *Grossman v. South Shore Public Sch. Dist.*, 507 F.3d 1097, 1099 (7th Cir. 2007) ("*Grossman*") (holding a public school teachers do not have a right to make the promotion of religion part of their job description and in doing so possibly violate the Establishment Clause); *Lee v. York County Sch. Div.*, 484 F.3d 687, 690-91 (4th Cir. 2007) (holding a school district did not violate teacher's free speech rights be taking down several items posted on a bulletin board that were "overly religious in nature"); *Helland v. South Bend Comm. Sch. Corp*, 93 F.3d 327 (7th Cir. 1996) ("*Helland*") (holding a school district was permitted to remove teacher from substitute list when concerned about unconstitutional interjection of religion in classroom).

"Teachers and other public school employees have no right to make the promotion of religion a part of their job description and by doing so precipitate a possible violation of the First Amendment's Establishment Clause." *Grossman*, 507 F.3d at 1099 (*citing Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 394 (1993); *Lee v. Weisman*, 505 U.S. 577, 593-98 (1992); *Helland*, 93 F.3d at 331 n. 1; *Marchi v. Bd. of Cooperative Educ. Serv. of Albany*, 173 F.3d 469, 475-76 (2d Cir. 1999); *Peloza*, 37 F.3d at 522). Corbett has argued throughout this litigation that disapproval of religion is part of his job because, as was argued throughout both Defendants and Union Intervenors' briefing at the District Court, his disapproving comments are part of the curriculum. Unfortunately for Corbett, the "First Amendment is not a teacher license for uncontrolled expression at variance with established curricular content." *Grossman*, 507 F.3d at 1100 (quotations and citations omitted).

II. THE DISTRICT COURT ERRED IN ULTIMATELY RULING THAT CORBETT WAS ENTITLED TO QUALIFIED IMMUNITY, DESPITE HAVING NOT PLED IT AS AN AFFIRMATIVE DEFENSE IN THE ANSWER

While the District Court noted that granting leave to amend the scheduling order and file an amended answer was a "fairly close question,"

it ultimately worked through the plethora of impediments to granting Corbett qualified immunity and, in doing so, severely prejudiced Chad. (ER 2, p. 6.) The District Court was forced to go over or under the following significant impediments: (1) Corbett had waived the affirmative defense of qualified immunity altogether after failing to plead it and proceeding to such an advanced stage in the litigation; (2) Corbett had to obtain leave from the District Court to amend the scheduling order; (3) Corbett had to obtain leave from the Court to amend the answer; (4) and, finally, Corbett had to establish that he was entitled to qualified immunity.

Given that Corbett never pled qualified immunity in the answer or asserted it at any stage in the litigation, waited until after a final ruling on the merits finding an Establishment Clause violation had occurred to assert it, and was found to have violated a well established constitutional right, Corbett should not have been permitted to assert qualified immunity in defense of his actions.

A. Corbett Waived Qualified Immunity As An Affirmative Defense By Failing To Raise It At Any Stage In The Litigation

Corbett's failure to raise qualified immunity prior to the District Court's ruling on the dispositive motions renders it lost. In good faith,

Chad proceeded with this litigation at great cost and expense, and Corbett should not be permitted to use an affirmative defense as a rescue parachute. *Evans v. Fogarty*, 2007 WL 2380990, at * 6 n.9 (10th Cir. August 22, 2007) (finding, "[a]lthough the defense of qualified immunity provides public officials important protection from baseless and harassing lawsuits, it is not a parachute to be deployed only when the plane has run out of fuel. Defendants must diligently raise the defense during pretrial proceedings and ensure it is included in the pretrial order.").

The Ninth Circuit follows the Supreme Court in holding that an official pleading qualified immunity must plead it as an affirmative defense. *Camarillo v. McCarthy*, 998 F.2d 638, 639 (9th Cir. 1993). The court in *Camarillo* relied on *Gomez v. Toledo*, 446 U.S. 635 (1980) (noting that, in a § 1983 action, qualified immunity is an affirmative defense that must be pled) and Federal Rules of Civil Procedure, Rule 8(c), for its characterization of qualified immunity as an affirmative defense that should be pled by the defendant. *See also Harlow v. Fitzgerald*, 457 U.S. 800, 815 (1982) ("*Harlow*").

As a general rule, affirmative defenses must be pled as required by Rule 8(c), or the result is a waiver of the defense by the defendant and the exclusion of that defense from the case. *In re Adbox, Inc.*, 488 F.3d 836

(9th Cir. 2007) (*citing Morrison v. Mahoney*, 399 F.3d 1042, 1046 (9th Cir. 2005)). Courts have held that this principle, extrapolated from Rule 8(c), applies to the qualified immunity affirmative defense. *See Ringuette v. City of Fall River*, 146 F.3d 1, 4 (1st Cir. 1998) ("Qualified immunity is an affirmative defense, Fed. R. Civ. P. 8(c), and an affirmative [defense] is generally lost unless it is raised in the pleadings.").

Although exceptions exist permitting qualified immunity to be raised at later stages in the litigation, an important chord has been sounded by the Supreme Court and lower courts – if qualified immunity is not raised before a case goes to trial (or reaches the next "stage"), it is effectively lost as an affirmative defense. *See Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985). As a result, the Supreme Court has stressed the importance of resolving immunity questions at the earliest possible stage in litigation. Corbett failed to do this, and waived qualified immunity as an affirmative defense.

B. The District Court Erred In Granting Corbett Leave To Amend His Answer Following A Final Ruling On A Dispositive Motion

While a party seeking to amend a pleading after the date specified in the scheduling order must show that there is "good cause" for amendment under Rule 16(b), thereby amending the scheduling order, this is not the

only hurdle. Upon the District Court's determination that the scheduling order could be amended, Corbett still had to show that the amendment was proper under Rule 15. Pursuant to Rule 15(a), an affirmative defense may only be added to an answer by consent of the opposing party or leave of the court. Fed. R. Civ. P., Rule 15(a).

As noted by the District Court, the Union Intervenors pled qualified immunity in their answer. The District Court erroneously determined that the Union Intervenors may plead qualified immunity on their own behalf and on behalf of Corbett. (ER 2, p. 21.) Upon successful intervention, the Union Intervenors filed an answer on their behalf, not on behalf of Corbett as an individual, Corbett in his official capacity, or the School District.

While Chad has filed a motion to dismiss the School District and Corbett, in his official capacity, from this appeal, the Union Intervenors may not assert a qualified immunity defense on behalf of Corbett as an individual, or any other defendant. The Supreme Court has stated that "[q]ualified or 'good faith' immunity is an affirmative defense that must be pleaded by a defendant official." *Harlow*, 457 U.S. at 815 (*citing Gomez v. Toledo*, 446 U.S. 635 (1980)). The Union Intervenors asserted affirmative defenses on their own behalf, and cannot assert qualified immunity on behalf of Corbett. As a result, Corbett must be granted leave to amend his

answer in order to seek qualified immunity.

In the Ninth Circuit, as elsewhere, "[f]ive factors are taken into account to assess the propriety of a motion for leave to amend: bad faith, undue delay, prejudice to the opposing party, futility, and whether the plaintiff has previously amended the complaint." *Johnson v. Buckly*, 356 F.3d 1067, 1077 (9th Cir. 2004) (*citing Nunes v. Ashcroft*, 348 F. 3d 815, 818 (9th Cir. 2003)). On May 1, 2009, the district ruled that Corbett violated the Establishment Clause. (ER 4, p. 90.) Corbett then sought leave to amend the answer to add an affirmative defense that was never asserted prior to the ruling on the merits. When considering the four most relevant factors, the District Court abused its discretion when it granted Corbett's motion for leave to amend the answer on September 15, 2009.

1. Corbett sought to amend his answer in bad faith

"In determining whether an amendment is sought in bad faith, courts have inquired whether the party seeking amendment has previously engaged in dilatory tactics and have evaluated the value of the proposed amendment." *Thornton v. McClatchy Newspapers, Inc*., 261 F.3d 789, 799 (9th Cir. 2001). It is clear that Corbett's amendment was proposed in bad faith, and had no legitimate value based on the generally understood purpose of the qualified immunity defense.

The qualified immunity defense "shield[s] [government agents] from liability for civil damages . . . ." *Harlow*, 457 U.S. at 818. Here, Chad sought only nominal damages and was not seeking further civil damages. The only value to Corbett was that he would not be required to pay the costs of litigation and attorneys' fees of Plaintiffs. Asserting qualified immunity in an attempt to avoid costs and attorneys' fees is a bad faith attempt to use immunity in a manner that was never contemplated by the Courts and contravenes the purpose of allowing the prevailing plaintiff to liberally recover such costs and fees.

The benefit and purpose of qualified immunity is to protect government officials from incurring the cost of defense and civil damages. *Castaldo v. Stone*, 192 F. Supp. 2d 1124, 1138 (D. Col. 2001) ("*Castaldo*"). Here, neither purpose was satisfied as the costs of defense had already been incurred due to Defendants' failure to assert qualified immunity at the outset of the litigation. Instead, after failing to properly assert a legally based defense during the entirety of the litigation, Corbett asserted immunity in bad faith after a ruling on the merits. This was nothing more than an illegitimate attempt to find a way around the clear mandates of the Supreme

Court requiring attorneys' fees to generally be paid by the defendant when Plaintiffs are victorious in a Section 1983 action.[2]

Further, Corbett did not seek leave to amend in a timely fashion as the qualified immunity defense was both available and obvious from the outset of this litigation. It is quite obvious from Plaintiffs' First Amended Complaint that the one and only cause of action Plaintiffs asserted was that Corbett had violated the Establishment Clause while teaching his Fall 2007 AP European history class. In light of the fact that Corbett was sued in his individual capacity as a government official, qualified immunity clearly was relevant. Corbett did not provide a justifiable reason for his failure to argue qualified immunity as an affirmative defense during the pretrial proceedings and prior to a ruling on the merits. Corbett's leave to amend the answer was sought in bad faith and this Court should find the District

[2] "[T]he Supreme Court has held that although it is within the district court's discretion to award attorney's fees under section 1988, in the absence of special circumstances a district court not merely 'may' but *must* award fees to the prevailing plaintiff." *Morscott, Inc. v. City of Cleveland*, 936 F.2d 271, 272 (6th Cir. 1991) (quotation marks and citations omitted; emphasis in original). In fact, "a prevailing plaintiff should receive fees almost as a matter of course." *Smith v. Heath*, 691 F.2d 220, 228 (6th Cir. 1982) (quoting *Dawson v. Pastrick*, 600 F.2d 70, 79 (7th Cir. 1979)); *see also Maloney v. City of Marietta*, 822 F.2d 1023, 1024 (11th Cir. 1987) (fees should be granted to a prevailing party "as a matter of course") (citation omitted).

Court abused its discretion in permitting Corbett to amend his answer.

2. Corbett's motion to amend was futile

Corbett could have made a request for leave to amend his answer prior to the District Court's May 1, 2009, ruling and, more importantly, should have asserted the qualified immunity defense at one of many opportunities throughout the litigation. Corbett sought leave to amend his answer only after a final ruling has been issued in this case. This, in and of itself, was evidence of the futility of the amendment.

The privilege of qualified immunity "is 'an immunity *from suit* rather than a mere defense to liability." *Castaldo*, 192 F. Supp. 2d at 1138 (emphasis added). After eighteen months of litigation and countless hours of discovery and depositions (on both sides of the lawsuit), and after the District Court had ruled on the dispositive cross-motions and issued a ruling on the merits in Chad's favor, Corbett sought leave to amend. It was absurd for Corbett to assert at such a late stage in the litigation that he should be immune "from suit." *Id*. Corbett would gain nothing from asserting qualified immunity in the face of nominal damages, other than not being required to pay the substantial attorneys' fees and costs incurred by Chad prior to the assertion of the defense; conversely, as is argued more fully below, Chad was substantially prejudiced. Therefore, the District Court

abused its discretion by granting Corbett leave to amend his answer because such an amendment was futile.

3. Corbett's motion to amend resulted in undue prejudice

Prejudice is the most important, and the most oft used, reason to deny leave to amend. *See Jackson v. Bank of Haw.*, 902 F.2d 1385, 1387 (9th Cir. 1990). The District Court errantly argued that because no further delay would result if Corbett was permitted to raise the issue of qualified immunity, no prejudice would result to Chad. (ER 2, pp. 17-18.) The absence of delay and lack of additional discovery does not, in and of itself, establish a lack of prejudice.

"Prejudice and undue delay are inherent in an amendment asserted after the close of discovery and after dispositive motions have been filed, briefed, and decided." *Campbell v. Emory Clinic*, 166 F.3d 1157, 1162 (11th Cir. 1999). Allowing the case to be fully litigated for approximately eighteen months only to grant immunity at the tail end of the case was an injustice to Chad. *Id.*; *see also Solomon v. N. Am. Life & Cas. Ins. Co.*, 151 F.3d 1132, 1139 (9th Cir. 1998) (motion "on the eve of the discovery deadline" properly denied because it would have required reopening discovery, thus delaying proceedings).

Here, because Chad was seeking only nominal damages, the hardship

Corbett would have endured if leave was not granted was virtually non-existent, absent the attorneys' fees and costs that had been incurred by Chad. Furthermore, this case involved a single cause of action for violation of the Establishment Clause against a School District official, the School District itself, and Corbett as an individual. There is therefore no justifiable reason for Corbett's failure to assert the defense at one of multiple opportunities at earlier stages in the litigation. The District Court abused its discretion in determining that no prejudice resulted as a result of the failure of Corbett to properly plead qualified immunity.

4. Corbett unduly delayed in filing the motion to amend

Undue delay concerns not only the delay in proceeding forward with the case, but "whether appellants unduly delayed in filing their motion." *See Jackson v. Bank of Haw.*, 902 F. 2d 1385 (9th Cir. 1990). Furthermore, "whether the moving party knew or should have known the facts and theories raised by the amendment in the original pleading" is relevant to the inquiry of whether a party has unduly delayed in filing their motion. *Id.* (*citing E.E.O.C. v. Boeing Co.*, 843 F.2d 1213, 1222 (9th Cir. 1988), cert. denied, 488 U.S. 889 (1988); *Jordan v. County of Los Angeles*, 669 F.2d 1311, 1324 (9th Cir. 1982), vacated on other grounds, 459 U.S. 810 (1982)).

Corbett unduly delayed raising the issues of the proposed additional affirmative defense. From the start of this case Corbett knew, or should have known, all of the facts and theories raised by late asserted defense of qualified immunity. Qualified immunity could have been asserted in the answer, in defendants' motion to dismiss, in his opposition to Chad's motion for summary judgment, and in defendants' motion for summary judgment. At each of these points in time, Corbett knew all of the same facts that he knew when he sought leave to amend, and his failure to raise qualified immunity until that point constituted undue delay. The District Court erred by failing to fully assess the above factors, and abused its discretion in permitting Corbett leave to amend his answer to assert qualified immunity.

C. Corbett, As An Individual Defendant, Is Not Entitled To Qualified Immunity

Qualified immunity protects government officials performing discretionary functions from liability for civil damages "as long as their actions could reasonably have been thought consistent with the rights that they are alleged to have violated." *Anderson v. Creighton*, 483 U.S. 635, 638 (1987) (citations omitted). This requires a two-step analysis. First, the court must decide, "in the light most favorable to the party asserting the

injury," if a constitutional right was violated. *Saucier v. Katz*, 533 U.S. 194, 201 (2001) ("*Saucier*"). If so, "the next, sequential step is to ask whether the right was clearly established." *Id.*

To determine if a right is clearly established, a court should use its "full knowledge of its own and other relevant precedents." *Elder*, 510 U.S. at 516 (quotation marks and citation omitted). It is not necessary to "find a prior case with identical, or even materially similar, facts." *Flores v. Morgan Hill Unified Sch. Dist.*, 324 F.3d 1130, 1137 (9th Cir. 2003) (quotation marks and citation omitted). It is enough that the preexisting law provided Corbett with "fair warning" that his actions were unconstitutional. *Id.* (citation omitted).

The initial inquiry—whether Corbett violated a constitutional right—has been discussed at length above and the District Court correctly determined that he did violate the Establishment Clause as to the Peloza statement. Further, the scope of the constitutional violation is far greater than the District Court recognized. Turning to the second step, there is a substantial body of case law and statutory law that put Corbett on notice that his actions were unconstitutional.

It has been clearly established for many years that the government must remain neutral with regard to religion, and it may not show its

disapproval of religion. The Supreme Court has repeatedly affirmed the principle that "[the] First Amendment mandates government neutrality between . . . religion and nonreligion." *Epperson*, 393 U.S. at 104. This concept has been articulated as forbidding the disapproval of religion by the Ninth Circuit, holding, "[t]he government neutrality required under the Establishment Clause is . . . violated as much by government disapproval of religion as it is by government approval of religion." *Vernon*, 27 F.3d at 1396 (*citing Lukumi*, 508 U.S. at 532).

As noted by the District Court, had the Court correctly determined that Corbett's statements amounted to multiple violations of the Establishment clause, the qualified immunity defense would have been unsuccessful because "multiple statements made in violation of the Clause would likely be found to be a clearly established violation." (ER 2, p. 8.) Similarly, had the District Court correctly determined that Corbett's many statements created an unconstitutionally hostile environment, the defense would have been unsuccessful.

Additionally, however, it is equally as clear that there are no exceptions for "small" violations. The Supreme Court has stated, "[t]here are no de minimis violations of the Constitution – no constitutional harms so slight that the courts are obliged to ignore them." *Elk Grove Unified Sch.*

Dist. v. Newdow, 542 U.S. 1, 36 (2004); *see also Abington*, 374 U.S. at 225 (noting, "[t]he breach of neutrality that is today a trickling stream may all too soon become a raging torrent").

These cases made it objectively clear that the government and governmental actors must remain neutral towards religion, and that no "small" violation of that principle can be excused. Every one of them was existing case law at the time Corbett violated Chad's First Amendment rights. The district court relied on the recent Ninth Circuit decision in *Catholic League for Religious and Civil Rights v. City and County of San Francisco*, 567 F.3d 595 (9th Cir. 2009) ("*Catholic League*"), for the proposition that the "Establishment Clause is not a blanket prohibition on making any disapproving or hostile statements." (ER 2, p. 27.) To the extent *Catholic League* does stand for such a proposition, the Ninth Circuit recently agreed to hear it en banc and it is not established precedent. *Catholic League*, 586 F.3d 1166 ("[t]he three-judge panel opinion shall not be cited as precedent by or to any court of the Ninth Circuit.").

It was readily apparent to a reasonable person in 2007 that a public high school teacher must remain neutral with regard to religion. The unlawfulness must be apparent based on pre-existing law if the facts asserted are construed in the light most favorable to the plaintiff. *See*

Saucier, 533 U.S. at 200-01. The unlawfulness was apparent based on the facts asserted when construed in the light most favorable to Chad and, as a result, Corbett is not entitled to qualified immunity.

D. The District Court Erred When It Denied Declaratory Relief

The District Court erroneously denied declaratory relief. Although the decision whether to grant declaratory relief is "committed to the sound discretion of the trial court … [w]hether that discretion should be exercised in a given instance is subject to more searching review by an appellate court than the 'abuse of discretion' standard." *Bilbrey by Bilbrey v. Brown*, 738 F.2d 1462, 1479 (9th Cir. 1984) ("*Bilbrey*") (*citing Doe v. Gallinot*, 657 F.2d 1017, 1024 (9th Cir. 1981)). A de novo review of this case should lead this Court to find that declaratory relief should be granted. *Wagner*, 354 F.3d at 1040.

Bilbrey identified the two criteria for determining when declaratory relief should be granted: "(1) when the judgment will serve a useful purpose in clarifying and settling the legal relations in issue[;] and (2) when it will terminate and afford relief from the uncertainty, insecurity, and controversy giving rise to the proceeding." *Bilbrey*, 738 F.2d at 1479 (*citing McGraw-*

Edison Co. v. Preformed Line Products Co., 362 F.2d 339, 342 (9th Cir. 1966) (*quoting* Borchard, *Declaratory Judgments* 299 (2d ed. 1941)).

The District Court relied upon *Sample v. Johnson*, 771 F.2d 1335, 1338 (9th Cir. 1985), stating that it saw "no purpose or 'usefulness' for a declaratory judgment" (ER 3, p. 20) since Chad did not establish that he would personally be subject to the "probability of recurrence." (ER 2, p.19.) The District Court improperly relied upon the "probability of recurrence" doctrine applied in *Sample* and should have applied the criteria established in *Bilbrey*. The facts in *Bilbrey* are substantially similar to this present case. In *Bilbrey*, the district court mistakenly believed that there would be no "useful purpose" in granting declaratory relief after it granted qualified immunity to the defendant and denied both declaratory and injunctive relief. *Bilbrey* involved the unlawful strip search of two elementary students by a school official. *Bilbrey*, 738 F.2d at 1463-64. Even though the students were no longer in elementary school, the school official was no longer in his post, and the possibility of recurrence to the students no longer existed, this Court found that declaratory relief should have been granted. *Bilbrey*, 738 F.2d at 1471. This Court stated the following in regard to the district court's analysis:

> The court apparently was influenced by the jury's verdict which found immunity and denied damages. The assumption was that since appellees had been found to have acted in good faith and probably had learned painful lessons during the trial, there was no need for a declaratory relief. But this looks entirely upon the appellees' point of view and not at the propriety of the relief to which the appellants were entitled…. Moreover, a court declaration is a message not only to the parties but also to the public and has significant educational and lasting importance. It would be another marker along the road to implementation of Fourth Amendment rights. As appellants point out, courts that have held school searches unconstitutional have generally found it appropriate to enter declaratory relief even where defendants may also have been separately held entitled to immunity from damages.

Id. at 1470-71; *citing Piphus v. Carey*, 545 F.2d 30, 32 (7th Cir. 1976), rev'd on other grounds, 435 U.S. 247 (1978) (declaratory relief appropriate for violations of students' due process rights even where suspensions expunged from school records); *Carey v. Piphus*, 435 U.S. 247, 266-67 (1978); *Bellnier v. Lund*, 438 F.Supp. 47, 55 (D.C.N.Y. 1977) (granting immunity and denying injunctive relief against school officials for strip search but granting declaratory relief); *Pope v. Chew*, 521 F.2d 400, 406 (4th Cir. 1975) (granting immunity, denying damages and ordering declaratory relief that prisoner was entitled to hearing on parol revocation).

Here, even if this Court finds that qualified immunity should be granted, that Corbett and the School District have appropriately learned from the experience, and/or that there is no possibility of recurrence, this Court

should grant declaratory relief because a declaratory judgment "will serve a useful purpose in clarifying and settling the legal relations in issue," *Bilbrey*, 738 F.2d at 1479, and "delineate important rights and responsibilities" in the public school setting. *Greater Los Angeles Council on Deafness, Inc. v. Zolin*, 812 F.2d 1103, 1112 n.14 (9th Cir. 1987) (discussing *Bilbrey*, "we found that a *bona fide* controversy existed notwithstanding the fact that the students searched had both gone on to high school and that one of the defendant school officials had left his post. The declaration would still serve to delineate important rights and responsibilities").

Further, granting declaratory relief in this case will help to establish the boundaries of the Establishment Clause for public school officials and thereby "terminate and afford relief from the uncertainty, insecurity, and controversy giving rise to the proceeding." *Bilbrey*, 738 F.2d at 1479. Finally, a declaratory judgment in this case will send a clear "message not only to the parties but also to the public and [will have] significant educational and lasting importance. It would be another marker along the road to implementation of [First] Amendment rights." *Bilbrey*, 738 F.2d at 1471. Public school teachers and students deserve a clear ruling that the "hostility" doctrine applies in the public school setting and, therefore, a declaratory judgment should be granted in this case.

CONCLUSION

Corbett made no attempt to respect neutrality as is constitutionally mandated, and instead directly, repeatedly, and without reservation expressed his disapproving viewpoint of religion and fundamental religious beliefs. Corbett's hostility towards religion is constitutionally impermissible and a violation of the Establishment Clause. Accordingly, Chad respectfully requests that this Court reverse the lower court decision, except as to the Peloza statement, and remand the case with instructions to enter summary judgment in Chad's favor as to the hostile environment Corbett created and additional individual statements he made evidencing his hostility towards religion. Chad further respectfully requests this Court reverse the lower court decision regarding qualified immunity, and remand the case with instructions to deny leave to amend the answer to assert the defense or, alternatively, to take action consistent with the determination that Corbett, as an individual, is not entitled to qualified immunity. Finally, Chad respectfully requests that this Court reverse the lower court decision

regarding declaratory relief and remand the case with instructions to grant said relief.

ADVOCATES FOR FAITH & FREEDOM

Dated: June 10, 2010

s/ Jennifer L. Monk
Attorneys for Appellants, C.F., a minor, by and through his parents BILL FARNAN and TERESA FARNAN

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because this brief contains 13,891 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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

ADVOCATES FOR FAITH & FREEDOM

Dated: June 10, 2010

s/ Jennifer L. Monk
Attorneys for Appellants, C.F., a minor, by and through his parents BILL FARNAN and TERESA FARNAN

STATEMENT OF RELATED CASES

1. Appellants are not aware of any related cases pending in this Court, with the exception of the Cross-Appeal, 09-56690, filed in this matter by Dr. James Corbett.

ADVOCATES FOR FAITH & FREEDOM

Dated: June 10, 2010

s/ Jennifer L. Monk
Attorneys for Appellants, C.F., a minor, by and through his parents BILL FARNAN and TERESA FARNAN

CERTIFICATE OF SERVICE

I am employed in the county of Riverside, State of California. I am over the age of 18 and not a party to the within action. My business address is 24910 Las Brisas Road, Suite 110, Murrieta, California 92562.

On June 10, 2010, I caused to be served the foregoing documents described below on the following interested parties in this action:

APPELLANTS – CROSS-APPELLEES OPENING BRIEF

☒ Via **ELECTRONIC CASE FILING**, by which listed counsel will automatically receive e-mail notices with links to true and correct copies of said documents:

- **Michael D Hersh**
  mhersh@cta.org
- **Roberta A Kraus**
  bkraus@wss-law.com
- **Daniel K Spradlin**
  dspradlin@wss-law.com
- **Caroline Anne Byrne**
  cbyrne@wss-law.com
- **J. Craig Johnson**
  cjohnson@tennerjohnson.com
- **Christian A. Hickersberger**
  chickersberger@tennerjohnson.com
- **Erwin Chemerinsky**
  echemerinsky@law.uci.edu

Executed on June 10, 2010, at Murrieta, California.

☒ (Federal) I declare that I am a member of the Bar of this Court at whose direction the service was made.

s/ Jennifer L. Monk
Email: jmonk@faith-freedom.com