

The following brief was joined by Clifton Kirkpatrick, as Stated Clerk of the General Assembly of the Presbyterian Church (U.S.A.). It was filed in the United States Court of Appeals for the Tenth Circuit on August 21, 1996.

**IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT**

RACHEL BAUCHMAN, by and through her :
parent and guardian CHERYL BAUCHMAN, :

Plaintiff-Appellant, :

-against- :

Docket No. 96-4101

WEST HIGH SCHOOL; SALT LAKE CITY :
SCHOOL DISTRICT; RICHARD :
TORGERSON; WILLIAM BOSTON; :
GENE BONELLA; TERESA PIELE; :
DOLORES RILEY; DARLINE ROBLES; :
DALE MANNING and MARY JO :
RASMUSSEN :

Defendants-Appellees.

**BRIEF OF
PRESBYTERIAN CHURCH (U.S.A.),
UNITED CHURCH BOARD FOR HOMELAND
MINISTRIES OF THE UNITED CHURCH OF CHRIST,
THE AMERICAN JEWISH COMMITTEE,
ANTI-DEFAMATION LEAGUE,
GENERAL CONFERENCE OF SEVENTH-DAY ADVENTISTS,
AND UNION OF AMERICAN HEBREW CONGREGATIONS
AS AMICI CURIAE IN SUPPORT OF APPELLANT**

Colby A. Smith

Alan H. Scheiner
DEBEVOISE & PLIMPTON
875 Third Avenue
New York, New York 10022
212-909-6000

Attorneys for the *Amici Curiae*

Dated: August 21, 1996

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STATEMENT OF INTEREST OF THE AMICI CURIAE

This Brief is filed on behalf of Presbyterian Church (U.S.A.), United Church Board for Homeland Ministries of the United Church of Christ, The American Jewish Committee, Anti-Defamation League, General Conference of Seventh-Day Adventists, and Union of American Hebrew Congregations, as *amici curiae*. Each *amicus* is a leading religious institution that believes strongly in preserving religious freedom and in the constitutionally mandated separation of church and state -- especially in the field of public education. Individual statements of interest for each of the *amici curiae* are collected in an Appendix to this Brief.

INTRODUCTION

This is a case of great importance not only to the plaintiff, but also to the First Amendment jurisprudence of this Circuit. The District Court dismissed plaintiff's claim that the Salt Lake City School Board, other School District officials and a teacher in one of Salt Lake City's public high schools (collectively, the "School District" or "school officials") condoned and supported (i) participation by a public high school choir in religious worship services and (ii) the teaching of religion in the public high school classroom. The District Court then denied plaintiff's motion for leave to amend the complaint to further clarify these claims.

The District Court's rulings must be reversed, because the governing law regarding plaintiff's allegations is unequivocal. "It is beyond dispute that, at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise." *Lee v. Weisman*, 505 U.S. 577, 587 (1992). Yet, plaintiff alleges that the West High School choir repeatedly participated in religious worship services and that she sought to enjoin the continuation of this illegal conduct in the choir class in which she was enrolled. In addition, "[a]lthough Establishment Clause jurisprudence is characterized by few absolutes, the Clause does absolutely prohibit government-financed or government-sponsored indoctrination into the beliefs of a particular religious faith." *School Dist. of Grand Rapids v. Ball*, 473 U.S. 373, 384 (1985). Yet, plaintiff alleges that West High School's choir instructor, with the knowledge and acquiescence of school officials, repeatedly used his public high school lectern as a pulpit for preaching his religious beliefs to his students. This too plaintiff sought to enjoin -- a request for which that same instructor publicly ridiculed the plaintiff, again without any effective discipline or intervention by the School District.

Despite these clear violations of the Establishment Clause, the court below, through the imposition of extraordinary procedural and pleading hurdles, dismissed plaintiff's complaint and then denied her motion to amend. *First*, the District Court dismissed plaintiff's original complaint without

even analyzing her key allegations that in prior years the high school choir had participated in religious services and that there was a tangible likelihood that such conduct would recur. *Second*, after allowing plaintiff only truncated discovery, the District Court denied her motion to amend her complaint by applying a summary judgment standard, rather than the proper motion to dismiss standard, in ruling the proposed amendment futile.

In applying the summary judgment standard the District Court also erroneously made findings of fact and conclusions of law that included consideration of the credibility of testimony taken during discovery.

By requiring plaintiff to overcome extraordinary hurdles merely to get into court, the District Court's ruling sets an unwarranted and dangerous precedent that clearly signals those who would seek to preserve their religious liberties that they will receive an unwelcome reception in the courts within this Circuit. That precedent must be forcefully overturned.

STATEMENT OF THE CASE

A. Plaintiff's Key Allegations.

Rachel Bauchman is an eleventh grade student at West High School ("West High") in Salt Lake City, Utah. [Am. Compl., Aplt. App. at 152, ¶ 5; Compl., Aplt. App. at 2, ¶ 4].¹ West High is a public school within the Salt Lake City School District, an arm of the Salt Lake City municipal government. [Am. Compl., Aplt. App. at 152-153, ¶¶ 5, 7; Compl., Aplt. App. at 3, ¶¶ 6, 7].

Bauchman alleges that West High's A Cappella Choir Class, in which Bauchman was enrolled during the 1994-95 school year, had a repeated history of performing at religious sites and participating in religious worship services. [Am. Compl., Aplt. App. at 157-162, ¶ 16; Compl., Aplt. App. at 6, 8,

1. Because Bauchman appeals from both the District Court's ruling granting defendants' motion to dismiss and the District Court's denial of her motion to amend her complaint, references are made to the allegations of both the Amended Complaint ("Am. Compl.") and the original Complaint ("Compl."), wherever possible. Although evidence adduced during the truncated discovery permitted by the court below supports plaintiff's case, we make no reference to it because it should not bear on the resolution of a motion to dismiss or for leave to amend.

¶¶ 23-26, 32]. Indeed, according to Bauchman's allegations, Richard Torgerson, the Choir Class instructor, has repeatedly required the Choir Class or other similar classes he has taught within the School District to participate in religious worship services, including an annual spring tour during which the Choir Class was required to sing at worship services of the Church of Jesus Christ of Latter Day Saints ("LDS"), the denomination of which Torgerson is a professed member. [Am. Compl., Aplt. App. at 157-162, ¶ 16; Compl., Aplt. App. at 8, ¶ 32].

Torgerson began this course of conduct as long ago as 1977 and has continued that activity in recent years by requiring the Choir Class to participate in LDS worship services an average of once a month during the 1992-93 school year; by requiring the Choir Class to perform religious music during Christmas concerts held within religious institutions in December 1993; and by requiring the Choir Class, as part of its annual Spring Tour in 1994, to participate in LDS "fireside" religious services. [Am. Compl., Aplt. App. at 161-162, ¶ 16(m); Compl., Aplt. App. at 6, ¶ 26]. Many students besides Bauchman have complained of these religious services. [Am. Compl., Aplt. App. at 162, ¶ 16(o)]. Although Bauchman did not enroll in the Choir Class until after these events took place, she heard about them while in the Choir Class and was concerned that they would recur, especially when she discovered that virtually all of the songs performed in the Choir Class during her sophomore year (the 1994-95 school year) had an overt religious message. [Am. Compl., Aplt. App. at 162-169, 186, 188-189, ¶¶ 17, 33-34, 38-41.; Compl., Aplt. App. at 5, ¶¶ 19-20].

Bauchman also alleges that Torgerson repeatedly used his position as the Choir Class instructor as a pulpit from which to preach religion in the classroom. [Am. Compl., Aplt. App. at 157-162, ¶ 16]. Bauchman alleges, for example, that during the 1992-93 school year Torgerson "frequently discussed the religious content of the many religious devotional songs he required the West High School Choir Classes to sing and used the religious content of the songs to advocate his own religious beliefs." [Am. Compl., Aplt. App. at 159, ¶ 16(g); *see also* Compl., Aplt. App. at 5, ¶ 19]. Similarly,

Bauchman alleges that during the 1993-94 school year Torgerson “repeatedly advocated his religion in the Choir Class” and “frequently stated that he would continue in his advocacy of religion in public school classes even though he knew that doing so violated established law.” [Am. Compl., Aplt. App. at 160, ¶ 16(h); *see also* Compl., Aplt. App. at 11, ¶ 50]. Also during the 1993-94 school year, Torgerson allegedly required the students, while practicing an overtly religious song, “to visualize `Jesus dying for our sins.” [Am. Compl., Aplt. App. at 160, ¶ 16(i); *see also* Compl., Aplt. App. at 5, ¶ 19]. Torgerson also allegedly gathered students for prayers in the spring of 1994 and at that time “expressed devotion and praise for God and Jesus.” [Am. Compl., Aplt. App. at 160-161, ¶ 16(k)]. When students protested these activities, Torgerson allegedly berated the students and “stated that he was going to continue his advocacy of religion through the Choir Class even though he knew such conduct violated the constitutional rights of the Choir Class members.” [Am. Compl., Aplt. App. at 162, ¶ 16(o)].

During the 1994-95 school year, when Bauchman was enrolled in Torgerson’s class, Torgerson “continued to engage in his habit and routine of unconstitutional religious advocacy, endorsement and proselytizing in his position as a public school instructor in and through his public school classes.” [Am. Compl., Aplt. App. at 162-169, ¶ 17; *see also* Compl., Aplt. App. at 7, ¶ 31]. Moreover, when Bauchman complained to Torgerson about the conduct, he allegedly said that she should “spend the remainder of the class periods for the semester in the school library” and allegedly threatened her with the choice of “(1) continuing to submit to required performances of religious music at religious venues, or (2) isolation from regular, graded, required Choir Class activities while the choir practiced and performed music at religious sites.” [Am. Compl., Aplt. App. at 166, ¶ 17(e), (f); *see also* Compl., Aplt. App. at 7, ¶ 30]. Torgerson also allegedly engaged in classroom lectures in which he “expressed his hostility toward [Bauchman] and blamed [Bauchman] and her parents for opposing the explicitly religious songs he selected for the Choir Class.” [Am. Compl., Aplt. App. at 167, ¶ 17(i),

(j); *see also* Compl., Aplt. App. at 7-8, ¶¶ 31, 35]. School officials allegedly acquiesced in that conduct and approved of it by failing to stop it. [Am. Compl., Aplt. App. at 169-186, ¶¶ 18-33; Compl., Aplt. App. at 10, ¶¶ 43-44]. Although the school and school officials allegedly had the "authority, control, discretion and supervisory power to prevent" the misconduct described in Bauchman's allegations, they failed and refused to do so. [Am. Compl., Aplt. App. at 186, ¶ 34, *see also* Compl., Aplt. App. at 10, ¶ 44].

B. The Procedural History of the Case.

Bauchman brought this action on May 30, 1995, broadly seeking injunctive relief against the actions described in her original Complaint. [Compl., Aplt. App. at 1-18]. The case was assigned to District Judge J. Thomas Greene.

On September 12, 1995, the district court dismissed the Complaint. *Bauchman v. West High School*, 900 F. Supp. 254 (D. Utah 1995). The court ruled that Bauchman failed to allege facts constituting a violation of the Establishment Clause against any defendant, citing the three-part test articulated in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). The court discussed only plaintiff's allegations about the singing of religious music at religious sites. *Bauchman*, 900 F. Supp. at 267-269. The court held that plaintiff failed to allege facts supporting Torgerson's intent to teach religion or any non-secular purpose. *Id.* at 266 n. 13. The court did not discuss the constitutional significance of plaintiff's allegations that Torgerson and the School District had previously caused the Choir Class to participate in religious services during the Spring Tour.

On September 25, 1995, Bauchman moved for reconsideration of the dismissal and for leave to amend her complaint. At that time, she submitted the proposed amended complaint referred to above.

On November 22, 1995, the district court denied plaintiff's motion for reconsideration and held her motion for leave to amend in abeyance. The District Court found that the only proposed

amendments not clearly futile were allegations that defendants engaged in "the promotion, endorsement and proselytization of religion" and that Torgerson acted with "an improper religious purpose." [November 22, 1995 Order, Aplt. App. at 269, 271]. The court ruled that discovery should be taken during a sixty-day period "so that this court can determine whether an amendment consistent with plaintiff's new theory should be allowed." [*Id.* at 276]. The court, however, limited discovery to events during the 1994-95 school year. [*Id.* at 277].

On May 30, 1996, the district court denied plaintiff's motion for leave to amend. The court held that plaintiff's "new theory" was addressed only to the "secular purpose" prong of the test announced by the Supreme Court in *Lemon*, and that the "secular purpose" prong must be satisfied under a "reasonable observer" standard. [May 30, 1996 Memorandum Decision and Order Denying Leave to Amend, Aplt. App. at 513-515, 518-519 (the "May 30, 1996 Order")]. The court held that the amendment would be futile because it "would be subject to dismissal under a motion for summary judgment." [May 30, 1996 Order, Aplt. App. at 540].

Bauchman filed her Notice of Appeal on June 3, 1996 and seeks an expedited ruling from this Court reversing the district court's November 22, 1995 dismissal of her claims and the May 30, 1996 denial of her motion for leave to amend.

SUMMARY OF ARGUMENT

The *amici* submit this brief because the district court's rulings below undermine basic tenets of the separation of the church and state. Stripped of tertiary issues, this case boils down to allegations of two core violations of the Establishment Clause: (i) public school-sponsored attendance at religious services and (ii) the use of a public school teaching position as a pulpit to preach religion. Despite allegations of these basic constitutional violations, the district court dismissed plaintiff's original complaint and refused her leave to amend. In so doing, the court improperly ignored plaintiff's claim for

an injunction against the School's prior and continuing conduct and applied an erroneous legal standard under *Lemon v. Kurtzman*.

The district court also created special procedures, in violation of the Federal Rules of Civil Procedure, to test plaintiff's Establishment Clause claims even before they were answered by the defendant. Those procedures constitute a dangerous precedent. If the district court is not reversed, individuals whose religious liberties are undermined in this Circuit will face impossible hurdles to the mere pleading of an Establishment Clause claim.

ARGUMENT

A complaint should be dismissed only when "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Scheur v. Rhodes*, 416 U.S. 232, 236 (1974) (citation omitted). "The allegations must be taken as true and all reasonable inferences from them must be indulged in favor of the complaint." *Williams v. Eaton*, 443 F.2d 422, 432 (10th Cir. 1971).

Under Federal Rule of Civil Procedure 15(a), leave to amend shall be "freely given when justice so requires." Fed. R. Civ. P. 15(a).

In the absence of any apparent or declared reason -- such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of the allowance of the amendment, futility of amendment, etc. -- the leave sought should, as the rules require, be "freely given."

Foman v. Davis, 371 U.S. 178, 182 (1962); accord *Hom v. Squires*, 81 F.3d 969, 973 (10th Cir. 1996) (quoting *Foman v. Davis*).

This Court engages in de novo review of the district court's dismissal of a complaint, *Boone v. Carlsbad Bancorp.*, 972 F.2d 1545, 1551 (10th Cir. 1992), and reviews the denial of a motion to amend for abuse of discretion, *TV Communications Network, Inc. v. Turner Network Television, Inc.*, 964 F.2d 1022, 1028 (10th Cir.), cert. denied, 506 U.S. 999 (1992).

I. Bauchman's Complaints Allege Clear Violations of the Establishment Clause.

Bauchman's complaints allege that the School District engaged in a pattern and practice of causing the Choir Class to participate in religious worship services. The complaints also allege that the School District, through Torgerson, repeatedly used the classroom to teach religion to public school students. Bauchman's complaints seek prospective relief against these two practices.

A. The Establishment Clause Forbids the Participation in Religious Worship Services Alleged in the Complaints.

It is well settled that public school officials may not engage public school students in religious exercises. *Lee v. Weisman*, 505 U.S. 577, 599 (1992); *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 224-25 (1963); *Engel v. Vitale*, 370 U.S. 421, 436 (1962). It is no defense that non-believing students are formally excused from such exercises. *Lee*, 505 U.S. at 596. *Wallace v. Jaffree*, 472 U.S. 38, 60 & n. 51 (1985); *Schempp*, 374 U.S. at 224-25; *Engel*, 370 U.S. at 430. The plaintiff's complaints allege precisely this core constitutional violation.

1. The Complaints Allege a Pattern of Prior Participation in Religious Services that the District Court Improperly Ignored.

The Complaints unequivocally allege that the Choir Class participated in religious worship services prior to Bauchman's enrollment. [Am. Compl., Aplt. App. at 161-162, ¶ 16(m); Compl., Aplt. App. at 6, ¶ 26]. The district court disposed of these allegations by ruling that events occurring prior to Bauchman's joining the Choir Class were irrelevant to her claims. In so doing, the district court ignored plaintiff's claim for prospective relief against future violations.

A claim for prospective relief does not depend upon the plaintiff's having already suffered the threatened injury: "All it takes to make the cause of action for relief by injunction is a real threat of future violation" *United States v. Oregon State Medical Soc'y.*, 343 U.S. 326, 333 (1952). In *Doe v. Duncanville Indep. Sch. Dist.*, 994 F.2d 160 (5th Cir. 1993), for example, the defendant

school had ceased its challenged practice of having a coach lead the basketball team in prayer. 994 F.2d at 163. Nevertheless, the court held that an injunction was warranted: "The crucial test, in an action involving a request for injunctive or declaratory relief, where defendant has voluntarily ceased his allegedly illegal conduct, is whether it can be said with assurance that there is no reasonable expectation that the wrong will be repeated." *Id.* at 166.

In this case, Bauchman alleged a well-established pattern of Choir Class participation in religious worship services dating back to 1977 and including specific episodes of such activity during each of the two school years prior to her first year of enrollment in the choir class. [Am. Compl., Aplt. App. at 161-162, ¶ 16(m); Compl., Aplt. App. at 6, ¶ 26]. Bauchman also alleged that she feared these practices would be repeated during her school year. [Am. Compl., Aplt. App. at 186, 188-189, ¶¶ 33-34, 38-41]. Indeed, these fears were supported by the pronounced religious content of the songs practiced by the Choir Class early in Bauchman's year. [Am. Compl., Aplt. App. at 162-169, ¶ 17; Compl., Aplt. App. at 4-5, ¶¶ 17, 19-22]. In addition, although Bauchman's expression of her concerns prompted West High officials to cancel the religious tour, the Choir Class instructor allegedly attempted to covertly plan a tour that would exclude non-LDS students. [Am. Compl., Aplt. App. at 166-167, ¶ 17(g); Compl., Aplt. App. at 8, ¶¶ 33-34].

Given these allegations, Bauchman's declaratory judgment complaints certainly stated a claim for prospective relief in the form of an injunction, and dismissal of her complaints was improper. *See Duncanville*, 994 F.2d at 163.

2. The District Court Misapplied this Court's Establishment Clause Test in Assessing Bauchman's Allegations Regarding Participation in Worship Services.

The Tenth Circuit recognizes that the three-part Establishment Clause test of *Lemon v. Kurtzman*, 403 U.S. 602 (1971) is "still good law." *Gaylor v. United States*, 74 F.3d 214, 216 (10th Cir.) *cert. denied*, 116 S. Ct. 1830 (1996). In *Lemon*, the Supreme Court ruled that, in order

to be valid under the Establishment Clause, a government-sponsored program must (i) have a secular purpose; (ii) have a primary effect that neither advances nor inhibits religion; and (iii) avoid excessive government entanglement with religion. 403 U.S. at 612-13. "Failure to satisfy any of the three *Lemon* test prongs suffices to support an Establishment Clause violation." *Robinson v. City of Edmond*, 68 F.3d 1226, 1229 n. 6 (10th Cir. 1995) *cert. denied*, 116 S. Ct. 1702 (1996). The district court misapplied these standards.

(a) **Singing in Religious Worship Services Does Not Serve a Secular Purpose.**

The court below erroneously concluded that the first prong of *Lemon* had been replaced by an objective "reasonable observer" test, which the district court claimed this Court articulated in *Gaylor*. [See May 30, 1996 Order, Aplt. App. at 519-20]. The first prong of *Lemon*, however, is a test of the motive of the state in doing the challenged act. See *Edwards v. Aguillard*, 482 U.S. 578, 585 (1987) (holding compelled instruction in creation science unconstitutional under "actual purpose" standard); *Wallace*, 472 U.S. at 56 (1984) (holding moment of silence unconstitutional under "actual purpose" standard). In *Robinson*, this Court stated that the first and second prongs of the *Lemon* test have been recast "to ask whether the challenged government action was *intended* to endorse, or has the effect of endorsing, religion." 68 F.3d at 1229 (emphasis added). *Robinson* held that the "reasonable observer" standard applied only to the "primary effect" or "endorsement" prong of *Lemon*. 68 F.3d at 1229. Similarly, in *Gaylor*, this Court referred to the "endorsement test" as a separate inquiry, asking whether a "reasonable observer" would view the challenged practice as an endorsement of religion. *Gaylor*, 74 F.3d at 217. Nothing in *Gaylor* or any other case decided by this Court suggests that the secular purpose test is no longer a test of the actual purpose or intent of the government agent.

The district court assessed the secular purpose of the allegations contained in Bauchman's original Complaint by using the proper standard. In assessing the original Complaint, however, the district court erred by ignoring Bauchman's key allegations of an established pattern of participation in

religious worship services: (i) that Torgerson engaged past Choir Classes in religious worship services, often at religious sites, (ii) that he had the Choir Class attended by Bauchman practice almost exclusively religious songs, and (iii) that he sought to organize certain class members covertly in order to continue his prior practice. [Am. Compl., Aplt. App. at 166-167, ¶ 17(g); Compl., Aplt. App. at 8, ¶¶ 32, 34].

These allegations are sufficient to suggest that Torgerson's motive, and the motive of the School officials who allowed his repeated practices, was to promote religion. This conclusion is reinforced by Torgerson's alleged behavior following Bauchman's expressions of concern about his instruction of the Choir Class. Rather than retreating, Torgerson became belligerent towards Bauchman and allegedly stated in class that he had no intention of limiting his comments in support of religion. [Am. Compl., Aplt. App. at 167-168, ¶ 17(i), (j), (k); Compl., Aplt. App. at 7-8, 11, ¶¶ 31, 35, 50]. These alleged statements make Torgerson's motivation entirely clear. As a result, the district court plainly erred when it found that Torgerson was motivated by a "primarily secular purpose." *Bauchman*, 900 F. Supp. at 269.²

In assessing Bauchman's motion to amend, the district court compounded its erroneous assessment of the allegations of the original Complaint by also doing an about face and applying an incorrect "reasonable observer" standard in its secular purpose analysis. [May 30, 1996 Order, Aplt. App. at 518-519]. This error caused the court to ignore the many allegations about Torgerson's intent that Bauchman had added to her Amended Complaint for the precise purpose of meeting the demands of the district court's prior dismissal order. [Am. Compl., Aplt. App. at 157-169, ¶¶ 16, 17]. Under

2. This finding by the district court is particularly remarkable given that the court was assessing a motion to dismiss. Here, where the proper standard is whether "it appears beyond doubt that the plaintiff can prove no facts in support of his claim," this type of fact-finding is improper. *See Scheur v. Rhodes*, 416 U.S. at 236. Plainly, in finding that Torgerson was motivated by a "primarily secular purpose," the district court did not accept the allegations of Bauchman's Complaint as true.

the proper standard, these allegations coupled with those in the original Complaint were more than sufficient to state a claim.

(b) The Primary Effect of Singing at Religious Worship Services is to Endorse Religion.

"If the challenged practice is likely to be interpreted as advancing religion, it has an impermissible effect and violates the Constitution, regardless of whether it actually is intended to do so." *Friedman v. Board of County Comm'rs*, 781 F.2d 777, 780 (10th Cir. 1985) (en banc), *cert. denied*, 476 U.S. 1169 (1986) (cross in an official seal violates the Establishment Clause). Whether or not the government's conduct has the effect of endorsing religion is to be determined from the viewpoint of a "reasonable observer". *Robinson*, 68 F.3d at 1229. The reasonable observer is "deemed aware of the history and context of the community and forum in which the religious display appears." *Capitol Square Review and Advisory Bd. v. Pinette*, 115 S. Ct. 2440, 2455 (1995) (O'Connor, J., concurring).

Under this primary effect or "endorsement" test, the allegations in Bauchman's complaint and amended complaint state a claim under the Establishment Clause. For example, in *Foremaster v. City of St. George*, 882 F.2d 1485 (10th Cir. 1989), *cert. denied*, 495 U.S. 910, (1990), plaintiff challenged a city seal which contained a depiction of the LDS temple in St. George, Utah. The Tenth Circuit reversed the district court order, also entered by Judge Greene, granting summary judgment in favor of the defendant on the issue of primary effect. This Court found that there was "a genuine issue of material fact as to what an average observer would perceive when viewing the City logo." 882 F.2d at 1491.

If a symbol depicting a church raises sufficient questions of endorsement to sustain a complaint, then Bauchman's allegations of actual coerced participation in religious worship services must do so. A reasonable observer easily could find that Torgerson's conduct had the primary effect of endorsing religion. Indeed, the primary effect test has been found to be violated for far less. *See, e.g., Lee v.*

Weisman, 505 U.S. at 594 (graduation prayers "in effect required participation in a religious exercise," despite its *de minimis* character); *Abington Sch. Dist. v. Schempp*, 374 U.S. at 224-25 (that compulsory school Bible readings are "minor encroachments on the First Amendment" does not diminish the "pervading religious character" of their effect).

(c) **Participation by a Public School Choir in Religious Worship Services Risks Excessive Government Entanglement With Religion.**_____

One of the important factors courts refer to in determining whether state action excessively entangles government with religion is whether the complained of action results in political or other conflict along religious lines. *Committee for Pub. Educ. and Religious Liberty v. Nyquist*, 413 U.S. 756, 795-96 (1973); *Lemon*, 403 U.S. at 622. Justice Frankfurter articulated this point almost half a century ago:

Designed to serve as perhaps the most powerful agency for promoting cohesion among a heterogeneous democratic people, the public school must keep scrupulously free from entanglement in the strife of sects. The preservation of the community from divisive conflicts, of Government from irreconcilable pressures from religious groups, of religion from censorship and coercion however subtly exercised, requires strict confinement of the State to instruction other than religio[n]. . . .

McCollum v. Bd. of Educ., 333 U.S. 203, 216-217 (1948) (Frankfurter, J., concurring). In *Bell v. Little Axe Indep. Sch. Dist. No. 70 of Cleveland County*, this Court relied on the political and religious divisions that the "Son Shine Club," a student religious club meeting in a public school, had caused within the community in ruling the club unconstitutional. 766 F.2d 1391, 1406-07 (10th Cir. 1985). In this case, Bauchman cited numerous examples of inter-faith strife in which the School was embroiled as a result of Torgerson's activities, including harassment by Torgerson and plaintiff's subjection to explicit religious epithets from other students, such as "Jewish bitch". [Am. Compl., Aplt. App. at 166, ¶ 17(d); Compl., Aplt. App. at 8-12, ¶¶ 36-52]. The religious divisions that Torgerson's conduct have created within the West High community unquestionably are the very types of strife that inevitably result from government entanglement in religion. *Bell v. Little Axe*, 766 F.2d at 1406-07.

In deciding to dismiss the original Complaint, the district court erroneously stated that these allegations at best gave rise to a tort claim, *Bauchman*, 900 F. Supp at 267 n.14, and in deciding to deny the motion to amend, the district court simply ignored this prong of the proper analysis.³

B. The Establishment Clause Forbids a Public School Teacher From Using His Position as a Pulpit to Preach Religion.

The Supreme Court has held:

Although Establishment Clause jurisprudence is characterized by few absolutes, the Clause does absolutely prohibit government-financed or government-sponsored indoctrination into the beliefs of a particular religious faith. . . . Such indoctrination, if permitted to occur, would have devastating effects on the right of each individual voluntarily to determine what to believe (and what not to believe) free of any coercive pressures from the State, while at the same time tainting the resulting religious beliefs with a corrosive secularism.

School District of Grand Rapids v. Ball, 473 U.S. 373, 385 (1985) (citations omitted); *see also Lee v. Weisman*, 505 U.S. at 598; *Edwards*, 482 U.S. at 584; *Aguilar v. Felton*, 473 U.S. 402, 413 (1985) (public school teachers may not teach in parochial schools); *McCollum*, 333 U.S. at 231; *Epperson v. Arkansas*, 393 U.S. 97, 105 (1968) (state may not "cast a pall of orthodoxy over the classroom."); *Duncanville*, 994 F.2d at 165 (citing "per se rule prohibiting public-school-related or initiated religious expression or indoctrination"). As the Supreme Court held in striking down a law requiring the teaching of creationism:

Families entrust public schools with the education of their children, but condition their trust on the understanding that the classroom will not purposely be used to advance religious views that may conflict with the private beliefs of the student and his or her family.

Edwards, 482 U.S. at 584. Under plaintiff's allegations in her complaint and amended complaint, this trust has been violated.

3. Indeed, the district court's decision itself illustrates the divisions that Torgerson's behavior can have on a community. In ruling on *Bauchman*'s motion to amend the district court opined that the "conceptions of both plaintiff and her father flunk the reasonable observer standard." [May 30, 1996 Order, Aplt. App. at 520-521]. This comment and the surrounding paragraph not only held the plaintiff, a high school student, up to unnecessary public ridicule, but also improperly singled out plaintiff's father, a non-litigant, whose actions are utterly irrelevant to any proper Establishment Clause analysis.

Bauchman alleges that Choir Class members "testified" that the LDS Church was the "only true church" during the course of religious worship services which students of all faiths were required to attend. [Am. Compl., Aplt. App. at 159, ¶ 16(f)]. Torgerson allegedly acknowledged that the law forbids his advocacy of religion at school, but vowed to continue it, "berating" students who protested. [Am. Compl., Aplt. App. at 160, 162, ¶ 16(h), (n), (o); Compl., Aplt. App. at 11, ¶ 50]. He selected almost exclusively Christian songs "for the religious messages they conveyed." [Am. Compl., Aplt. App. at 163-165, ¶ 17(a); *see also* Compl., Aplt. App. at 4-5, ¶¶ 17, 19, 21]. He instructed his class to visualize "Jesus dying for our sins." [Am. Compl., Aplt. App. at 160, ¶ 16(i)]. He instructed his class that they should believe in the religious messages in the choir's songs. [Am. Compl., Aplt. App. at 160, ¶ 16(i)].

All these allegations make the case that Torgerson was using his high school lectern as a pulpit. While preaching to the choir is appropriate at church, the Establishment Clause makes it improper in a public school Choir Class.

1. Torgerson's Exhortation of Religion Serves No Secular Purpose.

Bauchman plainly has alleged facts from which Torgerson's unconstitutional intent in his religious lecturing can be inferred. Torgerson allegedly advocated the LDS religion in class, while stating he knew the law forbade him to do so. [Am. Compl., Aplt. App. at 160, 162, ¶ 16(h), (n), (o)]. He asked his class to "accept" the religious message of the songs he assigned. [*Id.*, Aplt. App. at 161, ¶ 16(l)]. Torgerson also led the Choir Class in prayer and caused it to participate in religious services on a number of occasions. [*Id.*, Aplt. App. at 159, 160-161, ¶ 16(e), (f), (k); *see also* Compl., Aplt. App. at 8, ¶ 32]. Although many of these events occurred in the absence of plaintiff, they still support a reasonable inference that Torgerson's conduct was motivated by an improper religious purpose.

2. The Primary Effect of Torgerson's Preaching is to Endorse Religion.

A public school teacher cannot endorse religion over no religion or one religion over another. *See Everson v. Board of Educ.*, 330 U.S. 1, 15 (1947). It is therefore enough to allege facts showing that Torgerson's conduct "conveys or attempts to convey the message that religion or a particular religious belief is favored or preferred." *Robinson*, 68 F.3d at 1229 (quoting *County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573, 593 (1989)). Plaintiff alleged facts from which a "reasonable observer" could conclude that Torgerson was advocating religion over no religion and his own LDS faith over all. No reasonable observer could fail to view Torgerson's alleged conduct -- recited above -- as an endorsement of religion.

3. Torgerson's Preaching of Religion Risks Excessive Government Entanglement With Religion.

The entanglement of the Choir Class in religion is manifest in its division along religious lines. Torgerson allegedly tried to "limit the Choir Class to members of [the LDS Church]," [Am. Compl., Aplt. App. at 158-159, ¶ 16(d); *see also* Compl., Aplt. App. at 11, ¶ 47], and "berated dissenting students" [Am. Compl., Aplt. App. at 162, ¶ 16(o); *see also* Compl., Aplt. App. at 8, ¶ 35]. He initiated a campaign among parents and students to "punish and ostracize those who disagreed with his advocacy of religion." [Am. Compl., Aplt. App. at 166, ¶ 17(d); *see also* Compl., Aplt. App. at 9-10, ¶¶ 39-42]. He excluded dissenting students, including Bauchman, from the covert Special Tour he tried to assemble. [Am. Compl., Aplt. App. at 166-167 ¶ 17(g)-(h); Compl., Aplt. App. at 11, ¶ 47]. In a Choir Class lecture, he "directed the attention of the Choir Class to the fact that Rachel is a Jew" and encouraged her "ridicule and ostracism" by fellow students. [Am. Compl., Aplt. App. at 167-168, ¶ 17(k); *see also* Compl., Aplt. App. at 8, ¶ 36]. All these allegations demonstrate precisely the kind of divisiveness along religious lines that the third prong of *Lemon* seeks to avoid.

II. The District Court Erected Unprecedented and Dangerous Procedural Hurdles to Defeat a Well-Pleaded Establishment Clause Claim.

The lower court abused its discretion in denying the plaintiff leave to amend her complaint on grounds of futility. The court first held plaintiff's proposed amendment "in abeyance" while permitting limited discovery for sixty days. [November 22, 1995 Order, Aplt. App. at 276-277]. The court then ruled that plaintiff's amendment was futile because the Amended Complaint supposedly could not survive a motion for summary judgment. [May 30, 1996 Order, Aplt. App. at 540]. The district court cited no portion of the proposed Amended Complaint, instead discussing discovery materials at length, often making what amounted to findings of fact and conclusions of law. [*Id.*, Aplt. App. at 523-539].

In holding Bauchman's amended complaint futile under a summary judgment standard, the district court abused its discretion. "An amendment may be futile when it fails to state a valid theory of liability, or could not withstand a motion to dismiss." *Reagan v. Bankers Trust Co.*, 863 F. Supp. 1511, 1518 (D. Utah 1994) (citations omitted); see *T.V. Communications Network, Inc. v. Turner Network Television, Inc.*, 964 F.2d 1022, 1028 (10th Cir.), *cert. denied*, 506 U.S. 999 (1992). The standard for denial of an amendment, like the standard applicable to a motion to dismiss, requires a court to accept plaintiff's allegations as true. *Weimer v. Amen*, 870 F.2d 1400, 1407 (8th Cir. 1989); *Journal Pub. Co. v. American Home Assurance Co.*, 771 F. Supp. 632, 635 (S.D.N.Y. 1991).⁴

A court is not permitted, as the lower court in effect did here, to dismiss a complaint because it does not believe the plaintiff's allegations. *Neitzke v. Williams*, 490 U.S. 319, 327 (1989). The district court cited no precedent for its demand that plaintiff present evidence before leave to amend would be granted, and there is none. This district court therefore abused its discretion in denying the plaintiff leave to amend her Complaint.⁵

4. The district court also stated that plaintiff's Amended Complaint could not survive a motion to dismiss. The court, however, never analyzed plaintiff's allegations in the Amended Complaint and never treated those allegations as presumptively true, as a court is required to do in determining a motion to dismiss. *Williams v. Eaton*, 443 F.2d 422, 432 (10th Cir. 1971).

5. The district court compounded its abuse of discretion by denying Bauchman the opportunity to take discovery of Torgerson's and the School District's actions prior to the 1994-95 school

(continued...)

By erecting new hurdles to the mere pleading of an Establishment Clause claim, the district court's ruling threatens to chill plaintiffs whose religious liberties are threatened from even attempting to gain access to the Federal judiciary to protect those liberties. Religious freedom and the constitutional guarantee of it are bulwarks of our governmental and societal structure. If anything, courts should be more lenient in assessing such claims, rather than constructing new procedural hurdles in an attempt to close the courthouse door to them.

CONCLUSION

For the reasons stated, the district court's rulings should be reversed.

Respectfully submitted,

DEBEVOISE & PLIMPTON

By: _____

Colby A. Smith
(a member of the firm)
Alan H. Scheiner

875 Third Avenue
New York, New York 10022
(212) 909-6000

Counsel for *Amici Curiae*,
Presbyterian Church (USA), United Church Board for
Homeland Ministries of the United Church of Christ,
The American Jewish Committee, Anti-Defamation
League, General Conference of Seventh Day
Adventists, and Union of American Hebrew
Congregations

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5. (...continued)
year. [See November 22, 1995 Order, Aplt. App. at 276-77]. When the district court stated that it would decide plaintiff's motion for leave to amend based upon evidence adduced concerning Torgerson's alleged "improper religious purpose" [November 22, 1995 Order, Aplt. App. at 270-71, 276; May 30, 1996 Order, Aplt. App. at 513-14], this evidence of Torgerson's prior activities became highly relevant to his purpose and intent. Thus, the district court put plaintiff in a trap from which she could not escape.

CERTIFICATE OF SERVICE

I, Peter Johnson, do certify that on August 21, 1996, I caused the foregoing Brief of Presbyterian Church (U.S.A.), United Church Board for Homeland Ministries of the United Church of Christ, The American Jewish Committee, Anti-Defamation League, General Conference of Seventh-day Adventists, and Union of American Hebrew Congregations, as *Amici Curiae*, to be served, by United States Mail, postage prepaid, upon the following counsel of record:

Patrick Fisher, Esq.
Clerk of the Court
United States Court of Appeals for
the Tenth Circuit
Byron White United States
Courthouse
1823 Stout Street
Denver, Colorado 80257

Nathan B. Wilcox, Esq.
Anderson & Karrenberg
50 W. Broadway - Suite 700
Salt Lake City, UT 84101

John Robson, Esq.
Fabian & Clendenin
215 South State Street - 1200
P.O. Box 510210
Salt Lake City, Utah 84151

Dan R. Larsen, Esq.
Utah Attorney General's Office
160 East 300 South - Sixth Floor
P.O. Box 140811
Salt Lake City, Utah 84114

David J. Jordan, Esq.
Stoel Rives Boley Jones & Grey
201 South Main Street - Suite 1100
Salt Lake City, Utah 84111

James W. McConkie III, Esq.
Parker, McKeown & McConkie
4001 S. 700 E, #500
The Woodlands
Salt Lake City, UT 84107

Kevin J. Hasson, Esq.
Beckett Fund for Religious Liberty
2000 Pennsylvania Avenue, N.W.
Suite 3200
Washington, D.C. 20006

Brent D. Ward, Esq.
Parry Murray Ward
60 East South Temple 1270
Salt Lake City, Utah 84111

Ed Harris, Esq.
Andrew Hruska, Esq.
Sullivan & Cromwell
125 Broad Street
New York, N.Y. 10004

Peter Johnson