

1 DANIEL K. SPRADLIN - State Bar No. 82950  
dspradlin@wss-law.com  
2 ROBERTA A. KRAUS - State Bar No. 117658  
rakraus@wss-law.com  
3 WOODRUFF, SPRADLIN & SMART, APC  
555 Anton Boulevard, Suite 1200  
4 Costa Mesa, California 92626-7670  
Telephone: (714) 558-7000  
5 Facsimile: (714) 835-7787

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

7  
8 UNITED STATES DISTRICT COURT  
9 CENTRAL DISTRICT OF CALIFORNIA

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

13 Plaintiff,

14 v.

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

18 Defendants.

19  
20 CALIFORNIA TEACHERS  
ASSOCIATION/NEA; and  
21 CAPISTRANO UNIFIED EDUCATION  
ASSOCIATION,  
22

23 Union Intervenors/Defendants.  
24

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

**JOINT PROPOSAL FOR  
DISPOSITION OF THE  
EQUITABLE AND OTHER  
REMAINING ISSUES**

HEARINGS PENDING:

TYPE: Status Conference  
DATE: June 1, 2009  
TIME: 11:00 A.M.  
COURTROOM: 10C/Judge Selna

25 Pursuant to this Court's minute order dated May 1, 2009, the parties submit the  
26 following Joint Proposal for Disposition of the Equitable and Other Remaining Issues:

27 ///

28 ///

WOODRUFF, SPRADLIN  
& SMART  
ATTORNEYS AT LAW  
COSTA MESA

1 **JOINT STATEMENT**

2 After meeting and conferring the parties agree that there is a need for further  
3 judicial consideration regarding various issues upon which the parties have been  
4 unable to agree. These issues include:

5 1. Whether Plaintiff Chad Farnan ("Farnan") is entitled to equitable and  
6 injunctive relief against Defendant Dr. Corbett;

7 2. Questions regarding whether Defendant Capistrano Unified School  
8 District ("CUSD") is the proper subject of Farnan's request for equitable relief;

9 3. Dr. Corbett's belief that he is entitled to qualified immunity and that he  
10 may raise this defense at this time whereas Farnan disputes that Dr. Corbett may raise  
11 the qualified immunity defense at this time and believes that Dr. Corbett is not entitled  
12 to qualified immunity; and

13 4. A determination as to who is the prevailing party for purposes of  
14 obtaining costs and attorney's fees.

15 In light of these disputes, Defendants and the Union Intervenors agree that  
16 further briefing is needed in order for this Court to make a determination of these  
17 issues. Farnan believes that further briefing is not needed for the Court to determine  
18 issues three and four, but is needed as to issues one and two. Therefore, should this  
19 Court order further briefing on the issues, the parties propose the following briefing  
20 schedule:

- 21 ■ June 8, 2009: The parties e-file and serve their moving papers;
- 22 ■ June 15, 2009: Opposing papers are to be e-filed and served;
- 23 ■ June 22, 2009: Reply papers, if any, are to be e-filed and served; and
- 24 ■ June 29, 2009: All motions are to be heard by this Court.

25 In addition to the above, the parties submit their separate statements as follows:

26 **FARNAN'S STATEMENT AND PROPOSALS**

27 Farnan contends and proposes the following:

28 ///

1 **1. As the Prevailing Party, Plaintiff's Motion for Attorneys' Fees Should Be**  
2 **Considered by This Court Following Entry of Final Judgment**

3 In any action to enforce federal civil rights laws, including 42 U.S.C. § 1983,  
4 section 1988 allows courts to award “the prevailing party, other than the United  
5 States, a reasonable attorney’s fee as part of the costs.” A plaintiff is considered a  
6 prevailing party when it obtains a “court-ordered change in the legal relationship  
7 between the plaintiff and the defendant.” *Buckhannon Bd. and Care Home, Inc. v. W.*  
8 *Va. Dep’t of Health and Human Res.*, 532 U.S. 598, 604 (2001) (quotation marks and  
9 citation omitted).

10 Plaintiff brought this action under 42 U.S.C. § 1983 and has sought a permanent  
11 injunction against Dr. Corbett, prohibiting him from conveying a message of  
12 disapproval of religion in the classroom. This injunction “materially alters the legal  
13 relationship” between Plaintiff and Defendant “by modifying [Dr. Corbett’s]  
14 behavior.” *Farrar v. Hobby*, 506 U.S. 103, 111-12 (1992). Plaintiff’s First Amended  
15 Complaint asserted a single cause of action for violation of the First Amendment’s  
16 Establishment Clause. This Court’s ruling granting Plaintiff’s Motion for Summary  
17 Judgment held that Dr. Corbett did in fact violate the Establishment Clause. Thus,  
18 Plaintiff is a prevailing party in this matter. *See Hensley v. Eckerhart*, 461 U.S. 424,  
19 433 (1983) (“plaintiffs may be considered ‘prevailing parties’ for attorney’s fee  
20 purposes if they succeed on any significant issue in litigation which achieves some of  
21 the benefit the party sought in bringing suit.”) (quoting *Nadean v. Helgemoe*, 581 F.2d  
22 275, 278-79 (1st Cir. 1978)).

23 Once a plaintiff is deemed to be a prevailing party, the court has narrow  
24 discretion to deny attorneys’ fees under § 1988. “[T]he Supreme Court has held that  
25 although it is within the district court’s discretion to award attorney’s fees under  
26 section 1988, in the absence of special circumstances a district court not merely ‘may’  
27 but *must* award fees to the prevailing plaintiff.” *Morscott, Inc. v. City of Cleveland*,  
28 936 F.2d 271, 272 (6th Cir. 1991) (quotation marks and citations omitted; emphasis in

1 original). In fact, “a prevailing plaintiff should receive fees almost as a matter of  
2 course.” *Smith v. Heath*, 691 F.2d 220, 228 (6th Cir. 1982) (quoting *Dawson v.*  
3 *Pastrick*, 600 F.2d 70, 79 (7th Cir. 1979)); *see also Maloney v. City of Marietta*, 822  
4 F.2d 1023, 1024 (11th Cir. 1987) (fees should be granted to a prevailing party “as a  
5 matter of course”) (citation omitted).

6 Furthermore, whether Plaintiff is the prevailing party, and entitled to attorney’s  
7 fees pursuant to 42 USC § 1988, should be determined following Plaintiff’s Motion  
8 for Attorneys’ Fees. Said motion will be filed following entry of final judgment in  
9 this matter pursuant to this Court’s order regarding Plaintiff’s Motion for Summary  
10 Judgment.

11 More importantly, however, for purposes of this Joint Proposal and to  
12 determine whether further briefing on this issue is necessary, the School District is not  
13 a “prevailing party,” and a “prevailing defendant” is not generally entitled to  
14 attorneys’ fees pursuant to § 1988. *Allen v. City of Los Angeles*, 27 F.3d 1385, 1402  
15 (9th Cir. 1994) (“A prevailing defendant in a civil rights action is not entitled to  
16 attorney fees under 42 U.S.C. § 1988 merely because [it] prevails on the merits of the  
17 suit”) (citing *Vernon v. City of Los Angeles*, 27 F.3d 1385, 1402 (9th Cir.1994)).

18 Pursuant to this Court’s Order on the cross motions for summary judgment  
19 dated May 1, 2009, the only potential “prevailing Defendant” is Capistrano Unified  
20 School District. The School District, however, is not a prevailing party because of its  
21 relationship to Dr. Corbett who was sued both in his individual and official capacity.  
22 “[O]fficial-capacity suits generally represent only another way of pleading an action  
23 against an entity of which an officer is an agent. Suits against state officials in their  
24 official capacity therefore should be treated as suits against the State.” *Hafer v. Melo*,  
25 502 U.S. 21, 24 (1991) (internal citations and quotations omitted). Here, the claim  
26 against Dr. Corbett in his official capacity should be treated as a suit against the  
27 School District itself, as it has employed him for approximately 20 years. As a result,  
28 the School District is not a “prevailing party.”

1 Furthermore, even if this Court were to determine that the School District is a  
2 prevailing defendant, attorneys' fees are only recoverable where a "§ 1983 plaintiff's  
3 claims are groundless, without foundation, frivolous, or unreasonable." *Alaska Right*  
4 *to Life Political Action Comm. v. Feldman*, 504 F.3d 840, 852 (9th Cir. 2007) (internal  
5 citations omitted) (quoting *Karam v. City of Burbank*, 352 F.3d 1188, 1195 (9th Cir.  
6 2003)); see, e.g., *Legal Serv. of N. Cal. v. Arnett*, 114 F.3d 135 (9th Cir. 1997). Here,  
7 Dr. Corbett, an employee of Capistrano Unified School District for approximately  
8 twenty years, violated the Establishment Clause. Further, as the Court discussed in its  
9 Order on the cross motions for summary judgment, Plaintiff submitted evidence  
10 evincing the School District's knowledge of Dr. Corbett's constitutional violation and  
11 its subsequent failure to act, although this Court ultimately found the evidence to be  
12 insufficient. Plaintiffs' claims were therefore not groundless, frivolous, or  
13 unreasonable. To the contrary, as evidenced by this Court's ruling that Dr. Corbett's  
14 actions did violate the Establishment Clause, the single cause of action alleged was  
15 both reasonable and meritorious.

16 Although Plaintiff's ability to recover attorneys' fees as the prevailing party can  
17 and should be fully briefed following entry of judgment and a timely filed motion for  
18 attorneys' fees by Plaintiff, it is unnecessary to dedicate further briefing and judicial  
19 resources to determine whether Defendant Capistrano School District is eligible to  
20 obtain attorney's fees. The School District is not a prevailing party, and Plaintiffs'  
21 claims were certainly not frivolous. Furthermore, should Defendants wish to address  
22 this issue further they may file a motion for attorneys' fees following entry of  
23 judgment.

24 **2. Dr. Corbett Waived Qualified Immunity As an Affirmative Defense by**  
25 **Failing to Raise It at Any Stage in the Litigation**

26 "Although the defense of qualified immunity provides public officials important  
27 protection from baseless and harassing lawsuits, it is not a parachute to be deployed  
28 only when the plane has run out of fuel. Defendants must diligently raise the defense

1 during pretrial proceedings and ensure it is included in the pretrial order.” *Evans v.*  
2 *Fogarty*, 2007 WL 2380990, at \* 6 n.9 (10th Cir. August 22, 2007). Dr. Corbett has  
3 had numerous opportunities to raise the affirmative defense of qualified immunity.  
4 The plane ran out of fuel, and a ruling was entered in Plaintiff’s favor regarding Dr.  
5 Corbett’s Establishment Clause violation, forcing the deployment of a parachute:  
6 qualified immunity.

7 Dr. Corbett now seeks to amend his Answer to add the affirmative defense, but  
8 he provides no justifiable reason for why it was not argued in either Defendants’  
9 Motion to Dismiss, Defendants’ Motion for Summary Judgment or, at the very  
10 minimum, in Opposition to Plaintiffs’ Motion for Summary Judgment. Defendants’  
11 failure to raise qualified immunity prior to this Court’s ruling on the dispositive  
12 motions renders it lost. In good faith, Plaintiffs proceeded with this litigation at great  
13 cost and expense, and Dr. Corbett should not be permitted to use an affirmative  
14 defense as a rescue parachute.

15 Dr. Corbett asserts that “this Court must determine the applicability of the  
16 qualified immunity defense to Dr. Corbett before proceeding with a determination of  
17 damages” without any precedent or support for such a conclusion. Defendant cites no  
18 cases, however, in support of a right to raise qualified immunity for the first time after  
19 a final ruling on dispositive cross motions for summary judgment. In fact, Defendants  
20 state that “[q]ualified immunity may be raised by a motion to dismiss, motion for  
21 summary judgment and, of course, at trial.” Noticeably absent, however, is authority  
22 indicating that qualified immunity may be raised for the first time at the current stage  
23 of this litigation.

24 The Ninth Circuit follows the Supreme Court in holding that an official  
25 pleading qualified immunity must plead it as an affirmative defense. *Camarillo v.*  
26 *McCarthy*, 998 F.2d 638, 639 (9th Cir. 1993) (holding that while it should have been  
27 pled by the defendant in his answer, since prejudice could not be shown in allowing it  
28 to be raised *at summary judgment*, it would be allowed). The court in *Camarillo*

1 relied on *Gomez v. Toledo*, 446 U.S. 635 (noting that, in a § 1983 action, qualified  
2 immunity is an affirmative defense that must be pled) and Federal Rules of Civil  
3 Procedure, Rule 8(c) for its characterization of qualified immunity as an affirmative  
4 defense that should be pled by the defendant. *See also Harlow v. Fitzgerald*, 457 U.S.  
5 800, 815.

6 As a general rule, affirmative defenses must be pled as required by Rule 8(c), or  
7 the result is a waiver of the defense by the defendant and the exclusion of that defense  
8 from the case. *In re Adbox, Inc.*, 488 F.3d 836 (9th Cir. 2007) (citing *Morrison v.*  
9 *Mahoney*, 399 F.3d 1042, 1046 (9th Cir. 2005)). Courts have held that this principle  
10 extrapolated from Rule 8(c) applies to the qualified immunity affirmative defense.  
11 *See Ringuette v. City of Fall River*, 146 F.3d 1, 4 (1st Cir. 1998) (“Qualified immunity  
12 is an affirmative defense, Fed. R. Civ. P. 8(c), and an affirmative [defense] is  
13 generally lost unless it is raised in the pleadings.”).

14 While waiver of unpled affirmative defenses is the general rule, it is not always  
15 applied, and there are practical exceptions based on the circumstances of the cases. 5  
16 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice &*  
17 *Procedure* § 1278 (2d ed. 1990). Although exceptions exist permitting qualified  
18 immunity to be raised at later stages in the litigation, an important chord has been  
19 sounded by the Supreme Court and lower courts – if qualified immunity is not raised  
20 before a case goes to trial (or reaches the next “stage”), it is effectively lost as an  
21 affirmative defense. *See Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985) (holding that  
22 qualified immunity provides “an immunity from suit rather than a mere defense to  
23 liability; and like an absolute immunity, it is effectively lost if a case is erroneously  
24 permitted to go to trial.”); *Saucier v. Katz*, 533 U.S. 194, 200-01 (2001), disapproved  
25 on other grounds (same); *Castaldo v. Stone*, 192 F. Supp. 2d 1124, 1138 (D. Col.  
26 2001) (holding that “[t]he privilege is ‘an immunity from suit rather than a mere  
27 defense to liability; and like an absolute immunity, it is effectively lost if a case is  
28 erroneously permitted to go to trial.’ [citation] As a result, the Supreme Court has

1 stressed ‘the importance of resolving immunity questions at the earliest possible stage  
2 in litigation.’” [citation]).

3 Defendants did not plead the qualified immunity affirmative defense, yet they  
4 now ask this Court for leave to amend the pleading at an extraordinarily late stage in  
5 the litigation. Defendants filed a motion to dismiss, a motion for summary judgment,  
6 and opposed Plaintiffs’ motion for summary judgment and never raised qualified  
7 immunity. This Court ruled on the dispositive motions, finding an Establishment  
8 Clause violation, and Defendants now seek raise a defense that was waived and lost.

9 **3. Defendants Should Not Be Granted Leave to Amend Their Answer to**  
10 **Assert the Qualified Immunity Affirmative Defense**

11 Should this Court find that qualified immunity has not been waived altogether,  
12 Dr. Corbett still should not be granted the leave to amend the Answer in order to raise  
13 qualified immunity as an affirmative defense. Under Rule 15(a), an affirmative  
14 defense may be added to an answer by consent of the opposing party or leave of the  
15 court. Fed. R. Civ. P., Rule 15(a).

16 In deciding whether to grant leave to amend, courts balance a number of factors  
17 to determine when “justice so requires” leave to amend. Fed. R. Civ. P., Rule 15; 6  
18 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice &*  
19 *Procedure* § 1487. In the Ninth Circuit, as elsewhere, “[f]ive factors are taken into  
20 account to assess the propriety of a motion for leave to amend: bad faith, undue delay,  
21 prejudice to the opposing party, futility of amendment, and whether the plaintiff has  
22 previously amended the complaint.” *Johnson v. Buckley*, 356 F.3d 1067, 1077 (9th  
23 Cir. 2004) (citing *Nunes v. Ashcroft*, 348 F.3d 815, 818 (9th Cir. 2003)).

24 According to courts and commentators, prejudice is the most important, and the  
25 most oft used, reason to deny leave to amend. *See Jackson v. Bank of Haw.*, 902 F.2d  
26 1385, 1387 (9th Cir. 1990); 6 Charles Alan Wright, Arthur R. Miller & Mary Kay  
27 Kane, *Federal Practice & Procedure* § 1487 (2d ed. 1990). In considering prejudice,  
28 the court generally looks to see what hardship the moving party will endure if leave is

1 not granted, the reason the moving party failed to include the material in the original  
2 pleading, and the injustice that would result to the party opposing the motion. 6  
3 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice &*  
4 *Procedure* § 1487 (2d ed.1990). Here, because Plaintiff is seeking only nominal  
5 damages, the hardship Dr. Corbett will endure if leave is not granted is non-existent.  
6 Furthermore, this case involves a single cause of action for violation of the  
7 Establishment Clause against a School District official and the School District itself.  
8 There is no justifiable reason for Dr. Corbett's failure to assert the defense in the  
9 Answer. Finally, the injustice that would result to Plaintiffs if leave to amend is  
10 granted at this time is significant. Both parties engaged in significant discovery and  
11 numerous motions that would be rendered futile if qualified immunity were granted at  
12 this late stage. Allowing the case to be fully litigated for approximately eighteen  
13 months only to grant immunity at the tail end of the case would be an injustice to  
14 Plaintiff. *Campbell v. Emory Clinic*, 166 F3d 1157, 1162 (11th Cir. 1999)  
15 (“[p]rejudice and undue delay are inherent in an amendment asserted after the close of  
16 discovery and after dispositive motions have been filed, briefed, and decided”); *see*  
17 *also, Solomon v. North American Life & Cas. Ins. Co.*, 151 F3d 1132, 1139 (9th Cir.  
18 1998) (motion “on the eve of the discovery deadline” properly denied because it  
19 would have required reopening discovery, thus delaying proceedings).

20 The Ninth Circuit has found that, among other things: (1) the undue prejudice  
21 of having to develop new legal theories by establishing facts through the expense of  
22 depositions and (2) the undue delay caused by a party that unjustifiably delayed in  
23 moving to amend create a situation where movant is not entitled to leave to amend.  
24 *Jackson*, 902 F.2d at 1387-88 (9th Cir. 1990) (citing *Priddy v. Edelman*, 883 F.2d 438,  
25 447 (6th Cir. 1989) (“Putting the defendants ‘through the time and expense of  
26 continued litigation on a new theory, with the possibility of additional discovery,  
27 would be manifestly unfair and unduly prejudicial.’”) [other citations omitted].

28 In the present matter, at a minimum, more discovery would be required to look

1 into the knowledge and intent of Dr. Corbett with regard to the constitutional violation  
2 to combat the affirmative defense of qualified immunity. If there had not been  
3 significant delay in this defense being raised, the new legal matters that would be put  
4 at issue if leave is granted could have been a part of the now completed discovery  
5 process. Further, there has been undue delay in this matter on the part of Dr. Corbett  
6 in raising the issues of the proposed additional affirmative defense. From the start of  
7 this case he knew, or should have known, all of the facts and theories raised by this  
8 new claim of qualified immunity. *See Jackson*, 902 F.2d at 1387-88 (9th Cir. 1990)  
9 (“Relevant to evaluating the delay issue is whether the moving party knew or should  
10 have known the facts and theories raised by the amendment in the original pleading.”)  
11 citing *E.E.O.C. v. Boeing Co.*, 843 F.2d 1213, 1222 (9th Cir.), cert. denied, 488 U.S.  
12 889 (1988); *Jordan v. County of Los Angeles*, 669 F.2d 1311, 1324 (9th Cir.), vacated  
13 on other grounds, 459 U.S. 810 (1982). Dr. Corbett had ample opportunity to raise  
14 this issue in this matter in the Answer, in Defendants’ Motion to Dismiss, in his  
15 Opposition to Plaintiff’s Motion for Summary Judgment, and in Defendants’ Motion  
16 for Summary Judgment. At each of those points in time he knew all of the same facts  
17 that he knows now, and his failure to raise qualified immunity until this point thus  
18 constitutes undue delay and forecloses leave to amend.

19 Plaintiffs object to Dr. Corbett’s attempt to raise an unpleaded defense for  
20 qualified immunity and to the entry of any evidence or discussion in support of said  
21 defense. Dr. Corbett waived his right to assert qualified immunity, and the defense is  
22 lost as a result of his failure to raise it any stage of the litigation prior to this Court’s  
23 ruling on the dispositive motions. At this point, all evidence has been submitted, and  
24 the merits have been ruled upon. Furthermore, permitting Dr. Corbett to assert  
25 qualified immunity in defense of nominal damages is both prejudicial and unduly  
26 burdensome. This Court should deny Dr. Corbett’s request for leave to amend the  
27 Answer.

28 ///

1 **DEFENDANTS'/UNION INTERVENORS' STATEMENT AND PROPOSALS**

2 CUSD and Dr. Corbett (collectively "Defendants") and Intervenors California  
3 Teachers Association/NEA; and Capistrano Unified Education Association  
4 (collectively "Union Intervenors") jointly contend and propose the following:

5 **1. This Court must Determine the Applicability of the Qualified Immunity**  
6 **Defense to Dr. Corbett Before Proceeding with a Determination of**  
7 **Damages**

8 On May 1, 2009, this Court determined that Dr. Corbett violated the  
9 Establishment Clause when Dr. Corbett stated "religious, superstitious nonsense"  
10 during a discussion about the lawsuit filed against CUSD, Dr. Corbett and others by  
11 former biology teacher John Pelozza. Mr. Pelozza refused to teach the state mandated  
12 curriculum (the theory of evolution) but instead taught creationism in the classroom.

13 As set forth in Harlow v. Fitzgerald, 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d  
14 396 (1982), the qualified-immunity defense "shield[s] [government agents] from  
15 liability for civil damages insofar as their conduct does not violate clearly established  
16 statutory or constitutional rights of which a reasonable person would have known."  
17 (Id. at 818; see also, Behrens v. Pelletier, 516 U.S. 299, 305-306, 116 S.Ct. 834, 133  
18 L.Ed.2d 773 (1996))

19 Qualified immunity may be raised by motion to dismiss, motion for summary  
20 judgment and, of course, at trial. (Ibid.; see also, Mitchell v. Forsyth, 472 U.S. 511,  
21 526, 105 S. Ct. 2806, 86 L.Ed.2d 411 (1985))

22 In Saucier v. Katz, 533 U.S. 194, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001), the  
23 court identified two inquiries to be made in determining whether a public official is  
24 entitled to qualified immunity. The first is whether the alleged acts, when construed in  
25 the light most favorable to the plaintiff, show that the official's conduct violated a  
26 constitutional right. (Id. at 200-201) If no constitutional right was violated even under  
27 the plaintiff's allegations, the official is entitled to judgment; however, if a  
28 constitutional violation could be established under a favorable view of the evidence

