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' THIRD BRIEF ON CROSS APPEAL AND RESPONSE TO APPELLEES' AND INTERVENORS' SECOND BRIEFS ON CROSS APPEAL

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

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INTRODUCTION

This case, while quite simple at its core, has been subjected to a bevy of assertions by Corbett and the Union Intervenors that are neither relevant nor accurate. Establishment Clause precedent clearly requires government neutrality, and forbids a teacher to use his public high school classroom to express disapproval of religion. It is immaterial whether a teacher has previously been found to have violated the Establishment Clause for evincing hostility. The principles of the Establishment Clause apply in this context, and that is no more an argument against liability then arguing that prayer before high school football games is constitutional solely because no court had ever applied the Establishment Clause to an identical set of facts. The Supreme Court clearly disagreed. Corbett and the Intervenors make a variety of claims that stand in direct defiance to well-established First Amendment law and the undisputed words of Corbett to his class of fifteen year old high school students.

It is simply a distorted exaggeration of the facts and this lawsuit generally to state that "under the rationale of plaintiffs' lawsuit every teacher who defends evolution would potentially be personally liable because it, in the plaintiffs' words, expresses hostility to a religious theory and thereby establishes a religion of secularism." (Appellee's – Cross-Appellant's

Opening Brief ("Corbett's Opening Brief"), p. 2.) Common sense dictates that a person of Corbett's education and intelligence, in addition to other teachers across this Nation, could defend evolution without communicating disapproval of religion to his students as Corbett chose to do. Corbett was not "teaching secular material" that implies a criticism of religious approaches and, perhaps even more to the point, he was supposed to be teaching European History and not biology. Corbett was not "teaching" evolution at all, he was simply expressing his own hostility towards religion and creationism happened to be one topic through which he expressed his hostility.

Neither is this case about academic freedom. There is no question that it is not constitutionally permissible for a Christian teacher to use his classroom as a forum to attempt to convert his students to his faith. This is true regardless of whether that teacher were to stand up and loudly proclaim a right to do so based on "academic freedom." A teacher who wished to express his endorsement of religion within the classroom would endure constitutional scrutiny. Regardless of whether Corbett, his counsel, or the Union Intervenors would like the law to be different, Supreme Court precedent is clear that the Establishment Clause prohibits both endorsement

of religion and expressions of hostility towards religion. This door does not swing one way.

Corbett, his counsel, and the Union Intervenors at a minimum must be consistent. It is intellectually dishonest to argue for a broad interpretation of the Establishment Clause when a school district wants to teach intelligent design or a teacher places a Bible on a desk, while at the same time asserting that Corbett's academic freedom permits him unfettered ability to express his own disapproval of religion. Counsel's respected attorney, Erwin Chemerinsky, has written on this Establishment Clause issue before when discussing his concerns about the "fundamental religious right," a group Corbett expressed his concerns about in Chad's public high school classroom.

Five years ago, Mr. Chemerinsky stated:

> "Fundamentalists, whether Christian, Islamic, or Jewish, share remarkably similar views on many issues -- and remarkably similar intolerance. I believe that the greatest threat to liberty in the United States is posed by the religious right, largely comprised of Christian fundamentalists. Across a broad spectrum of issues they want to move the law in a radically more conservative direction, ultimately threatening our freedom."

Erwin Chemrinsky, *Time to Fight the Religious Right*, THE HUFFINGTON POST, September 28, 2005, http://www.huffingtonpost.com/erwin-chemerinsky/time-to-fight-the-religio_b_8048.html.

To support his comments about the "religious right," Chemerinsky seems to have forsaken the academic freedom argument that is now relied upon by Corbett, and instead asserted a broad view of the Establishment Clause to assure that creationism is not taught in classrooms.

> "Monday marked the start of a trial determining the legality of the teaching of intelligent design -- creationism dressed up as psuedoscience -- in a Pennsylvania school district. That threat extends far beyond just one county in Pennsylvania, as moves are afoot in state legislatures and county school boards across the country to call established scientific fact into question and to supplant science curricula with ideology. No matter what the label, this is asking science courses to teach a religious theory for the origin of human life, exactly what the Supreme Court declared unconstitutional 20 years ago."

Id.

Chemerinsky espoused a broad view of the Establishment Clause, a view that Corbett now vehemently fights against while ostensibly promoting concepts of academic freedom and a teacher's right to teach provocatively in the classroom. This highlights the fundamental question that must be answered by this case: either the Establishment Clause stands as a broad prohibition of government endorsing or expressing hostility towards religion, or it does not.

The Supreme Court has clearly stated that expressing disapproval of religion is not permissible as it assures that government is no longer neutral. Although it has not been applied with such frequency, its potency remains

undiminished. Hostility towards religion through the expression of disapproval of religion in a public high school classroom is no more constitutionally permissible than governmental endorsement of religion in that same classroom.

SUMMARY OF THE ARGUMENT

Corbett violated the Establishment Clause by expressing his disapproval of religion in a public high school classroom. Through a myriad of statements made during a single semester of a European history class, all of which can be read in their entirety in the transcripts submitted with Farnan's Excerpt of Record, Corbett expressed hostility towards religion. Furthermore, Corbett's attempt to distinguish statements that are "critical of religion" from statements that show "disapproval of religion" is not supported by applicable case law. The relevant constitutional inquiry is whether a reasonable person would determine that Corbett expressed disapproval of religion. Ultimately, that question can be answered by reviewing Corbett's words in writing and on compact discs. Finally, Corbett's actions are unconstitutional under the Lemon test as they lack a secular purpose, inhibit religion, and foster an excessive entanglement with religion.

In addition, the district court should not have determined qualified immunity in Corbett's favor. Corbett's assertion of qualified immunity following a final ruling on the merits at the summary judgment phase was untimely and resulted in prejudice to Chad. Accordingly, Corbett waived his right to assert qualified immunity in this litigation. Furthermore, the amendment to the scheduling order should not have been approved as Corbett lacked good cause and the motion to amend the answer should not have been granted as Corbett cannot satisfy the applicable standard. The motion to amend the answer was sought in bad faith, futile, unduly prejudicial, and should not have been approved because of undue delay. Finally, this Court should apply the two-step analysis to qualified immunity as it is most beneficial given the circumstances presented. As a result, this Court should first determine whether Corbett violated a constitutional right and then determine whether the law was well-established. Corbett was not entitled to a finding of qualified immunity as Chad's right to be free from religious hostility in a public school classroom was well-established in 2007.

ARGUMENT

I. CORBETT VIOLATED THE ESTABLISHMENT CLAUSE BY EXPRESSING HIS DISAPPROVAL OF RELIGION IN A PUBLIC HIGH SCHOOL CLASSROOM

"[The] First Amendment mandates government neutrality between . . . religion and nonreligion." *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968). 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); *see also Van Orden v. Perry*, 545 U.S. 677, 677 (2005) (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) (citing *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993)).

The Establishment Clause requires government neutrality, and Corbett's statements and the hostile classroom environment he created falls far short of that requirement. Beyond the assertions of academic freedom and the irrelevant case law used to bolster this red herring, rests a basic

understanding about neutrality that shines brightly across the undisputed comments of Corbett. Neutrality can be achieved in public school classrooms, and it is constitutionally mandated. European History can and should be taught objectively, without the clear expression of disapproval of religion from a teacher.

Despite many pages of both Corbett's and the Union Intervenors' Opening Briefs dedicated to placing Corbett's statements into the right "context," they fail to recognize that there is no context within which Corbett's statements pass the constitutional test of neutrality. The fact that there are far more cases addressing the endorsement of religion in the classroom than those dealing with hostility, does not alter the well-established test set forth by the Ninth Circuit and the United States Supreme Court. It does, however, speak to the need for the law to be applied uniformly regardless of whether it is endorsement or hostility that has resulted in government action that is not neutral, as required by the Establishment Clause.

A. Corbett's Statements Expressed Hostility Towards Religion

The beginning of Corbett's Argument section states as a "fact" something that is a contested issue, has no citation to the record, and is wholly irrelevant to the questions before this Court on appeal. "Farnan

taped Corbett's class without permission, despite having being [sic] specifically told that taping was not permitted, and in violation of California law…" (Corbett's Opening Brief, p. 14.) While Chad has disputed this statement throughout the lawsuit, it does not change Corbett's unconstitutional actions. Further, neither the School District nor any other governmental entity has even asserted that Chad violated California law, much less taken actions against Chad for this alleged violation. Moreover, Chad began to tape his class for educational purposes, although it later became clear that the religiously hostile environment created by Corbett and his statements expressing disapproval of religion had been memorialized and could be used in this litigation.

Corbett then asserts that the "district court was correct that the vast majority of these statements have nothing to do with religion." (Corbett's Opening Brief, p. 14.) Notably, Corbett fails to cite language from the district court that actually says this, and relies upon three statements he believes have "nothing to do with religion." Although this characterization could be challenged because Corbett is speaking about "conservatives," otherwise known as the religious right or religious fundamentalists, three statements hardly make up the "vast majority" of the plethora of statements

set forth in Appellants – Cross-Appellees Opening Brief ("Chad's Opening Brief").

"Of the statements that do mention religion," says Corbett, "many are expressions of views with regard to European history, including religion there, which was the subject of the class." (Corbett's Opening Brief, p. 15.) To support this claim, and show that Corbett's statements did not express disapproval towards religion, Corbett states the following:

> For instance, Dr. Corbett points out that there is correlation between church attendance and crime rates in the United States or foreign countries (Appellant's Opening Br. at 10, 13), that conservatives (including religious fundamentalists) subordinate women (*id.* at 10), that religious explanations for natural phenomena were often supplanted with science (*id.* at 18), that Republicans have made an appeal to Christian voters (*id.* at 18), that American voters consider religion in voting (*id.* at 18), that different religions have differing Bibles (*id.* at 19), and that religions benefit from government police and sanitation services (*id.* at 21).

(*Id.*)

While these quotes certainly do not represent all of the statements Corbett made about religion, they also are not "expressions of views with regard to European history." In order to teach European history, is it necessary for Corbett to express a present day view that religious fundamentalists subordinate women? How about whether religions benefit from government police and sanitation services? Or, that the Christian

values and morals taught in churches across the Nation do not result in a correlation between church attendance and crime rates in the United States or foreign countries, presently? Review of the relevant transcripts shows that Corbett was not expressing "views with regard to European history," and was instead expressing views regarding his own disapproval of Christianity, fundamentalist religions, and the social issues conservative Christians champion.

The statements made by Corbett regarding religion reflect an overarching theme of disapproval of religion and conservative Christian fundamentalists. His statements expressing his disapproval of religion constitute a violation of the Establishment Clause. During a 60-minute timeframe an entire class of largely fifteen to sixteen year-old kids were told by a government speaker that if you believe in Jesus, you are irrational and cannot see the truth, that Christians and other religious groups are "vitally interested" in "controlling women," and that religion is not connected with morality. (Appellants' Excerpts of Record ("Farnan's E.R.") 12, p. 243.)

This one single day in Corbett's class is exacerbated, however, by statements he made on other days. While his statements are too numerous to list each of them here, taken together the comments reveal far more than Corbett's simple disapproval of religion. Instead, the comments evince his

complete disdain for creationism (which he compares to "magic") (Farnan's E.R. 15, p. 306) and a fundamentalist Christian college (which he states has no academic integrity) (Farnan's E.R. 13, p. 268). Corbett additionally "taught" the students that Aristotle promoted *nonsense* when he argued that there has to be a God. (Farnan's E.R., p. 305.) 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." (Farnan's E.R. 7, pp. 120-121.) 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." (Farnan's E.R. 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." (Farnan's E.R. 7, p. 142.) These comments alone, along with the myriad of comments provided in Chad's Opening Brief, created a classroom environment disapproving of religion and failed to satisfy the First Amendment's requirement of neutrality.

Corbett and Union Intervenors also implicitly argue that Corbett's plethora of comments expressing disapproval of religion is somehow mitigated by comments that "were praising of religion." (Corbett's Opening

Brief, p. 16; Intervenors – Appellees' Second Brief on Cross Appeal and Response to Appellant's First Brief on Cross Appeal ("Union Intervenors Brief"), p. 18.) To begin with, there is no legal authority to support such an assertion and neither Corbett nor the Union Intervenors offer a single case. Further, the statements made by Corbett which they argue show his "praise of religion" do not. The simple fact that Corbett had a friend that is a fundamentalist Christians is irrelevant both to the applicable legal standards and to the question of whether Corbett expressed hostility towards religion. (Union Intervenors Brief, p. 18.) Similarly, the fact that Corbett thought a kid who wanted to be a minister was "absolutely brilliant" is not a positive statement about Christianity or religion, except to the extent that Corbett is recognizing the common sense fact that students who want to be ministers can in fact be "absolutely brilliant." (Corbett's Opening Brief, p. 16.) While it is commendable that Corbett can recognize this, he is praising the student. He is not praising religion or even the student's religious views.

Finally, Corbett and Union Intervenors rely on the fact that Chad, and even the district court itself, have taken Corbett's statements "entirely out of context" in an attempt to explain away one statement at a time. (Corbett's Opening Brief, p. 19.) In regards to the Peloza Statement, which the district court found to have been a violation of the Establishment Clause, Corbett

asserts that he was merely "explaining why he took his actions with respect to Mr. Peloza." (Corbett's Opening Brief, p. 19.) Corbett later states that he was "explaining to his students that Peloza was a C- and D- science student with a degree in Physical Education…" (*Id.*) Why was he explaining this at all to his students? What is the connection to European history curriculum? And, why, in the course of explaining, did Corbett need to express that creationism was superstitious nonsense? Surely he could have chosen not to disparage religion, and instead explain that Peloza sought to teach creationism which is not an approved part of the curriculum. Corbett's arguments are not really about context, they are about attempting to assert a secular purpose for his unconstitutional actions by stating what he was trying to "teach" his students. A thorough review of the relevant transcripts reveals that he was expressing disapproval, and it is ultimately irrelevant what Corbett was trying to "teach" when he expressed his disapproval. He could and should have taught in such a manner that abided by the neutrality required by the First Amendment.

Chad has not mischaracterized, or taken out of context, Corbett's statements. It is necessary, of course, to include the specific comments which Chad alleges most clearly reveal Corbett's hostility. It is impossible to include every statement reflecting hostility in Chad's briefing because of

the many hours of lectures. Chad was careful to select the most revealing statements, while providing as much text surrounding the statement itself as possible, so as to stay within page limitations. Doing so, in and of itself, does not indicate that Plaintiffs have somehow changed or mischaracterized Corbett's statements in such a way that the meaning of the statements was altered.

In fact, the majority of Corbett's statements are so egregious that there is no "context" within which they could be put in order to make them constitutionally viable. They simply did not need to be uttered in a public high school classroom. His comments, when taken together and understood as a running dialogue with high school students during a single semester, are undoubtedly disapproving of religion. Corbett created a classroom environment of hostility towards religion. Finally, and most significantly, Chad provided this Court with the entirety of the transcripts for the Court to make a determination based on the full conversation that occurred as to each statement, and in order to give the Court a full understanding of the conversations that created and fostered a hostile environment towards religion.

B. Corbett's Attempt to Distinguish Statements That Are Critical of Religion From Statements That Show Disapproval of Religion Is Not Supported By Applicable Case Law

Corbett asserts that "religion and religious institutions alone would be immune from criticism by teachers and government officials." (Corbett's Opening Brief, pp. 20-21.) Corbett goes on to state that "[u]nder the plaintiffs' position, a teacher violates the Establishment Clause if he or she criticizes an action, policy, or position of a religion even if it is done so, as here, entirely based on secular principles." (*Id.* at 21.) As Corbett has done here, if teachers are permitted to provide post hoc explanations for why their disapproval of religion is based on "secular principles" than the reasoning behind the Supreme Court's requirement that government remain neutral will be gutted. Further, the discussions that occurred in Corbett's classrooms and the statements he made were not based on secular principles, rather they were based on anti-religious principles as is revealed by the statements individually and when taken together to consider the environment that was created within the classroom.

Both the Ninth Circuit and Sixth Circuit have approached hostility-type Establishment Clause cases by making the following inquiry: "[I]f a

reasonable observer would conclude that the message communicated is one of . . . disapproval of religion, then the challenged practice is unlawful." *Vasquez v. Los Angeles County*, 487 F.3d 1246, 1257 (9th Cir. 2007); *Chaudhuri v. Tennessee*, 130 F.3d 232, 237 (6th Cir. 1997). Instead of analyzing Corbett's comments to determine if a reasonable observer would conclude that Corbett communicate a message of disapproval of religion, Corbett seeks to assert that statements "critical" of religion do not amount to civil liability. Despite his attempts, Corbett never provides analysis explaining why this distinction makes a difference in this case. Corbett also fails to address the glaring reality that he did express an unconstitutional lack of neutrality towards religion, regardless of whether you identify it as "criticism" or "disapproval."

While it is certainly possible to imagine generalized situations where a single criticism of a particular issue involving religion would satisfy the applicable constitutional test, it is irrelevant to the circumstances of this case. For instance, Corbett provides the following example: "Imagine that a radical Islamic clergy member or church called for a violent jihad against a city and urged the death of innocent people. Could a teacher denounce this? The answer should be obvious, but if the plaintiffs prevail in this lawsuit, such denouncement would be an impermissible violation of the

Establishment Clause." (Corbett's Opening Brief, p. 21.) Without question, a teacher may constitutionally denounce terrorism and the death of innocent people. If that same teacher chose to denounce the entire Muslim religion repeatedly during a semester long class and asserted that all Muslims were radical terrorists, a reasonable person could determine the teacher was expressing his disapproval of the Muslim religion and his speech would likely constitute unconstitutional disapproval of religion.

Corbett did not denounce terrorism and the loss of innocent lives; rather, he stated that religious fundamentalists are interested in keeping their women barefoot, pregnant, and in the kitchen. (Farnan's E.R. 12, pp. 242-43.). He purportedly quoted Mark Twain and said that "religion was invented when the first con man met the first fool." (Farnan's E.R. 15, p. 306.) He stated an unequivocal belief that creationism was "superstitious nonsense." (Farnan's E.R. 10, pp. 195-198.) All these statements and many more were made during several months in a public high school classroom. A reasonable person listening to Corbett's classroom lectures, and the many statements made during those lectures, would determine that Corbett expressed disapproval of religion. That is the constitutional test.

Regardless of how Corbett attempts to couch his statements, or whether he calls it criticism or disapproval, expressing disapproval of religion in a public high school classroom is unconstitutional – just as promotion of religion is unconstitutional in a public high school 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 v. South Shore Public School Dist.*, 507 F.3d 1097, 1099 (7th Cir. 2007) (citing *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 394 (1993). Accordingly, 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. *Madigan*, 921 F.2d 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 own disapproval over the course of the semester. The stringent analysis that is so often applied in cases involving endorsement of religion should also apply here regarding Corbett's hostility towards religion.

C. Corbett's Actions Are Unconstitutional Under The Lemon Test

In *Lemon v. Kurtzman*, 403 U.S. 602 (1971), the Supreme Court "articulated the 'traditional' test by which courts analyze possible government violations of the Establishment Clause." (Corbett's Opening Brief, p. 23.) According to *Lemon*, 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*, 403 U.S. at 612-13; *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 (quoting *Am. Family Ass'n, Inc. v. City and County of San Francisco*, 277 F.3d 1114, 1121 (9th Cir. 2002)).

When applying the *Lemon* test, the Ninth Circuit has approached hostility-type Establishment Clause cases by making the following inquiry: "[I]f a reasonable observer would conclude that the message communicated is one of . . . disapproval of religion, then the challenged practice is unlawful." *Vasquez*, 487 F.3d at 1257; *see also Chaudhuri*, 130 F.3d at 237. Under any of the three prongs of the *Lemon* test or the reasonable person inquiry set forth in *Vasquez*, Corbett's actions fail to satisfy the standards set forth and constitute unconstitutional hostility towards religion.

Both Corbett and the Union Intervenors have expressed their outrage at one statement amounting to a constitutional violation and further asserted that the Peloza statement satisfies the *Lemon* test. Establishment Clause cases are factually sensitive, and while Chad believes many statements violated the Establishment Clause as set forth in his Opening Brief, the facts here support a finding that a single statement so clearly expressing disapproval of religion is a violation. This is because when coupled with the atmosphere that was created within the classroom as a result of Corbett's numerous statements that, at a minimum, were "critical" of religion,

regardless of their purpose, a reasonable person would find the Peloza statement to express disapproval of religion.

1. Corbett's purpose was not secular

While it is arguable that Defendants' practice violates the purpose prong by endorsing secularism, which amounts to a religious belief system, it is not necessary to make this determination. "The purpose prong of the *Lemon* test asks whether government's actual purpose is to endorse or disapprove of religion." *Lynch v. Donelly*, 465 U.S. 668, 690 (1984) (O'Connor, J., concurring). 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's statements are motivated by hostility toward Christianity, particularly when considered throughout the semester long course. Corbett argues that his actual purpose is the teaching of European history and the development of critical thinking skills. (Corbett's Opening Brief, p. 24.) Critical thinking skills can and are developed across the Nation without expressing sharp disapproval of religion. The particular method that Corbett

used to "develop his students critical thinking skills" were motivated by his hostility toward Christianity. Otherwise, he would and could have chosen different words that were not disapproving of religion to "teach" that particular lesson.

As noted by Corbett, in *McCreary County v. ACLU*, 545 U.S. 844, 860 (2005), the Court recognized that when assessing the purpose of a governmental action the decision should be based on "readily discoverable fact, without any judicial psychoanalysis of a drafter's heart or hearts." *Id.* at 861-63. (Corbett's Opening Brief, p. 27.) Ultimately, *McCreary* examined cases where "the government's action was held unconstitutional only because openly available data supported a commonsense conclusion that a religious objective permeated the government's action." *McCreary*, 545 U.S. at 863.

Corbett and Union Intervenors' have ascribed different "purposes" to different statements where Corbett expressed disapproval of religion. The Union Intervenors went as far as to dedicate four pages to explaining what they believe was Corbett's purpose for a variety of different statements. (Union Intervenors Brief, pp. 28-31.) What Corbett and Union Intervenors have done is exactly what *McCreary* cautioned against. They have asked this Court to provide judicial psychoanalysis of Corbett's words in order to

ascribe a purpose that is not consistent with the common sense conclusion that comes from the "openly available data." In reviewing the entirety of the transcripts, which were included in the Excerpts of Record with Chad's Opening Brief and are openly available, this Court can come to the common sense conclusion that disapproval of religion permeated Corbett's statements in question.

Further, under Corbett and Union Intervenors' analysis, a Christian teacher who asserted he or she was teaching the students critical thinking by proselytizing in his public school classroom would be free to do so if his purpose was to "teach" critical thinking and tolerance for Christians. While doing so might have the secondary effect of challenging the students' belief systems and teaching them to think critically, the purpose for approaching that particular lesson from the platform chosen is clear. The same is true with Corbett's platform of disapproval of religion.

A similar principle stands true for the district court's and Union Intervenors' claims that the purpose for some of Corbett's statements was to teach tolerance and anti-discrimination. (Union Intervenors Brief, p. 29.) Tolerance can without question be taught in a manner not expressing disapproval of religion. Corbett expressed his intolerance regarding Christianity and religion because of his own personal beliefs, and he

attempted to teach "tolerance" by expressing disapproval of religion because of his own intolerance towards those beliefs. His hostility towards religion permeated his statements, and are the purpose behind teaching tolerance as he did.

Chad has not argued that the School District's purpose for providing AP European History is improper or that the inclusion of relevant religious thought in history studies renders the course unlawful under the Establishment Clause. Of course, the various impacts of religion on European history can be taught without expressing disapproval of religion or religious thoughts or ideas. It occurs every day in schools across America. Unlike the vast majority of public school teachers who remain neutral concerning religion in history, Corbett has adopted an overarching anti-religious theme that communicates disapproval of religion to his students.

A complete and thorough reading of the entirety of the transcripts results in a common sense understanding that Corbett's approach for teaching his class and his purpose in approaching it in the manner he did was to express disapproval of religion. The transcripts make clear that for the vast majority of these comments Corbett was not in the middle of a lecture regarding European history or challenging the students to think critically about the themes being discussed. Instead, Corbett used his classroom as a

bully pulpit to repeatedly and consistently make statements evincing his own intolerance towards fundamentalist Christians and express his disapproval of religion.

2. 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, Inc.*, 277 F.3d at 1122.

Corbett states that "[a]lthough Farnan is a high school student, the class is a elective college-level course…[t]he material and the discussions are geared to a more mature student," and argues that, as a result, this should be factored into the analysis as has occurred when the Supreme Court has considered cases involving college students. (Corbett's Opening Brief, p. 31.) While the Supreme Court has noted, the "potential for undue influence is far less significant with regard to college students…", never has any court stated that a "college-level course" alters the analysis with respect to

violations of the Establishment Clause in public school classrooms. *Edwards v. Aguillard*, 482 U.S. 578, 584 n. 5 (1987). Regardless of whether this was a college-level course, it took place in a high school, was offered in a high school, and Corbett chose not to teach at the collegiate level. Chad was a fifteen-year old in a high school sophomore class, not a twenty-year old college student.

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. Corbett and Union Intervenors failed to apply the facts of this case, and the many statements made my Corbett, to this standard.

Both Corbett and Union Intervenors relied primarily on *Am. Family Ass'n, Inc.*, 277 F.3d 1114, 1122. There, the court stated the following:

> These documents are directly aimed at the Plaintiffs and both documents contain statements from which it may be inferred that the Defendants are hostile towards the religious view that homosexuality is sinful or immoral. Nonetheless, we believe the district court properly concluded that this was not the principal effect of the Defendants' actions. The documents, read in context as a whole, are primarily geared toward promoting equality for gays and discouraging violence against them. A number of the Defendants' statements are merely rebuttals of medical and psychological evidence cited by the Plaintiffs in their advertisement and not criticisms of the Plaintiffs' underlying religious beliefs. Certainly, the letter and resolution may contain over-generalizations about the Religious Right, at times misconstrue the Plaintiffs' message, and may be based on

> a tenuous perceived connection between the Plaintiffs' advertisements and the increase in violence against gays and lesbians. This does not, however, make religious hostility the primary effect of the Defendants' actions.

Id.

The distinctions here are clear. There was only one "theme" running through Corbett's statements, which was an unconstitutional disapproval of religion. The topics discussed are varied and diverse, and Corbett was not responding to anything, other than his own beliefs about religion. They were not aimed nor did they have an effect of discouraging violence, nor was he rebutting evidence cited by any student in that classroom instead of criticizing the underlying religious belief. Corbett directly criticized fundamentalist Christians and religions, whether quoting Mark Twain to state that religion was invented when the first con man met the first fool, commenting on how they control women, talking about superstitious nonsense, or stating that when you put on Jesus glasses you cannot see the truth. (Farnan's E.R. 9, pp. 177-78, 11, p. 216, 12, p 243, 15, p. 306, 12, p. 243, 10, pp. 195-197, 12, p 256.)

Corbett further argues that Farnan's excerpts are only a "small portion of the whole." (Corbett's Opening Brief, p. 33.) To begin with, Corbett certainly made more than a "few statements" about religion. (*Id.*) Additionally, however, Corbett relies on a case regarding curriculum, which

held that because the challenged curriculum constituted a single minute of the larger curriculum an objective observer would not view the school as endorsing witchcraft. *Brown v. Woodland Joint Unified School Dist.*, 27 F.3d 1373, 1381 (9th Cir. 1994). This is the exact point that is lost in Corbett and Union Intervenors' extensive briefing on the merits of the Establishment Clause claim. This case is not about curriculum, but it is extremely significant that many topics involving religion can be taught in an objective manner in the confines of a public school classroom. It can be included in the curriculum. A constitutional violation occurs when Corbett chooses to make comments day after day criticizing a variety of different aspects of religion and religious beliefs having absolutely nothing to do with the curriculum itself and everything to do with a theme that he wanted to express.

The relevant facts of this case can be brought into clear focus by simply reviewing the transcripts of Corbett's class lectures and listening to the tone and inflection in which he delivers his rhetoric concerning religion. That evidence is the only evidence that needs to be considered by the reasonable observer. A reasonable observer sitting in Corbett's class would be able to hear that message with enough force and clarity to state that the primary effect of the Defendants' actions inhibits religion.

3. The Defendants' continual and incessant actions foster an excessive government entanglement with religion

The Defendants' actions also fail the third prong of the *Lemon* test because the statements made by Corbett are continual and incessant, and the School District has done nothing to lessen them. Corbett's outright hostility has effectively served to foster "an excessive government entanglement with religion." *Lemon*, 403 U.S. at 613. The curriculum for AP History evidences the fact that the course may properly 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 the Defendants' affirmative statements, especially when not necessary in light of the curriculum standards and a common-sense understanding of European history, represents a deeper entanglement than that 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).

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 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. (*See*, *e.g.*, Farnan's E.R. 15, p. 323 ("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."))

Corbett's response to Chad's argument that his continual and incessant statements amount to unconstitutional excessive entanglement is to rely upon the district court's errant ruling that only the Peloza statement amounted to an Establishment Clause violation. (Corbett's Opening Brief, p. 37.) The Peloza statement is just one of many statements expressing disapproval of religion. Reviewing the entirety of the transcripts included in the Excerpts of Record reveals this clearly. Reviewing the transcript reveals something else significant. Corbett additionally argues that his conduct is not excessive entanglement because his "classes engage in open discussion and debates." (Corbett's Opening Brief, p. 38.) In the many pages of transcripts made from recordings of Corbett's class, not even a single page reflects an open discussion or debate with the students. Although the reader certainly understands Corbett's views on religion, religious fundamentalists, and the conservative politics that result from those religious beliefs, there are very few comments from students.

Corbett blithely notes that Chad seeks to "prohibit all disapproval of religion in the classroom." (Corbett's Opening Brief, p. 38.) While this may be true, that standard comes from years of well-established precedents from the Supreme Court and the Ninth Circuit. The very simple question that needs to be answered is: did Corbett express disapproval of religion in his

public high school classroom, thereby expressing hostility and violating the Establishment Clause? Corbett created a classroom environment that reflected disapproval of religion that is patently unconstitutional. No lengthy discussion about academic freedom, context, European history curriculum, or the supposedly horrible results of applying the law in answering the question above will change what the transcripts and audio recordings prove Corbett said in that classroom.

II. THE DISTRICT COURT SHOULD NOT HAVE DETERMINED QUALIFIED IMMUNITY IN CORBETT'S FAVOR.

A. The Amendment to the Scheduling Order Should Not Have Been Approved

Corbett argues that the district court acted properly when it amended the scheduling order pursuant to Federal Rule of Civil Procedure, Rule 16(b)(4), and allowed Corbett to amend his Answer to add qualified immunity as an affirmative defense. "A schedule may be modified only for good cause and with the judge's consent." *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 608 (9th Cir. 1992). However, "[u]nlike Rule 15(a)'s liberal amendment policy … , Rule 16(b)'s 'good cause' standard primarily considers the diligence of the party seeking amendment."

Therefore, Rule 16(b) imposes a higher showing of diligence of a party than Rule 15(a)'s liberal amendment policy. *Id.*

Corbett properly asserts that "good cause" may be found when the party that seeks the amendment shows "diligence." (Corbett's Opening Brief, p. 41 (citing *Johnson*, 975 F.2d at 608).) In that same case, however, the court also stated that "carelessness is not compatible with a finding of diligence and offers no reason for a grant of relief." *Id.* at 609. In *Johnson*, "good cause" was denied when the plaintiff failed to "heed clear and repeated signals that not all the necessary parties had been named in the complaint." *Id.* The court stated that the plaintiff's attorneys "filed pleadings and conducted discovery but failed to pay attention." *Johnson*, 975 F.2d at 610.

This case is similar to Johnson in that Corbett simply failed to pay sufficient attention to the subject matter of this litigation. This is a Section 1983 action and Corbett is accused of violating the Establishment Clause as a public official. The Plaintiff's First Amended Complaint alleged that "[p]laintiff's rights are violated each day he attends Defendant Dr. James Corbett's history class. Defendants' conduct is a violation of the constitutional guarantee found in the Establishment Clause through their exhibition of hostility toward religion …." (Farnan's E.R. 19, p.2.) At a

bare minimum, Corbett should have included qualified immunity as an affirmative defense based on the First Amended Complaint alone.

Corbett makes numerous assertions throughout his brief that it was not apparent to Corbett's counsel that Corbett was entitled to qualified immunity until the district court ruled on the cross-motions for summary judgment. Corbett claims that the law was not clearly established that a single statement disparaging religion could amount to an Establishment Clause violation. (Corbett's Opening Brief, p. 43.) Corbett further claims that Chad's case asserts only, and indeed relies upon, a "barrage" of "continual and incessant actions" and comments that were hostile to religion. (Corbett's Opening Brief, pp. 42-43, 47, 68-69.) If Corbett makes these statements in good conscience, however, he is implicitly admitting that a government actor's pattern of favoring irreligion over religion amounts to a violation of the Establishment Clause. At the same time, however, Corbett would plead ignorance and seek to have this Court believe that he did not know that the right he violated was "clearly established" because "[i]n 2007, the law was not clearly established that a *single statement* allegedly disparaging religion made by a teacher during one lecture in a yearlong class could trigger an Establishment Clause violation." (Corbett's Opening Brief, p 43 (emphasis added).) This contradiction cannot stand. Corbett cannot say that Chad's

briefs led him to believe that Chad would only have a legitimate grievance if the district court found numerous comments to be hostile to religion, and then also argue that Corbett could not possibly be expected to have known that such behavior, even one statement, amounted to a constitutional violation. Such a conclusion simply defies logic.

Essentially, Corbett's counsel took an "all or nothing" approach to this case. Corbett suggests that either all the statements taken together violated the Establishment Clause or none of the statements violated the Establishment Clause. Corbett cannot argue in good faith that it was unforeseeable that the district court would land somewhere in between the two. It is inexcusable for Corbett to willfully choose this strategy and to fail to affirmatively assert qualified immunity as a possible defense in his Answer to the First Amended Complaint. *U.S. v. First Nat'l Bank of Circle*, 652 F.2d 882, 887 (9th Cir. 1981) (one factor to consider for allowing an amendment under Rule 16(b) is "the degree of willfulness, bad faith or inexcusable neglect"). In the end, the scope of the inquiry should be whether it was reasonable for Corbett to ignore the significant likelihood that the district court would not entirely agree with Chad on all accounts, but might agree on some accounts. Corbett's decision to ignore qualified

immunity was a careless error and no good cause exists to support the amendment.

B. The Motion to Amend the Answer Should Not Have Been Granted

Corbett states (correctly) that once a court finds good cause, then it must evaluate whether the amendment should be allowed under Rule 15(a), which provides that a court must freely grant leave to amend beyond the 20-day timeframe "when justice so requires." *See Johnson*, 975 F.2d at 608. Corbett then cites and analogizes to *Foman v. Davis*, 371 U.S. 178 (1962), surmising that because in that case the court held that the district court had erred in denying the plaintiff leave to amend her complaint, the Court in this case should hold that the district court did not err in granting the defendant leave to amend his Answer.

This case is distinguishable from *Foman* in two significant regards. First, in *Foman*, the court held that the district court's "dismiss[al of] petitioner's complaint for failure to state a claim upon which relief might be granted" and subsequent refusal to allow her to amend the complaint to include a cause of action for recovery in quantum meruit amounted to an abuse of discretion. *Id.* at 182. In so holding, it cited two justifications: (1) the plaintiff had pled in her complaint "underlying facts or circumstances"

that were "a proper subject of relief" and should therefore "be afforded an opportunity to test [her] claim on the merits," and (2) the district court had "outright refus[ed] to grant the leave without any justifying reason appearing for the denial." *Id.*

Second, it is immediately apparent that what was at issue in *Foman* was a *complaint* which, although it alleged the necessary "underlying facts or circumstances" giving rise to a cause of action, had technically neglected to state that cause of action in appropriate terms. The consequence of denying the plaintiff leave to amend was to defeat her case at the outset, such that the merits of her case were never tried. This is fundamentally different from Corbett, who failed to assert in his *Answer* the affirmative defense of qualified immunity—a failure which does not preclude the Court from deciding the merits of a case (and in fact has the opposite effect). Additionally, in *Foman* the court held that the district court truly had abused its discretion because it failed to articulate any reason for having denied leave to amend. Notably, among the "justifications" the district court could have provided, the *Foman* court lists "repeated failure to cure deficiencies by amendments previously allowed." *Id.* That is not the case here, where defendant's carelessness, bad faith, and undue delay, inter alia, provided the

district court with ample proper justifications for denial of leave to amend the Answer to Chad's timely amended complaint.

Corbett further relies on the Supreme Court's very recent decision in *Krupski v. Costa Crociere S.p.A.*, _____ U.S. _____, 130 S. Ct. 2485 (2010). In that case, a cruise ship passenger filed a suit against a carrier to recover for injuries she sustained while aboard the cruise ship. In her complaint, however, the plaintiff errantly identified the carrier. The Supreme Court held that the district court ought to have granted leave to amend the complaint to state the defendant's proper name on the ground that amendment of her complaint to identify the carrier correctly related back to her original complaint. *Id.* But errantly identifying a defendant in a complaint is not tantamount to neglecting to assert an affirmative defense in an answer, especially when existing case law firmly states that an affirmative defense must be pled or else it is lost. *See, e.g.*, *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985); *In re Adbox, Inc.*, 488 F.3d 836 (9th Cir. 2007) (citing *Morrison v. Mahoney*, 399 F.3d 1042, 1046 (9th Cir. 2005)). Moreover, Corbett's requesting leave to amend his Answer to assert the affirmative defense of qualified immunity did not assist the court in deciding the case on its merits, which is the linchpin of *Foman* and other such cases

that hold that leave to amend "shall be freely given when justice so requires." *Id*. at 182.

1. The amendment was sought in bad faith.

In evaluating whether a party seeks to file an amendment in bad faith, courts consider previous "dilatory tactics" of the moving party, as well as the value of the proposed amendment. *Thornton v. McClatchy Newspapers, Inc.*, 261 F.3d 789, 799 (9th Cir. 2001).

In arguing that the post-judgment motion for leave to amend his Answer was not in "bad faith," Corbett discusses the two-prong qualified immunity inquiry established in *Saucier v. Katz*, 533 U.S. 194 (2001), meanwhile recognizing that the Supreme Court recently gave the lower courts more discretion in deciding whether the two-pronged analysis applies and, if so, in what order. *Pearson v. Callahan*, _____ U.S. _____, 129 S. Ct. 808, 818 (2009).[1] *Saucier* calls for a court to consider whether "taken in the light most favorable to the party asserting the injury, . . . the facts alleged show the [government official's] conduct violated a constitutional right" and whether "the right was clearly established." *Saucier*, 533 U.S. at 201.

[1] Note, however, that *Pearson* does not upset the underlying rationale for the *Saucier* test. "Where the defendant seeks qualified immunity, a ruling on that issue should be made early in the proceedings *so that the costs and expenses of trial are avoided where the defense is dispositive*." *Saucier*, 533 U.S. at 200.

The *Saucier* analysis, regardless of the sequence in which it is applied, is not helpful to Corbett's case. First, the alleged acts asserted in the First Amended Complaint, if "taken in the light most favorable," *id.*, to Farnan, *do* show that Corbett violated the Establishment Clause and therefore violated a constitutional right. Second, it is clearly established that a government actor's hostility to religion is a violation of the Establishment Clause. This is especially clear when, as Corbett asserts, the First Amended Complaint alleges that hostility was shown continually and incessantly, or in a "barrage" of antireligious comments. (Corbett's Opening Brief, pp. 42-43, 47, 68-69.) The established law was clear enough to prompt intervening party, California Teachers Association, to assert the defense of qualified immunity.

Additionally, while Corbett cleverly tries to assert that "Farnan's contention that he was entitled to an award of attorney's fees as a matter of right supports Dr. Corbett's position . . . that Farnan was seeking more than simply *nominal* damages against Dr. Corbett," 42 U.S.C. § 1988 explicitly states that actions asserting violations of 42 U.S.C § 1983 are entitled to attorney's fees. Therefore, it was apparent to Corbett—from the outset of litigation—that he could be liable for attorney's fees based on Chad's First Amended Complaint. In fact, both the original Complaint and the First

Amended Complaint explicitly state in both the "Jurisdiction" and "Prayer for Relief" sections that plaintiff sought costs and attorneys' fees pursuant to 42 U.S.C. § 1988(b). Corbett's post-judgment assertion of qualified immunity, made with full knowledge that Chad had sought attorneys' fees since the filing of the suit, is clearly a bad faith attempt to now avoid the attorneys' fees that have been amassed throughout the litigation. What's more, while Corbett had opportunity after opportunity to assert the defense, he proceeded with full-scale litigation, including with filling his own motion for summary judgment, without asserting a defense that would "bar[] claims for costs and attorney's fees." (Corbett's Opening Brief, p. 48.) Corbett has no legitimate excuse for waiting until after a judgment on the merits to assert the defense of qualified immunity.

Finally, the Union Intervenors assert that *Owens v. Kaiser Foundation Health Plan, Inc.,* 244 F.3d 708, 712 (9th Cir. 2001), stands for the proposition that no bad faith exists where a defendant offers a "plausible explanation of delay and acted promptly after learning of [the] applicability of [an] affirmative defense." (Union Intervenors Brief, pp. 50-51.) This reading of the case is erroneous. The defendant in *Owens* sought to amend its answer in order to add res judicata as an affirmative defense, "[i]mmediately upon learning of the availability of the res judicata defense."

Owens, 244 F.3d at 712. The court in *Owens* relied on the fact that the defendant offered "substantial competent evidence to explain the delay." *Id.* The defendant did not merely present a "plausible explanation of delay." *Id.* Additionally, the court found it important that the defendant acted immediately upon learning of the "availability" of the defense. *Id.* The defendant did not wait until it determined that it would be entitled to a determination in its favor before it sought to add the defense of res judicata. Corbett, however, did not seek to add qualified immunity upon learning of its "availability," but waited until the district court issued its decision on the merits of the case, which made it "apparent" that he "would be entitled to a determination of qualified immunity." (Corbett's Opening Brief, p. 43.) Parties must accept more responsibility for their defense than waiting for the obvious to appear in an order written by a trial judge and after many month of litigation.

2. The amendment was futile.

In arguing that his amendment after a judgment on the merits was rendered is not futile, Corbett relies on an Eleventh Circuit case, *D'Aguanno v. Gallagher*, 50 F.3d 877 (11th Cir. 1995). In that case, the Eleventh Circuit held:

> The policy that supports qualified immunity—especially removing for most public officials the fear of personal monetary liability—would be undercut greatly if government officers could be held liable in their personal capacity for a plaintiff's costs, litigation expenses, and attorneys' fees *in cases where the applicable law was so unsettled* that defendants, in their personal capacity, were protected from liability for other civil damages.

Id. at 881 (emphasis added).

In addition to the fact that this case is not controlling law in this Circuit, this case is distinguishable from the instant case for two reasons. First, *D'Aguanno* requires "applicable law . . . so unsettled that defendants, in their personal capacity, were protected from liability for other civil damages." *Id.* In *D'Aguanno*, the alleged constitutional violation involved the Fourth Amendment. *Id.* Fourth Amendment jurisprudence is rife with inconsistencies and case-by-case analyses. Even though, as Corbett later notes in his brief, Establishment Clause jurisprudence is complicated, and even though courts have different tests available to them for analyzing Establishment Clause claims, the law is not unsettled to this extent. (Corbett's Opening Brief, p. 64.)

Second, the *D'Aguanno* court argues that the policy supporting qualified immunity ("removing for most public officials the fear of personal monetary liability") would be undercut by holding officers liable in their personal capacity. *D'Aguanno*, 50 F.3d at 881. That policy is only

marginally applicable in this case, but the more fundamental purpose of qualified immunity—immunity from suit—is of substantial significance. In the Supreme Court's most recent revisiting of qualified immunity, it explained:

> Because qualified immunity is "an immunity from suit rather than a mere defense to liability . . . it is effectively lost if a case is erroneously permitted to go to trial." *Mitchell v. Forsyth*, 472 U.S. 511 (1985) (emphasis deleted). Indeed, we have made clear that the "driving force" behind creation of the qualified immunity doctrine was a desire to ensure that "'insubstantial claims' against government officials [will] be resolved prior to discovery." *Anderson v. Creighton*, 483 U.S. 635, 640, n.2 (1987). Accordingly, "we repeatedly have stressed the importance of resolving immunity questions at the earliest possible stage in litigation." *Hunter v. Bryant*, 502 U.S. 224, 227 (1991) (per curiam).

Pearson, 129 S. Ct. at 818 (emphasis added). Corbett's failure to assert the defense at any of the earlier stages of the litigation in which he had the opportunity waived his right to use the defense for the purposes for which it was intended.

3. The amendment was unduly prejudicial.

"[T]he most important [factor] is whether amendment would result in undue prejudice to the opposing party." *William Inglis & Sons Baking Co. v. ITT Continental Baking Co., Inc.*, 668 F.2d 1014, 1053 n. 68 (9th Cir. 1981), *cert. denied*, 459 U.S. 825 (1982) (citing *Howey v. United States*, 481 F.2d 1187, 1190 (9th Cir. 1973)).

In *Heimbaugh v. City & County of San Francisco*, 977 F.2d 589 (9th Cir. 1992), the court determined that denying leave to amend was proper partly because "allowing the plaintiff to amend his complaint [would] unduly prejudice the defendant who ha[d] already spent considerable time and money litigating this case once." This same principle is applicable in the instant case. Here, Corbett learned no new information between the filing of the lawsuit and his post-judgment assertion of qualified immunity that would justify his last minute raising of the defense. Instead, he waited until after Chad had expended considerable time and expense to assert a defense that would protect him from any liability. Therefore, to allow him to assert this defense after motioning to dismiss the case, filing an Answer, undergoing multiple depositions and rounds of discovery, and ultimately having the merits decided against him by the district court on a motion for summary judgment, would be to allow him to use qualified immunity as "a parachute

to be deployed only when the plane has run out of fuel." *Evans v. Fogarty*, 241 Fed.Appx. 542, 550 n. 9 (10th Cir. 2007). The result of Corbett's rescue parachute would cause substantial undue prejudice to Chad.

Corbett also relies on a Third Circuit case, *Charpentier v. Godsil*, 937 F.2d 859 (3rd Cir. 1991), to argue that he did not waive qualified immunity by not raising it as an affirmative defense in his Answer. However, in *Charpentier*, qualified immunity was legislated into state law and the statute did not expressly make it available as an affirmative defense under the circumstances of the case. *See generally*, *id.* at 864-67. In fact, the district court did not believe that qualified immunity was even available as a defense. *Id.* at 863. It was not until the Third Circuit engaged in significant statutory construction and "prediction" of how the New Jersey Supreme Court would interpret the statute did it decide that qualified immunity was available as a defense on one of two claims. *Id.* at 867. In this case, qualified immunity has long been established as a defense to Section 1983 claims and no statutory construction is required to determine whether a prudent defense would include it in its arsenal from the beginning. This is especially true where, as Corbett argues, "[t]here was not a single case of any court in the country prior to the district court's May 1st ruling that a statement by a teacher that is perceived as hostile to religion could be the

basis for an Establishment Clause violation…." (Corbett's Opening Brief, pp. 64-65.)

Further, *Charpentier* is also distinguishable in that the plaintiff never claimed that any prejudice would result from allowing an amendment. *Charpentier,* 937 F.2d at 864. Additionally, the defendant joined in a trial brief raising qualified immunity as a defense to liability. *Id.* The defendant in *Charpentier* did not simply sit on his hands until after a ruling on the merits and then assert qualified immunity as Corbett did in the present case. There, although the defendant did not include qualified immunity as an affirmative defense in his answer, he clearly raised the defense prior to a ruling on the merits without any showing of prejudice by the plaintiff.

4. The amendment should not have been approved because of undue delay.

In conformance with *Foman v. Davis*, this Circuit has repeatedly held that "[l]eave to amend may also be denied for repeated failure to cure deficiencies by previous amendment." *Abagninin v. AMVAC Chemical Corp.*, 545 F.3d 733, 742 (9th Cir. 2008) (quoting *Foman*, 371 U.S. at 182). For example, in *McGlinchy v. Shell Chemical Co.*, 845 F.2d 802 (9th Cir. 1988), the district court denied the plaintiffs leave to amend their complaint when they had already filed two amended complaints and failed to assert the

claims for fraud and negligent interference with contract, which became apparent only during discovery, therein. *Id.* at 809. The court reasoned that they "had ample opportunity to add new claims." *Id.*

Here, Corbett has had several opportunities to assert the affirmative defense of qualified immunity, which was, or at least should have been, apparent to him based on current law from the outset. Corbett initially filed a motion to dismiss, but in it he never raised the defense. Then he filed his Answer to the First Amended Complaint but failed to raise the defense again. Then the parties filed cross motions for summary judgment, yet, again, Corbett did not raise qualified immunity in either his motion or his responses to Chad's motion. Time after time, Corbett had the opportunity to raise qualified immunity, with each stage in the litigation making it even more obvious than the stage before that the defense was available.

Further, in *McGlinchy*, the court also rejected the appellants' claim that they "only became aware of [additional] claims . . . after engaging in discovery" as dismissive of undue delay. *McGlinchy*, 845 F.2d at 809. In rejecting this argument, the court emphasized the fact that when the appellants subjectively became aware of the new claims was immaterial. The court instead imposed an objective standard, holding that "[a]ppellants *should have* been aware of [the claim] when they filed their original

complaint." *Id.* (emphasis added). Corbett similarly asserts that he did not raise qualified immunity until "the viability of [it] became apparent" following the district court's ruling. (Corbett's Opening Brief, p. 52.) Again, however, this is not an acceptable explanation; Corbett should have known from the outset of litigation.

As argued above, Corbett's delay is inexcusable. For the same reasons that Corbett cannot show "good cause" under Rule 16(b), Corbett cannot justify his undue delay. The First Amended Complaint accuses a public official of violating the Establishment Clause. Asserting qualified immunity as a viable defense under those circumstances should have been a "knee-jerk reaction" to the Section 1983 claim. Further, it is disingenuous for Corbett to argue that he could not have known that his "all or nothing" approach to litigation was not the wisest strategy. While Corbett argues that he could not have known that the district court might have held him liable for one statement, he also rationalized and defended every statement individually, 28 in all, that Chad presented in his Motion for Summary Judgment. The First Amended Complaint includes pages of Corbett's statements and Corbett should have considered the possibility that he might not be able to provide a sufficient *post-hoc* rationalization for every

statement so as to avoid liability under the Establishment Clause. However, Corbett chose the "all or nothing strategy" and it did not work.

Corbett should not have been rewarded with the opportunity to amend his Answer to assert qualified immunity simply because the initial defense strategy he took in this litigation was not entirely successful.

C. Corbett Was Not Entitled to A Finding of Qualified Immunity.

1. Qualified immunity was not timely raised and, as a result, Corbett waived the affirmative defense

As Corbett correctly stated, qualified immunity "shield[s] [government agents] from liability for civil damages insofar as their conduct does not violate clearly establish statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). This is the purpose behind the affirmative defense, a purpose that has been rendered entirely irrelevant in this case as a result of Corbett's failure to assert the defense in his Answer, motion to dismiss, or motion for summary judgment. Tellingly, it was not until Corbett was found to have violated the Establishment Clause and was facing attorneys' fees pursuant to 42 U.S.C § 1988 that qualified immunity was first raised. By that time,

damages were not at issue other than nominal damages as they were not sought by Chad and not awarded by the district court.

In *Camarillo v. McCarthy*, 998 F.2d 638, 639 (9th Cir. 1993), the court considered the propriety of a defendant raising qualified immunity for the first time at summary judgment. The court in *Camarillo* relied on *Gomez v. Toledo*, 446 U.S. 635 (1980) (noting that, in a Section 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. To begin with, Corbett did not raise the defense at summary judgment, and allowed a ruling on the merits to be issued before ever even raising the issue. In addition, in *Camarillo*, the defense was deemed not to have waived because there was no prejudice. Here, Corbett's actions were clearly prejudicial. Qualified immunity was carelessly omitted from the Answer, never argued at any stage of the litigation, and a favorable ruling was obtained by Chad. Of course, as the prevailing party Chad is generally entitled to attorneys' fees, and sought no other damages beyond nominal damages.

Corbett argues that the general rule regarding timeliness of an affirmative defense does not apply here because he asserted qualified

immunity "as soon as the district found him liable for making one statement that it found to be hostile to religion." (Corbett's Opening Brief, p. 57.) This is entirely immaterial, as Corbett has asserted that the Complaint relied on a "barrage" of anti-religious comments. A reasonable official would have known that this could have amounted to an Establishment Clause violation and pled the defense. The cases cited by Corbett and Union Intervenors to support a determination that qualified immunity was not waived are all distinguishable, either because qualified immunity was raised at an earlier stage of the litigation and before final ruling on the merits or because the defense had been pled and then never fully argued before it was addressed by the Ninth Circuit. *See Guzman-Rivera v. Rivera-Cruz*, 98 F.3d 664 (1st Cir. 1996) (noting that qualified immunity may be raised in motion to dismiss, motion for summary judgment, or at trial); *Graves v. City of Coeur D'Alene*, 339 F.3d 828 (9th Cir. 2003) (raised the issue of qualified immunity *sua sponte* in the Ninth Circuit). Additionally, the cases cited by Corbett and Union Intervenors do not take into account or address a situation similar to the one before this Court. They do not address the substantial prejudice incurred by Chad and the unique status of the litigation when qualified immunity was first asserted.

Finally, Corbett and Union Intervenors rely on *Kwai Fun Wong v. United States*, 373 F.3d 952, 956-57 (9th Cir. 2004), in arguing that "qualified immunity cannot be resolve without first deciding the scope of the constitutional rights at stake" and therefore Corbett could not have asserted it earlier in the litigation, or apparently even pled it as a defense. (Corbett's Opening Brief, p. 55; Union Intervenors Brief, p. 40.) This is a particularly suspect assertion in light of Corbett's citation of *Pearson v. Callahan*, for the proposition that "this Court may determine qualified immunity in Dr. Corbett's favor without first determining that there has been a constitutional violation." *Pearson*, 129 S.Ct. at 818. In fact, *Kwai Fun Wong* cites to *Saucier v. Katz*, to support its holding that such a finding is required, the very case Corbett states was at least partially modified by *Pearson* as to this exact issue.

When considering timeliness, it is appropriate to inquire as to whether Corbett knew or should have known the facts and theories raised by the amendment in the original pleading. *See*, *e.g.*, *AmerisourceBergen Corp. v. Dialysist West, Inc.*, 465 F.3d 946 (9th Cir. 2006); *Jackson v. Bank of Hawaii*, 902 F.2d 1385, 1388 (1990). As a governmental official, the qualified immunity doctrine was uniquely created for individuals like Corbett. The Complaint alleged that Corbett, a government employee,

violated the Establishment Clause by expressing disapproval of religion, and as Corbett has noted repeatedly there is no existing precedent holding a teacher liable in this fashion. The facts and theories in the Complaint were more than clear, especially in light of the fact that it was a simple Complaint with a single cause of action. Corbett's assertion of qualified immunity was prejudicial, untimely, and should not be permitted where it was never pled, argued, and there are no civil liability damages at issue.

2. The constitutional right at issue was clearly established in 2007.

To determine if a right is clearly established, a court should use its "full knowledge of its own and other relevant precedents." *Elder v. Holloway*, 510 U.S. 510, 516 (1994) (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).

Corbett argues that there had never been a ruling prior to the district court's May 1, 2009, ruling holding that "a statement by a teacher that is perceived as hostile to religion could be the basis for an Establishment

Clause violation and a basis for liability in an individual capacity." (Corbett's Opening Brief, p. 65.) At the outset, it is significant that the district court erred in finding only one statement to be an Establishment Clause violation. As addressed fully above, Corbett created a religiously hostile classroom environment and there is more than just one statement where he expressed disapproval of religion.

As acknowledged by both the district court and Corbett himself, there is precedent to sufficiently show that Corbett is not entitled to qualified immunity because the right was clearly established if his liability is based on more than the Peloza statement. (Corbett's Opening Brief, p. 62.) The district court noted that 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." (Farnan's E.R. 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.

The only question then becomes whether one statement, when surrounded by a host of other questionable statements and said to a

classroom of fifteen-year old kids, was clearly established to have been an Establishment Clause violation. Corbett and Union Intervenors rely on a host of Establishment Clause cases regarding promotion or endorsement of religion, many of which state that hostility is just as impermissible, and a host of due process and fourth amendment cases where the scope of those "general rights" are far broader. (*See generally*, Union Intervenors Opening Brief, pp. 57-64; Corbett's Opening Brief, pp. 58-65.)

One such case, *Anderson v. Creighton*, 483 U.S. 635 (1987), stated that if the test of "clearly established law" were applied at a level of generality comparable to asserting a violation of a right to due process of law, then "[p]laintiffs would be able to convert the rule of qualified immunity that our cases planning establish into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights." *Id*. at 639. Asserting that Corbett has violated the Establishment Clause is nowhere near the same level of generality as asserting that a defendant has violated plaintiff's right to due process of law. An Establishment Clause violation is a very specific right, the contours of which are far more narrow.

Further, under the analysis espoused by Union Intervenors no Establishment Clause violation would ever be "well-established" to such an

extent that qualified immunity would be inappropriate. They state that "Establishment Clause cases are notoriously context-dependent and complex, and courts frequently discuss that no fixed or categorical rules help guide the detailed contextual inquiry required under the Establishment Clause." (Union Intervenors Brief, p. 60.) The specificity that both Corbett and Union Intervenors say is required cannot ever be satisfied by laws that "yield different results depending on context." (*Id.*)

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 v. State of Ark.*, 393 U.S. 97, 104 (1968). As noted previously, 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).

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.

3. This Court should apply Saucier's two-step analysis.

Corbett incorrectly asserts that the two-step analysis provided in *Saucier v. Katz* was reversed. The two-step analysis provides that the court must first decide, "in the light most favorable to the party asserting the injury," if a constitutional right was violated. *Saucier*, 533 U.S. at 201. If so, "the next, sequential step is to ask whether the right was clearly established." *Id.* Although the two-step process "is often appropriate, it should no longer be regarded as mandatory" (*Pearson*, 129 S.Ct. at 818) or "inflexible." *Id.* at 813. While the sequential approach is not "mandatory in all cases," it is often beneficial in developing constitutional precedent." *Id.* at 819.

Under the circumstances of this case, this Court should engage in *Saucier's* two-step analysis in order to develop constitutional precedent. Corbett, however, argues that this court should skip the first step and only address the second step. In doing so, Corbett argues that this court should

merely focus on whether "the law was clearly established that a teacher could be personally liable for violating the Establishment Clause based on a single statement." (Corbett's Opening Brief, p. 66.) However, this approach would deny Chad's right to have his case reviewed, not only as to the individual statements, but as to the totality of all the comments as well as the hostile classroom environment that Chad claims to have existed – all in violation of the Establishment Clause.

Chad argues that Corbett "created and fostered and environment that was hostile towards religion" through numerous comments made "day after day." (Chad's Opening Brief, p. 27-28.) Chad also alleges that "[i]n addition to the hostile environment created by Corbett, he made many individual statements that expressed disapproval of religion." (*Id.* at p. 28.) Unlike *Brosseau v. Haugen*, 543 U.S. 194 (2004), where there is a defined set of facts in one setting, this case presents the question of whether Corbett's many comments over many days amount to a violation of the Establishment Clause and also whether the statements individually amount to a violation of the Establishment Clause.

Because the district court's grant of summary judgment is reviewed de novo, *Blankenhorn v. City of Orange*, 485 F.3d 463, 470 (9th Cir. 2007) (citation omitted), and because the district court's determination of qualified

immunity is also reviewed de novo, *Elder*, 510 U.S. at 516 (citations omitted), this Court should evaluate the facts in their entirety and should not merely focus on whether one statement can amount to a violation of the Establishment Clause. Doing so would provide the most beneficial approach to assessing this important constitutional question.

III. CHAD IS ENTITLED TO DECLARATORY RELIEF

The Union Intervenors errantly asserts that abuse of discretion is the standard of review for declaratory relief in this case. Although, a district court's decision whether to exercise jurisdiction over a declaratory judgment action is reviewed for an abuse of discretion, *Wilton v. Seven Falls Co.*, 515 U.S. 277, 289-90 (1995); *Rhoades v. Avon Prods., Inc.*, 504 F.3d 1151, 1156-57 (9th Cir. 2007), review of a district court's decision *granting or denying declaratory relief* is reviewed de novo. *Wagner v. Professional Engineers in California Government*, 354 F.3d 1036, 1040 (9th Cir. 2004); *Ablang v. Reno*, 52 F.3d 801, 803 (9th Cir. 1995). Therefore, this Court should apply the de novo standard of review to determine whether Chad is entitled to declaratory relief.

The Union Intervenors argue that Chad's claim for declaratory relief is moot. Unfortunately, Chad did graduate and has just begun his freshman year of college. Despite the fact that this case arose during Chad's

sophomore year of high school and despite the fact that this case has progressed at a reasonable pace in relation to the heavy caseload experienced by the federal courts within California and the Ninth Circuit, this case is just now receiving appellate review. Students in California who seek to protect their First Amendment liberties through the federal courts experience a significant disadvantage when protecting their liberties than their counterparts in the forty-nine other states. This case presents an opportunity for this Court to eliminate this inequity and create an additional exception to the application of mootness in circumstances such as this present case.

"It is well-settled that once a student graduates, he no longer has a live case or controversy justifying declaratory and injunctive relief against a school's action or policy." *Cole v. Oroville Union High Sch. Dist.*, 228 F.3d 1092, 1098 (9th Cir. 2000), citing *Doe v. Madison Sch. Dist. No. 321*, 177 F.3d 789, 798 (9th Cir.1999) (en banc). In forty-nine other states, however, a case will not automatically be moot if damages are awarded. However, in California, school districts are state agencies and thus immune from damage suits under the Eleventh Amendment. *Belanger v. Madera Unified Sch. Dist.*, 963 F.2d 248, 251-54 (9th Cir.1992). Therefore, cases brought by California students who graduate before they are decided on appeal are continually mooted out because neither injunctive relief, declaratory relief,

nor damages are available against California school districts. The only real opportunity for a California case to be reviewed on appeal is if a government actor is named in their individual capacity and held liable for damages. However, if the case is a matter of first impression, and qualified immunity is applicable, the case will inevitably be moot before it is resolved on appeal.

This presents the situation where constitutional violations are allowed to continue repeatedly without review by the courts. As a result, Chad urges this Court to except this case from the general rule. More specifically, the "capable of repetition, yet evading review" exception to mootness applies only when (1) the challenged action is too short in duration to be fully litigated before cessation or expiration, and (2) there is a reasonable expectation that the same complaining party will be subjected to the same action again. *Spencer v. Kemna*, 523 U.S. 1, 17, 118 S.Ct. 978 (1998).

If this Court allows qualified immunity to be asserted and finds that Corbett is entitled to qualified immunity, this case is one that will continue to evade review because Chad has graduated and all future complainants will likely suffer the same fate as Chad. Although Chad is in college, he stands for the rights of other students and this case should be decided in the interest of justice by granting declaratory relief if nominal damages are not permitted as a result of qualified immunity. If the Ninth Circuit does not render a

decision on the merits, Corbett and other like-minded school officials will espouse their intolerance with indefinite immunity. A decision on the merits from this Court will protect the rights of all future students in California and will help properly establish the contours of the Establishment Clause in public schools.

ADVOCATES FOR FAITH & FREEDOM

Dated: August 25, 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)(7)

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because this brief contains 13,590 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: August 25, 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 August 25, 2010, I caused to be served the foregoing documents described below on the following interested parties in this action:

APPELLANTS' – CROSS-APPELLEES' THIRD BRIEF ON CROSS APPEAL AND RESPONSE TO APPELLEES' AND INTERVENORS' SECOND BRIEFS ON CROSS APPEAL

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

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Executed on August 25, 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.

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