

Appeals 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

v.

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)

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THE STATEMENT BY DR. CORBETT CONCERNING JOHN PELOZA DID NOT EXPRESS HOSTILITY TO RELIGION

A. Introduction

The district court carefully reviewed each statement by Dr. Corbett and concluded that only one of them expressed hostility to religion and violated the Establishment Clause: Dr. Corbett's answer to a student's question about why he had opposed John Pelozo continuing to teach high school biology.¹ Dr. Corbett is appellant only as to that statement and thus this reply brief is properly limited to discussing that statement.² The district court found that Dr. Corbett was protected by qualified immunity as to this statement because there is no clearly established law that a reasonable teacher should know as to when

¹ The District Court stated: "Accordingly, the Court grants summary adjudication on the primary effect prong of the *Lemon* test against Corbett with regard to the Pelozo statement and in favor of the School Defendants and the Unions with regard to all other statements." 615 F.Supp.2d 1137. 1153 (C.D. Cal. 2009).

² Of course, the difficulty in focusing on just one statement is that Farnan contends that the statement has to be put in the context of all of Dr. Corbett's statements. "[T]he 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 with the classroom of Corbett's numerous statements that, at a minimum, were 'critical' of religion, regardless of their purpose, a reasonable person would find the Pelozo statement to express disapproval of religion." Appellant's – Appellees' Third Brief on Cross Appeal at 21-22. This inevitably then requires that the Pelozo statement be placed in the overall context of Dr. Corbett's class and thus that there be some reference to the other statements. Nonetheless, the focus of this brief is the Pelozo statement because it is the only matter on which Dr. Corbett is the appellant.

statements in class that are perceived as disapproving religion can be the basis for civil liability. No court in the country ever has found any teacher liable under such circumstances and the absence of any case law means that qualified immunity applies. *See, e.g., Brosseau v. Haugen*, 543 U.S. 194 (2004); *Wilson v. Layne*, 526 U.S. 603 (1999) (absence of prior cases meant that qualified immunity existed).

It is striking that in discussing the Peloza statement, and all of the statements, Farnan's reply brief says over and over again that hostility to religion is a violation of the Establishment Clause and it asserts over and over again that Dr. Corbett was hostile to religion. But in doing so, it begs the key questions: when do statements about religion, including statements critical of religious institutions, constitute hostility to religion? Surely, it cannot be that a teacher can criticize any institution except for religious ones and any criticism of a religion or religious institution becomes hostility to religion. That would provide a preference for religions over all other institutions that would itself raise grave Establishment Clause issues.

Farnan's reply brief repeatedly asserts that hostility to religion violates the Establishment Clause, but it provides no basis for determining what is hostility to or disapproval of religion or for assessing whether Dr. Corbett's statements should be regarded as hostility to religion which

violates the Establishment Clause. Farnan says that this is determined from the perspective of the reasonable observer, but that does not answer how a reasonable observer is to determine when criticism of religion becomes hostility to religion. The fact that Dr. Corbett has taught thousands of students and only one, Chad Farnan, ever complained that he was hostile to religion undercuts Farnan's assertion as to how the reasonable observer would perceive Dr. Corbett's speech in class. Dr. Corbett does not deny that government hostility to religion violates the Establishment Clause, but he vehemently denies that he was hostile to religion.

No prior decision of this or any court in the country ever has found that a teacher can be held liable for statements critical of religion while teaching a class. The point at which a teacher's statements constitute hostility to religion which violates the First Amendment is simply undefined. That is why the district court correctly ruled that Dr. Corbett was protected by qualified immunity as to the Pelozo statement.

Nor can it be denied that creating civil liability for teachers for what they say in their classrooms raises serious issues with regard to academic freedom and chilling expression. The district court's finding that Dr. Corbett violated the Establishment Clause with regard to the Pelozo statement does just this.

B. The Pelozo Statement Did Not Violate the Establishment Clause.

The Pelozo statement came in response to a student's question in class. John Pelozo was a high school biology teacher, like Dr. Corbett at the Capistrano Unified School District, who refused to teach evolution in his high school biology class. Pelozo actually brought a lawsuit arguing that requiring him to teach evolution and keeping him from expressing his religious views about creationism violated his First Amendment rights. This Court affirmed the district court's dismissal of Pelozo's lawsuit. *Pelozo v. Capistrano Unified School District*, 37 F.3d 517 (9th Cir. 1994).³

The controversy over John Pelozo and his refusal to teach evolution was well known in the Capistrano Unified School District. Dr. Corbett had been involved in this controversy because he had been the advisor to the student newspaper which ran an article saying that Pelozo was teaching religion and not science. It was not surprising then that a number of years later, a student asked Dr. Corbett how and why he had gotten involved in the

³ This Court's decision in *Pelozo* is quite relevant to this case. Farnan's opening brief argues that Dr. Corbett's speech in class established a religion of "secularism." Appellant's Opening Brief at 36. But in *Pelozo*, this Court expressly rejected such an argument, stating: "neither the Supreme Court, nor this circuit, has ever held that evolutionism or secular humanism are 'religions' for Establishment Clause purposes." *Pelozo v. Capistrano Unified School District*, 37 F.3d at 521.

Peloza controversy. Dr. Corbett responded directly to the student's question and stated that Peloza "was not telling the kids the scientific truth about evolution." Dr. Corbett explained that Peloza wanted space in the newspaper to present his point of view. The statement which the district court found to violate the Establishment Clause was Dr. Corbett's explanation for why he did not give Peloza that space; it was a statement originally made in 1991 and repeated in 2007 in answer to a student's question. Dr. Corbett stated: "I will not leave John Peloza alone to propagandize kids with this superstitious, religious nonsense."

This statement thus was not expressing hostility to religion. Rather, it was Dr. Corbett explaining why as faculty advisor to the newspaper he would not let Peloza explain his refusal to teach evolution and defend teaching creationism. Dr. Corbett was explaining his motivation for a particular action.

Farnan's reply brief says very little about the Peloza statement and whether it should be regarded as hostility to religion. First, Farnan says: "Why was he explaining this at all to his students? What is the connection to European history curriculum?" Appellants' – Cross Appellees' Third Brief [hereafter, "Farnan's Third Brief"], at 14. This actually is a theme throughout Farnan's reply brief, repeatedly claiming that Dr. Corbett acted

improperly because his statements were not strictly about European history.

See, e.g., Farnan's Third Brief at 2, 8, 10, 24, 25.

But this lawsuit is not about whether Dr. Corbett was a good European history teacher. In fact, history teachers inevitably relate historical material to contemporary events to engage students and explain the relevance of material. Religion is a crucial part of European history and it was appropriate and even desirable for a European history teacher to relate the material to events in the United States today. The fact that Dr. Corbett did this does not show that he acted improperly or that he violated the Establishment Clause. Moreover, Farnan does not deny that Dr. Corbett was responding to a student's question. Surely, teachers have broad latitude in doing this and being responsive to their students, especially when the teacher is questioned about the motivation for his or her action. Academic freedom and freedom of speech would be chilled if a court could base liability on its own judgment that a teacher strayed too far from the course topic.

Second, in addressing the Pelozo statement, Farnan says: "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 Pelozo sought to teach religious creationism which is not an approved part of the curriculum." Farnan's

Third Brief at 14. Dr. Corbett was explaining his own motives for refusing to allow Peloza to publish a defense in the student newspaper. He was expressing his choice to not allow a teacher who refused to defend evolution and only wanted to teaching religious creationism to have a forum for doing so. At no time in making this statement did Dr. Corbett disparage any religion. To say that it is “nonsense” to deny evolution is not hostility to religion, it is affirming the scientific theory for the original of human life. The Supreme Court has been explicit that schools may teach evolution and cannot teach creationism because the former is based in science. *Edwards v. Aguillard*, 482 U.S. 578 (1987).

Third, as to this and all statements, Farnan interprets criticism of religion as hostility to religion. Farnan states: “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.’” Appellants’ – Cross-Appellees Third Brief at 17. Farnan says that Corbett is liable because of his numerous statements “that, at a minimum, were critical of religion.” *Id.* at 21.

But it simply cannot be that all criticism of religion or religious institutions is hostility to religion. It cannot be that a European history teacher criticizing the role of religion in the Crusades, or the Catholic

Church for its persecution of Galileo, or the Catholic Church for not dealing with child abuse by priests, can be held civilly liable for being hostile to religion. It cannot be that a teacher can criticize the actions of every institution except for religious institutions. That is Farnan's position and it cannot be reconciled with the Establishment Clause or with constitutional protection for speech. There is an enormous difference between criticizing religious institutions and expressing hostility to religion.

The point at which criticism of religion is evidence of or becomes hostility to religion is a terribly difficult question and one never answered by this or any court. It is exactly for this reason that the district court was correct in finding that Dr. Corbett was protected by qualified immunity as to the Peloza statement. Farnan explicitly says that criticism of religion is disapproval and hostility that violates the Establishment Clause. No court ever has held this and likely no court ever will because it would give religion and religious institutions favored status that the First Amendment will not allow.

In fact, Farnan goes even further and says that teachers can be held liable if they even make factual statements about religion that contain no criticism or express no hostility. Farnan states: "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. [Quoting Corbett:] ‘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 about Mormons and under no circumstances would vote for a Mormon president.’”

Appellants’ – Cross-Appellees’ Third Brief at 31. These are factual statements. The Republican Party has aggressively appealed to fundamentalist Christians. *See* William Martin, With God on Our Side: The Rise of the Religious Right in America (2000); Sara Diamond, Not By Politics Alone: The Enduring Influence of the Christian Right (1998). Nor does Farnan suggest that Dr. Corbett erroneously reported the opinion poll concerning voter hesitancy over a Mormon president. Making such factual statements is not a criticism of religion, let alone hostility to religion.

Farnan repeatedly asserts throughout his Third Brief that the Establishment Clause prohibits official government disapproval of religion (Farnan’s Third Brief at 1, 2, 3, 4, 5, 7, 19, 28). This proposition is granted. What is at issue in this case is the definition of “disapproval.” It is not enough to say that because government disapproval of religion is forbidden,

Dr. Corbett has therefore violated the Establishment Clause any time he criticized religion.

Farnan's claim that it is "a distorted exaggeration" (Farnan's Third Brief at 1) to think that under his view the teaching of evolution could be found to violate the Establishment Clause. According to what standard could one conclude this? Farnan claims it is "common sense" (Farnan's Third Brief at 2). But, without a clearly established standard of disapproval it is not "a distorted exaggeration" to suggest that instruction on evolution, a subject that's tenets are in direct contradiction to the religious beliefs of many, might be perceived by some as hostile to religion and thus violate the Establishment Clause. If governmental disapproval of religion can be found in any criticism of religious belief, even a single isolated comment as Farnan claims (Farnan's Third Brief at 21), then the teaching of evolution, in and of itself, could be found to violate the Establishment Clause.

In determining whether the government has impermissibly advanced or endorsed religion, the Supreme Court has recognized that not all support for religion is an impermissible "approval" or "advancement." "Not every law that confers an indirect, remote or incidental benefit upon religion is for that reason alone, constitutionally invalid." *Lynch v. Donnelly*, 465 U.S. 668, 683 (1984). Schools can open their property for use by religious

organizations without “endorsing” religion. *See Lambs Chapel v. Center Moriches Union Free School District*, 508 U.S. 384 (1993) (holding that the use of public school property for religious purposes after school hours or on weekends did not violate the Establishment Clause); *see also Widmar v. Vincent*, 454 U.S. 263 (1981) (holding that a university policy prohibiting the use of university space for religious worship or ritual was unconstitutional). Public schools can fund the printing of a religiously themed student publication without violating the Establishment Clause. *See Rosenberger v. Rector & Visitors of the University of Virginia*, 515 U.S. 819 (1995). What to some may seem a common sense “approval” or “advancing” of religion has been held to be permissible under the Establishment Clause.

Additionally, if criticism of religion were sufficient for disapproval, then by parity of reasoning, praise of religion would be sufficient for approval. But there are no cases in which mere praise of religion is considered to be an unconstitutional approval of religion in violation of the Establishment Clause. Teachers have not, so far, been forbidden from acknowledging the positive role religion has played in society, such as the involvement of religious leaders and groups in the abolition and civil rights movements. But if the law should be uniformly applied, as noted in

Farnan's Third Brief (at 8), then according to Farnan's argument, positive comments about religion should be prohibited as well. As a result of such a rule, no history teacher could discuss the positive or negative role of religion in history. This would not only treat religion differently from all other ideologies, thereby violating the Establishment Clause, but would seriously stunt a teacher's ability to educate his or her students properly. Just as the Supreme Court has found that not all support for religion is endorsement, not all criticism of religious belief and action should be considered disapproval of religion.

While Farnan criticizes the distinction made between criticism and disapproval as "not supported by applicable case law" (Farnan's Third Brief at 5), he offers no precedent demonstrating that criticism of particular religious beliefs amounts to disapproval of religion. In fact, as noted in Dr. Corbett's prior brief, what little precedent that exists on the issue of hostility to religion as an Establishment Clause violation strongly supports the idea that criticism of religious belief alone is insufficient for a violation of the Establishment Clause. This Court held in *American Family Association Inc., v. City and County of San Francisco*, 277 F.3d 1114 (9th Cir. 2002), that "although the letter and resolutions may appear to contain attacks on the Plaintiff's religious views, in particular that homosexuality is sinful, there is

also a plausible secular purpose in the Defendant's actions -- protecting gays and lesbians from violence....” Id. at 1121. The presence of a plausible secular purpose was sufficient to avoid a constitutional violation even in light of a governmental criticism of religious beliefs.

Farnan emphasizes that Dr. Corbett's statements would violate the Establishment Clause in any context: “[T]here is no context within which Corbett's statements pass the constitutional test of neutrality” (Farnan's Third Brief at 8). But context is crucial in determining whether there is a violation of the Establishment Clause. The fact that the speaker was quoting an author or prompting a class discussion or explaining his own motivations for an action, as Dr. Corbett was doing, would strongly suggest that the primary purpose or effect of the statements were not the disapproval of religion.

As the Tenth Circuit in *Roberts v. Madigan*, 921 F.2d 1047 (10th Cir. 1990), noted, the manner in which books are used is more important than their content in determining Establishment Clause issues. “Thus, the Establishment Clause focuses on the manner of use to which materials are put; it does not focus on the content of the materials per se” *Roberts*, 921 F.2d at 1055. The same should be true of a teacher's lectures. How Dr. Corbett's words were used is extremely important in determining the

Establishment Clause issue, and context is of the utmost importance when determining the manner of use. Dr. Corbett's words were used in an educational environment and were intended to teach and foster critical thinking.

Farnan cites *Roberts v. Madigan* to suggest that if a teacher reading his or her Bible silently at a desk could be prohibited from doing so as a possible violation of the Establishment Clause, then Dr. Corbett's statements allegedly exhibiting hostility to religion should not be permitted either (Farnan's Third Brief at 19). However, Farnan fails to include all of the relevant facts in the case. It was not merely the teacher's reading of the Bible that the school, and the court, found troubling. Mr. Roberts read from the Bible frequently during the silent reading period, kept the Bible on his desk throughout the day, placed a poster on the classroom wall stating "You have only to open your eyes to see the hand of God," and placed two other religious books pertaining to Jesus on the classroom bookshelf. *Roberts*, 921 F.2d at 1049. Here, as in all Establishment Clause cases, the fuller context sheds light on manner and purpose. It was the combination of factors that led the Tenth Circuit to conclude that the school did not violate the Establishment Clause in restricting the teacher's behavior. They had a

secular purpose in their prohibition: to avoid an Establishment Clause violation.

The trial court found that, in context, Mr. Roberts' Bible reading, the poster, and the presence of two Christian books in Mr. Roberts' classroom library created the appearance that Mr. Roberts was seeking to advance his religious views... Mr. Roberts' Establishment Clause claims fail because the school district acted for the valid purpose of preventing him from promoting Christianity in a public school. *Roberts*, 921 F.2d at 1049, 1059.

Thus, even if the Pelozo statement or others are critical of religion that does not mean that they are hostility to religion that violates the Establishment Clause.

Fourth and finally, under the test of *Lemon v. Kurtzman*, 403 U.S. 602 (1971), the Pelozo statement did not violate the Establishment Clause. As to the first prong of the *Lemon* test, Dr. Corbett's purpose was answering a student's question about what had happened and why Dr. Corbett acted as he did. As to the second prong of the *Lemon* test, Dr. Corbett's statement did not have the effect of inhibiting religion. Dr. Corbett did no more than say that he opposed Pelozo's refusing to teach evolution and teach only creationism as "superstitious nonsense." Dr. Corbett mentioned no religion or even any set of religious beliefs. Finally, the Pelozo statement raised no conceivable issue with regard to the entanglement of religion.

C. Allowing Liability for the Peloza Statement Would Have a Chilling Effect on Freedom of Speech and Academic Freedom.

Farnan's brief ignores a crucial point: allowing liability for teachers for speech that is critical of religion would have an enormous chilling effect on freedom of speech and academic freedom.

As this Court recently noted: "Formal and informal enforcement of policies that regulate speech on college campuses raises issues of profound concern." *Lopez v. Candaele*, ___ F.3d ___, 2010 WL 3607033 (9th Cir. Sept. 17, 2010). This Court explained: "If colleges are forced to act as the hall monitors of academia, subject to constant threats of litigation both from [those] who wish to speak and listeners who wish to have them silenced, many school districts would undoubtedly prefer to 'steer far' from any controversial [speaker] and instead substitute 'safe' ones in order to reduce the possibility of civil liability and the expensive and time-consuming burdens of a lawsuit." *Rodriguez v. Maricopa County Community College District*, 605 F.3d 703, 709 (9th Cir. 2010). The same, of course, is true in high schools and if liability is allowed for the Peloza statement, high schools teachers truly will steer clear of any mention of religion in their classrooms, even in teaching subjects like European history where religious institutions are such a crucial part of instruction.

Much deference has been given to schools to shape the policies that govern the classrooms. “[School] officials must be allowed, within certain bounds, to exercise discretion in determining what materials or classroom practices are being used appropriately. ‘The Court has repeatedly emphasized the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools.’” *Roberts*, 921 F.2d at 1055 (quoting *Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503, 507 (1969)). The Ninth Circuit has affirmed this need for deference to be given to school districts. *Pelozo v. Capistrano Unified School District*, 37 F.3d at 522.

Farnan argues that the statements made by Dr. Corbett were neither necessary in the context of a classroom nor relevant to the subject he was teaching (Farnan’s Third Brief at 10, 14). But the question before the court is not whether or not the statements were necessary, but whether or not they were permissible. Farnan would place courts in the role of monitoring teachers’ classrooms to see if their speech was sufficiently related to the subject matter of the course. It is hard to imagine anything more chilling of instruction and academic freedom.

Conclusion

This case poses a novel and profoundly difficult question: when can an individual teacher be held liable because his statements are found to be hostile to religion? The district court found an Establishment Clause violation based on a single statement. Looked at in context, this statement did not express disapproval of religion and did not violate the Establishment Clause. Moreover, since there is no prior decision of any court holding a teacher liable under such circumstances, and because allowing liability would raise grave First Amendment concerns, this Court should dismiss the entire case based on qualified immunity. *See Pearson v. Callahan*, 129 S.Ct. 808 (2009).

Respectfully submitted,

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Certificate of Compliance

I certify that:

Pursuant to Fed. R. App. P. 32(a)(7)(c) and Ninth Circuit Rule 32-1, this brief has a typeface of 14 points and contains 4,003 words.

/s/ Christian A. Hickersberger

Christian A. Hickersberger

Proof of Service
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Appeal Nos. 09-56689, 09-56690

I, Christian A. Hickersberger, declare under penalty of perjury under the laws of the State of California that the following is true and correct:

I am employed in the City and County of Riverside, State of California, in the office of a member of the bar of this court, at whose direction the service was made. I am over the age of eighteen (18) years, and not a party to or interested in the within-entitled action. I am an employee of TENNER JOHNSON LLP, and my business address is 11810 Pierce Street, Suite 300, Riverside, CA 92505.

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