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ASSOCIATION

13
14 UNITED STATES DISTRICT COURT
15 CENTRAL DISTRICT OF CALIFORNIA
16

17 CHAD FARNAN, a minor, by and
18 through his parents BILL FARNAN and
TERESA FARNAN,

19 Plaintiff,

20 v.

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

25 Defendants.
26
27
28

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

**DEFENDANTS' POST-SUMMARY
JUDGMENT MOTION FOR A
DETERMINATION THAT DR.
CORBETT IS ENTITLED TO
QUALIFIED IMMUNITY;
MEMORANDUM OF POINTES AND
AUTHORITIES**

HEARINGS PENDING:

TYPE: Motions
DATE: July 13, 2009
TIME: 1:30 P.M.
COURTROOM: 10C/Judge Selna

1 CALIFORNIA TEACHERS
2 ASSOCIATION/NEA; and
3 CAPISTRANO UNIFIED EDUCATION
4 ASSOCIATION,

Union Intervenors/Defendants.

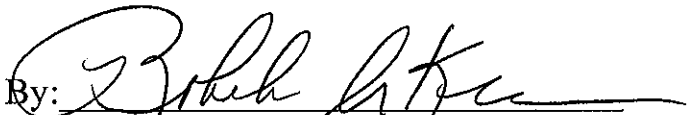
5 TO: ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

6 PLEASE TAKE NOTICE that on July 13, 2009, at 1:30 p.m. or as soon
7 thereafter as the matter may be heard in Courtroom 10C of the above-entitled Court,
8 located in the Ronald Reagan Federal Building, 411 West Fourth Street, Santa Ana,
9 California 92701, Defendants CAPISTRANO UNIFIED SCHOOL DISTRICT
10 (“CUSD”) and DR. JAMES CORBETT (“Dr. Corbett”) (sometimes collectively
11 “Defendants”) and Intervenors CALIFORNIA TEACHERS ASSOCIATION/NEA;
12 and CAPISTRANO UNIFIED EDUCATION ASSOCIATION (“Union Intervenors”)
13 will and hereby do move this Court, following its ruling on the parties’ motions for
14 summary judgment, for a determination that Dr. Corbett is entitled to qualified
15 immunity in this matter.

16 This motion is based on this notice, the attached memorandum of points and
17 authorities, the Court’s order regarding the parties’ motions for summary judgment,
18 the evidence filed by the parties’ in support of their motions for summary judgment,
19 such matters of which this Court may be asked to take judicial notice, as well as the
20 pleadings and records on file in this matter.

21 DATED: June 8, 2009

WOODRUFF, SPRADLIN & SMART, APC

22
23
24 By: 

25 DANIEL K. SPRADLIN
26 ROBERTA A. KRAUS
27 Attorneys for Defendants CAPISTRANO
28 UNIFIED SCHOOL DISTRICT and DR.
JAMES CORBETT

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **1. INTRODUCTION**

3 As stated by Farnan, “the gravamen of Plaintiffs’ case was and remains the
4 barrage of religious hostility expressed by Dr. Corbett throughout the Fall 2007
5 semester during his Advanced Placement European History class.”¹ This case “does
6 not concern a few incidental statements of a teacher that may periodically reflect upon
7 the teacher’s personal beliefs” but concerns Dr. Corbett’s alleged “continual and
8 incessant actions.”²

9 Yet, on May 1, 2009, this Court found that Dr. Corbett did not engage in a
10 continual and incessant barrage of religious hostility. Instead, this Court determined
11 that Dr. Corbett violated the Establishment Clause when Dr. Corbett stated “religious,
12 superstitious nonsense” during a discussion about the lawsuit filed against CUSD, Dr.
13 Corbett and others by former biology teacher John Pelozza who had refused to teach
14 the state-mandated curriculum (the theory of evolution) but instead taught creationism
15 in the classroom. Dr. Corbett made this single statement during the course of one
16 lecture while teaching his year-long AP European History course. The Court found
17 that no other statement attributed to Dr. Corbett during this year-long AP European
18 History course violated the Establishment Clause and that there was no evidence
19 presented sufficient to establish that Dr. Corbett had a pattern and practice of violating
20 the Establishment Clause.

21 Based on this ruling, it is apparent that Dr. Corbett now is entitled to a qualified
22 immunity defense. While this Court has held that the single statement by Dr. Corbett
23 violated the Establishment Clause, in 2007, the law was not established that a single
24 statement by a teacher made during one lecture given in the course of a year-long
25 class could trigger an Establishment Clause violation.

26 _____
27 ¹ See, Plaintiff’s reply to Defendants’ opposition to Plaintiff’s motion for summary
28 judgment, 1:4-6.

² See, Plaintiff’s opposition to Defendants’ motion for summary judgment, 10:14-16.

1 **A. Background Facts**

2 Since the filing of his lawsuit and up through this Court’s ruling on the parties’
3 motions for summary judgment, Farnan has contended that Dr. Corbett made anti-
4 Christian or anti-religious comments on a daily basis throughout the 2007 semester;
5 that anti-Christian comments essentially were the theme of Dr. Corbett’s lectures.
6 According to Farnan, it was the continual and incessant comments attributed to Dr.
7 Corbett that violated the Establishment Clause. Examples of Farnan’s position in this
8 regard are voluminous and can be found, by way of illustration, in the following
9 documents:

10 (1) Farnan’s first amended complaint:

- 11 ▪ “On a regular basis during the Fall 2007 semester . . .” (4:7-11);
- 12 ▪ “Parents and/or students have complained to the District for many years
13 regarding Dr. Corbett’s religious hostility expressed in his classroom”
14 (9:26-27);
- 15 ▪ “Dr. Corbett continues to spend a large portion of class time . . . , he
16 clearly demonstrates hostility towards religion . . .”, “As a result of his
17 ongoing comments . . .” (10:3-7)

18 (2) Farnan’s opposition to Defendants’ motion to dismiss:

- 19 ▪ “statements made by Dr. Corbett are continual and incessant” (10:14);
- 20 ▪ “continual and incessant disapproval of religion” (10:23);
- 21 ▪ “For months Chad Farnan sat in an AP European History class . . .
22 learning . . . about Dr. Corbett’s own propagation of a ‘religion of
23 secularism’” (12:11-14);
- 24 ▪ “When taken together, [Dr. Corbett’s comments] are clearly anti-
25 Christian diatribes” (15:12-13)

26 (3) Farnan’s responses to Defendants’ special interrogatories, response nos. 5 and
27 7:

28 ///

- 1 ▪ “Throughout the Fall 2007 semester, Dr. Corbett made numerous
2 statements regarding Christianity and religion generally that expresses a
3 viewpoint that is derogatory, disparaging, and belittling regarding
4 religion and Christianity in particular. . . . While there are individual
5 comments that are particularly offensive and expressive of said
6 viewpoints, those and all of his comments must be taken in context of the
7 entire lecture and class environment . . .” (6:16-25 and 7:20-28)

8 (4) Plaintiff’s opposition to Defendants’ motion for summary judgment:

- 9 ▪ “Plaintiffs brought this action with the intent to quell the religious
10 hostility that has germinated for many years in Dr. Corbett’s public
11 classroom at Capistrano Valley High School” (1:2-4)
- 12 ▪ “numerous hostile comments of Dr. Corbett” (4:4-5)
- 13 ▪ “the Court must inquire into the purpose for the overreaching theme
14 established by Dr. Corbett’s lectures” (6:6-7)
- 15 ▪ “[Dr. Corbett] states it many times, and in many ways, both indirectly
16 and directly” (6:16-17)
- 17 ▪ “Dr. Corbett is using his bully pulpit to spew his propaganda . . .” (8:12-
18 13)
- 19 ▪ “Dr. Corbett’s statements regarding religion and Christianity, both in
20 Chad’s class and other classes, send primarily a message of disapproval
21 of religion” (9:2-4)
- 22 ▪ “Defendants’ actions fail the third prong of the Lemon test because the
23 statements made by Dr. Corbett are continual and incessant, and the
24 School District has done nothing to lessen them” (9:18-20)
- 25 ▪ “*This case does not concern a few incidental statements of a teacher that
26 may periodically reflect upon the teacher’s personal beliefs. Instead, it
27 concerns Dr. Corbett’s continual and incessant actions . . .*” (10:14-16;
28 emphasis added)

- 1 ▪ “When applying the correct standard, and reviewing all of Dr. Corbett’s
2 comments instead of singling out a few comments . . .” (14:24-26)

3 (6) Plaintiff’s memorandum of points and authorities in support of motion
4 for summary judgment:

- 5 ▪ “[T]eachers, including [Dr. Corbett] violate the Establishment Clause
6 when they use the classroom to *repeatedly express* disapproval of
7 religion, religious faith, and the resulting worldviews” (1:6-8; emphasis
8 added)
- 9 ▪ “Defendants’ decision to ‘teach’ anti-Christian themes” (15:8-9)
- 10 ▪ “barrage of hostility aimed at Dr. Corbett’s students over the years past”
11 (17:16-17)
- 12 ▪ “the statements of Dr. Corbett are continual and incessant” (18:3-4)

13 (7) Declaration of Chad Farnan in support of Plaintiffs’ motion for summary
14 judgment:³

- 15 ▪ “Dr. James Corbett spent a significant amount of class time discussing
16 topics and issues not relevant to European history” (2:19-20);
- 17 ▪ “On a regular basis during the fall 2007 semester, Dr. Corbett discussed a
18 wide variety of topics not related to Advanced Placement European
19 History” (3:3-4);
- 20 ▪ “While teaching the subject of the class and while discussing various
21 other topics, Dr. Corbett made statements and expressed viewpoints that
22 were derogatory, disparaging, and belittling regarding religion and
23 Christianity in particular” (3:5-9)
- 24 ▪ “These comments were not limited to one particular day, but instead
25 occurred on most days that I was in his classroom” (3:10-11)

27 ³ Many of these same assertions are also contained in Plaintiff’s statement of
28 uncontroverted facts and conclusions of law in support of his motion for summary
 judgment. (See, for example, fact nos. 9, 10, 11, 36, 37)

- 1 ▪ “Dr. Corbett’s anti-Christian viewpoints are well-known by the students
- 2 at my high school as they are often presented through comments he
- 3 makes during class” (3:12-14)
- 4 ▪ “Dr. Corbett made many comments regarding his personal bias against
- 5 Christianity” (3:15-16)
- 6 ▪ “When Dr. Corbett was talking to my class, he regularly included his
- 7 own ideas about God and religion” (3:16-17)
- 8 ▪ “As a result of his ongoing comments . . .” (3:19-20)

9 (8) Plaintiff’s reply to Defendants’ opposition to Plaintiff’s motion for
10 summary judgment:

- 11 ▪ *“The gravamen of Plaintiffs’ case was and remains the barrage of*
- 12 *religious hostility expressed by Dr. Corbett throughout the Fall 2007*
- 13 *semester during his Advanced Placement European History class” (1:4-6;*
- 14 *emphasis added)*

15 (9) Plaintiff’s response to Defendants’ objections to Plaintiff’s evidence
16 submitted by Plaintiff in support of his motion for summary judgment:

- 17 ▪ “Dr. Corbett’s habit or routine practice of making negative or hostile
- 18 comments about religion and Christianity . . .” (3:21-22)

19 This Court, itself, in denying Defendants’ motion to dismiss, also noted that the
20 gist of Farnan’s claim against Defendants is based on Farnan’s claim that his rights
21 were violated by a “practice and policy hostile toward religion and favoring irreligion
22 over religion.” (Court’s minute order denying motion to dismiss, ¶2)

23 **2. THIS COURT MUST DETERMINE THE APPLICABILITY OF THE**
24 **QUALIFIED IMMUNITY DEFENSE TO DR. CORBETT**

25 In light of this Court’s May 1, 2009 ruling on Farnan’s motion for summary
26 judgment, Dr. Corbett is entitled to qualified immunity. Qualified immunity “shield[s]
27 [government agents] from liability for civil damages insofar as their conduct does not
28 violate clearly established statutory or constitutional rights of which a reasonable

1 person would have known.” (Harlow v. Fitzgerald, 457 U.S. 800, 818, 102 S.Ct. 2727,
2 73 L.Ed.2d 396 (1982); see also, Behrens v. Pelletier, 516 U.S. 299, 305-306, 116
3 S.Ct. 834, 133 L.Ed.2d 773 (1996))

4 **A. The Right that Dr. Corbett has been Determined to have Violated**
5 **was not Clearly Established in 2007**

6 In Saucier v. Katz, 533 U.S. 194, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001), the
7 court identified two inquiries to be made in determining whether a public official is
8 entitled to qualified immunity. The first is whether the alleged acts, when construed in
9 the light most favorable to the plaintiff, show that the official’s conduct violated a
10 constitutional right. (Id. at 200-201) If no constitutional right was violated even under
11 the plaintiff’s allegations, the official is entitled to judgment; however, if a
12 constitutional violation could be established under a favorable view of the evidence
13 submitted, the court must move to the second step in the analysis. That step involves
14 an inquiry into whether the constitutional right was clearly established and “must be
15 undertaken in light of the specific context of the case, not as a broad general
16 proposition.” (Ibid.)

17 More recently the United States Supreme Court held that while the sequence set
18 forth in Saucier is often appropriate, it should no longer be regarded as mandatory.
19 Instead, judges should be permitted to exercise their sound discretion in deciding
20 which of the two prongs of the qualified immunity analysis should be addressed first
21 in light of the circumstances in the particular case at hand. (Pearson v. Callahan, --
22 U.S. --, 129 S.Ct. 808, 818, 172 L.Ed.2d 565 (2009)) The Pearson court also
23 recognized that the Saucier protocol, while not mandatory, often is beneficial.
24 (Pearson v. Callahan, supra, 129 S.Ct. at 818)

25 Quoting Malley v. Briggs, 475 U.S. 335, 341, 106 S.Ct. 1092, 89 L.Ed.2d 271
26 (1986), the Saucier court stated that qualified immunity protects “all but the plainly
27 incompetent or those who knowingly violate the law.” (Saucier v. Katz, supra, 533
28 U.S. at 202) A public official or employee is entitled to qualified immunity even if

1 that official makes a good faith mistake about the law. (Id. at 205)

2 The inquiry on the second prong is not whether a particular right is established
3 in a vacuum. The inquiry is whether it was established on the *specific facts* of a
4 particular case. (Id. at 202) The court must find that the right was clearly established
5 in light of the specific facts of a particular case such that “a reasonable official would
6 understand that what he is doing violates that right.” (Ibid.; see also, Dibble v. City of
7 Chandler, 515 F.3d 918, 930 (9th Cir. 2008) [since determining whether a “public
8 employee’s speech is constitutionally protected turns on a context-intensive, case-by-
9 case balancing analysis, the law regarding such claims will rarely, if ever, be sufficient
10 ‘clearly established’ to preclude qualified immunity”])

11 In United States v. Lanier, 520 U.S. 259, 270, 117 S.Ct. 1219, 137 L.Ed.2d 432
12 (1997), the court stated that a public official can be liable for a constitutional violation
13 “only if ‘the contours of the right [violated are] sufficiently clear that a reasonable
14 official would understand that what he is doing violates that right.’” While there need
15 not be case law directly on all fours, the unlawfulness of a particular action “must be
16 apparent” in light of preexisting law before liability will be imposed. (Anderson v.
17 Creighton, 483 U.S. 635, 640, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987))

18 Under qualified immunity, public employees remain immune as long as their
19 actions do not violate clearly established [federal] statutory or constitutional rights of
20 which a reasonable person would have known. (Harlow v. Fitzgerald, supra, 457 U. S.
21 at 817-818 [allegations of malice are insufficient to overcome application of qualified
22 immunity]; see also, Anderson v. Creighton, supra, 483 U.S. at 640-641 [an official’s
23 subjective belief is irrelevant; court applies an objective standard]) The Ninth Circuit
24 recently stated:

25 “The constitutional violation must be ‘clearly established’ at the time of
26 the alleged misconduct. [Citation] ‘The operation of this standard,
27 however, depends substantially upon the level of generality at which the
28 relevant “legal rule” is to be identified.’ [Citation] ‘[T]he right the

1 official is alleged to have violated must have been “clearly established”
2 in a more particularized, and hence more relevant, sense: The contours of
3 the right must be sufficiently clear that a reasonable official would
4 understand that what he is doing violates that right.’ [Citation] . . . ‘The
5 dispositive inquiry is “whether it would be clear to a reasonable [official]
6 that his conduct was unlawful in the situation he confronted.”’ [Citation]”
7 (Rodis v. City, County of San Francisco, 558 F.3d 964, 969 (9th Cir.
8 2009)

9 The plaintiff has the burden of proving that the rights he claims were “clearly
10 established.” (Davis v. Scherer, 468 U.S. 183, 197, 104 S.Ct. 3012, 82 L.Ed.2d 139
11 (1984)) Here, Farnan has not and cannot establish that the rights he claims were
12 violated were “clearly established” under existing case law in 2007. At that time it
13 was not clearly established that a teacher could violate the Establishment Clause by
14 making a single statement in one lecture given during a year-long course. Cases that
15 have discussed or held that schools have violated the Establishment Clause have
16 looked at the *curriculum* or *theme* or ongoing conduct being challenged.

17 For example, in Edwards v. Aguillard, 482 U.S. 578, 107 S.Ct. 2573, 96
18 L.Ed.2d 510 (1987), the court held that a Louisiana law that proscribed the teaching of
19 evolution as part of the public school curriculum, unless accompanied by a lesson on
20 creationism, violated the Establishment Clause. Thus, Edwards involved the content
21 of the curriculum taught by state teachers during the school day.

22 In Illinois ex rel. McCollum v. Board of Ed. of School Dist. No. 71, Champaign
23 Cty., 333 U.S. 203, 68 S.Ct. 461, 92 L.Ed. 649 (1948), the school district excused
24 students from their normal classroom study during the regular school day to attend
25 classes taught by sectarian religious teachers, who were subject to approval by the
26 school superintendent.

27 In School Dist. of Abington Township v. Schempp, 374 U.S. 203, 83 S.Ct.
28 1560, 10 L.Ed.2d 844 (1963), the court found unconstitutional Pennsylvania's practice

1 of permitting public schools to read Bible verses at the opening of each school day.
2 (See also, Wallace v. Jaffree, 472 U.S. 38, 70, 105 S.Ct. 2479, 86 L.Ed.2d 29 (1985)
3 [Alabama statute authorizing moment of silence for school prayer]; Stone v. Graham,
4 449 U.S. 39, 101 S.Ct. 192, 66 L.Ed.2d 199 (1980) [posting copy of Ten
5 Commandments on public classroom wall]; Engel v. Vitale, 370 U.S. 421, 430, 82
6 S.Ct. 1261, 1266, 8 L.Ed.2d 601 (1962) [recitation of “denominationally neutral”
7 prayer])

8 Religious activities prohibited in public schools thus include daily readings
9 from the Bible (Abington School District, supra, 374 U.S. 203), recitation of the
10 Lord's Prayer, (Ibid.), posting the Ten Commandments in every classroom (Stone v.
11 Graham, supra, 449 U.S. 39, beginning school assemblies with prayer (Collins v.
12 Chandler Unified School Dist., 644 F.2d 759 (9th Cir. 1981)), and teaching a
13 Transcendental Meditation course that includes a ceremony involving offerings to a
14 deity. (Malnak v. Yogi, 592 F.2d 197 (3d Cir. 1979))

15 In Altman v. Bedford Cent. School Dist., 245 F.3d 49, 78 (2nd Cir. 2001), the
16 court looked at whether a school’s Earth Day celebration endorsed the religion of
17 Gaia. In finding that it did not, the court stated:

18 “The district court made no finding that anyone attending the ceremonies
19 suggested that the Earth possessed supernatural powers or that it should
20 be worshiped; nor have plaintiffs called to our attention any evidence of
21 such a suggestion. The court pointed to two remarks of the faculty
22 advisor, one that was consistent with the teachings of Genesis, and one
23 that was contrary to those teachings. But we cannot conclude that a
24 reasonable observer would view either of those statements as having a
25 Gaia-endorsing effect; *Supreme Court precedent makes clear that the*
26 *Establishment Clause is not transgressed merely because a statement*
27 *either is in agreement with, or is in disagreement with, a given religious*
28 *tenet.”* (Emphasis added)

1 In Doe v. Duncanville Ind. School District, 70 F.3d 402, 406 (5th Cir.1995), the
2 court held that a school choir singing the song “The Lord Bless You and Keep You,”
3 and even adopting it as a theme song, did not violate the Establishment Clause.

4 Justices of the Supreme Court themselves have remarked on the confusion
5 surrounding the proper interpretation of the Establishment Clause. (See for example,
6 Rosenberger v. Rector, 515 U.S. 819, 861, 115 S.Ct. 2510, 2532, 132 L.Ed.2d 700
7 (1995) [Thomas, J., concurring: “[O]ur Establishment Clause jurisprudence is in
8 hopeless disarray . . .”]; Lynch v. Donnelly, 465 U.S. 668, 688-689, 104 S.Ct. 1355,
9 1367, 79 L.Ed.2d 604 (1984) [O'Connor, J., concurring: “It has never been entirely
10 clear . . . how the three parts of the [*Lemon*] test relate to the principles enshrined in
11 the Establishment Clause”]; Van Orden v. Perry, 545 U.S. 677, 125 S.Ct. 2854, 162
12 L.Ed.2d 607 (2005) [Thomas, J., concurring: “The unintelligibility of this Court's
13 precedent raises the further concern that, either in appearance or in fact, adjudication
14 of Establishment Clause challenges turns on judicial predilections”])

15 Recently, the Ninth Circuit in Krestan v. Deer Valley Unified School District
16 No. 97, of Maricopa County, 561 F.Supp.2d 1078, 1086 (D. Ariz., 2008), commented
17 on this confusion, stating:

18 “The analytical test to be applied in determining whether the video
19 violates the Establishment Clause is not easily identified. See *Card v.*
20 *City of Everett*, 520 F.3d 1009, 1013-16 (9th Cir.2008) (discussing the
21 somewhat confused state of Establishment Clause jurisprudence). The
22 Supreme Court has used a number of different tests. In the plurality
23 portion of her opinion for the Supreme Court in *Mergens*, Justice
24 O'Connor applied the traditional three-part test found in *Lemon v.*
25 *Kurtzman*, 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971). See
26 *Mergens*, 496 U.S. at 247-53, 110 S.Ct. 2356. That test asks (1) whether
27 the government action in question has a secular purpose, (2) whether its
28 principal or primary effect is one that neither advances nor inhibits

1 religion, and (3) whether the action would foster an excessive
2 government entanglement with religion. *Lemon*, 403 U.S. at 612-13, 91
3 S.Ct. 2105. [¶] Justice Kennedy concurred with the *Mergens* plurality,
4 but applied a different test. *Mergens*, 496 U.S. at 260-62, 110 S.Ct. 2356.
5 He asked whether the government action gives direct benefits to a
6 religion in such a degree that it in fact establishes a state religion, or
7 whether the government action coerces any student to participate in a
8 religious activity. *Id.* at 260, 110 S.Ct. 2356. [¶] The Supreme Court's
9 decision in *Good News Club v. Milford Central School*, 533 U.S. 98, 121
10 S.Ct. 2093, 150 L.Ed.2d 151 (2001), which was handed down after
11 *Mergens*, applied neither *Lemon* nor Justice Kennedy's test. The case
12 instead considered the school's neutrality toward religion, any coercive
13 pressure students might feel to engage in the club's activity, and whether
14 the school's action would be perceived as an endorsement of particular
15 religious views. *Id.* at 114-18, 121 S.Ct. 2093."

16 Given the confusion expressed both by the Ninth Circuit and the United States
17 Supreme Court over how to determine whether an activity violates the Establishment
18 Clause, it is not surprising that the law is not clear to a teacher that a single comment
19 made in a lecture in a year-long course might constitute a violation of the
20 Establishment Clause. This Court, apparently for the first time, made such a
21 determination when it ruled that Dr. Corbett violated the Establishment Clause when
22 he made the single statement during one lecture that the teaching of creationism in a
23 high school biology class was "religious, superstitious nonsense."

24 By its ruling this Court determined that the first prong of the qualified immunity
25 inquiry. Now, Dr. Corbett is entitled to a determination of the second prong of the
26 inquiry, i.e., was the right deemed to have been violated clearly established in 2007. A
27 review of the applicable law, as discussed above, and applying the required objective
28 standard, mandates that this prong be decided in the negative – the right was *not*

1 clearly established. Although the parties have had ample opportunity to brief this
2 particular issue, to date no case has been presented where a school teacher was held to
3 have violated the Establishment Clause by making a single statement during a year-
4 long course. Accordingly, the right cannot be said to be clearly established and Dr.
5 Corbett is entitled to a determination of qualified immunity in his favor.

6 **B. Dr. Corbett has raised the Issue of Qualified Immunity at the First**
7 **Practicable Opportunity**

8 Qualified immunity may be raised by motion to dismiss, motion for summary
9 judgment and, of course, at trial. (Behrens v. Pelletier, supra, 516 U.S. at 305-306; see
10 also, Mitchell v. Forsyth, 472 U.S. 511, 526, 105 S. Ct. 2806, 86 L.Ed.2d 411 (1985))
11 The question of qualified immunity is generally a question of law, which should be
12 determined as early in the litigation as possible. (Act Up!/Portland v. Bagley, 988
13 F.2d 868, 873 (9th Cir. 1993))

14 In the recent case of Pearson v. Callahan the Court stated:

15 “[T]here are cases in which there would be little if any conservation of
16 judicial resources to be had by beginning and ending with a discussion of
17 the ‘clearly established’ prong. ‘[I]t often may be difficult to decide
18 whether a right is clearly established without deciding precisely what the
19 constitutional right happens to be.’ [Citation]” (Pearson v. Callahan,
20 supra, 129 S.Ct. at 818)

21 Here, the Court has determined the first prong of the inquiry, i.e., Dr. Corbett
22 violated the Establishment Clause when he made the single statement during one
23 lecture that the teaching of creationism in a high school biology class was “religious,
24 superstitious nonsense.” This determination triggered, for the first time, the possibility
25 of a qualified immunity defense. Up until this Court rendered its decision, Farnan
26 contended that Dr. Corbett made anti-Christian or anti-religious comments on a daily
27 basis throughout the 2007 semester; that anti-Christian comments essentially were the
28 theme of Dr. Corbett’s lectures. Farnan clearly stated that the gist of his action was the

1 “barrage of religious hostility” expressed throughout the Fall 2007 semester and that
2 his action did not concern “a few incidental statements” of Dr. Corbett.

3 As noted above, case law did exist in 2007 that would seem to support Farnan’s
4 claim that a curriculum or class theme based on anti-Christian or anti-religious
5 teachings could be a violation of the Establishment Clause. Thus, if Farnan’s
6 contentions were accepted as true, it did not appear that a viable qualified immunity
7 defense existed.

8 This Court’s ruling, however, is not based on Dr. Corbett making anti-Christian
9 or anti-religious comments on a daily basis such that it was a theme of Dr. Corbett’s
10 AP European History course. Instead, this Court has held that a single comment made
11 during a single lecture is sufficient to trigger an Establishment Clause violation.

12 This Court’s May 1st decision here was the first time that a court has held that a
13 single comment made by a teacher during the course of a single lecture in a year-long
14 class could constitute an Establishment Clause violation. The parties have submitted
15 numerous briefs in this case and, to date, no one has produced a case that has held that
16 a teacher can violate the Establishment Clause by making a single statement during
17 the course of one lecture.

18 Thus, Defendants and the Union Intervenors, by seeking a determination of the
19 qualified immunity defense as soon as possible after this Court’s determination, have
20 not unreasonably delayed in raising this defense but have asserted it at the first
21 practicable moment. The qualified immunity defense is now ripe for this Court’s
22 determination and that determination should be in Dr. Corbett’s favor.

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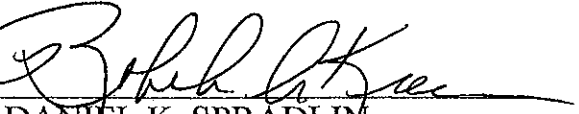
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1 **3. CONCLUSION**

2 In light of the above, this Court should determine the qualify immunity defense
3 in Dr. Corbett's favor and rule that he is immune from liability in this matter.

4 DATED: June 8, 2009


WOODRUFF, SPRADLIN & SMART, APC

5
6 By: 

7 DANIEL K. SPRADLIN
8 ROBERTA A. KRAUS
9 Attorneys for Defendants CAPISTRANO
10 UNIFIED SCHOOL DISTRICT and DR.
11 JAMES CORBETT

12 DATED: June 8, 2009

CALIFORNIA TEACHERS ASSOCIATION --
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15 Attorneys for Intervenors CALIFORNIA
16 TEACHERS ASSOCIATION and
17 CAPISTRANO UNIFIED EDUCATION
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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF ORANGE

I am over the age of 18 and not a party to the within action; I am employed by WOODRUFF, SPRADLIN & SMART in the County of Orange at 555 Anton Boulevard, Suite 1200, Costa Mesa, CA 92626-7670.

On June 8, 2009, I served the foregoing document(s) described as **DEFENDANTS' POST-SUMMARY JUDGMENT MOTION FOR A DETERMINATION THAT DR. CORBETT IS ENTITLED TO QUALIFIED IMMUNITY; MEMORANDUM OF POINTS AND AUTHORITIES; DECLARATION OF DANIEL K. SPRADLIN**

- by placing the true copies thereof enclosed in sealed envelopes addressed as stated on the attached mailing list;
- by causing the foregoing document(s) to be electronically filed using the Court's Electronic Filing System which constitutes service of the filed document(s) on the individual(s) listed on the attached mailing list:

(BY MAIL) I placed said envelope(s) for collection and mailing, following ordinary business practices, at the business offices of WOODRUFF, SPRADLIN & SMART, and addressed as shown on the attached service list, for deposit in the United States Postal Service. I am readily familiar with the practice of WOODRUFF, SPRADLIN & SMART for collection and processing correspondence for mailing with the United States Postal Service, and said envelope(s) will be deposited with the United States Postal Service on said date in the ordinary course of business.

(BY OVERNIGHT DELIVERY) I placed said documents in envelope(s) for collection following ordinary business practices, at the business offices of WOODRUFF, SPRADLIN & SMART, and addressed as shown on the attached service list, for collection and delivery to a courier authorized by _____ to receive said documents, with delivery fees provided for. I am readily familiar with the practices of WOODRUFF, SPRADLIN & SMART for collection and processing of documents for overnight delivery, and said envelope(s) will be deposited for receipt by _____ on said date in the ordinary course of business.

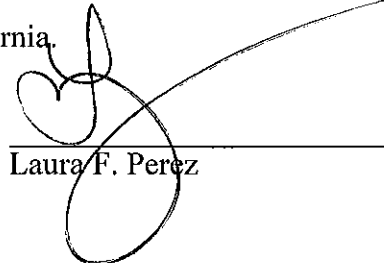
(BY FACSIMILE) I caused the above-referenced document to be transmitted to the interested parties via facsimile transmission to the fax number(s) as stated on the attached service list.

(BY PERSONAL SERVICE) I delivered such envelope(s) by hand to the offices of the addressee(s).

(State) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

(Federal) I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made. I declare under penalty of perjury that the above is true and correct.

Executed on June 8, 2009 at Costa Mesa, California.



Laura F. Perez

1 **CHAD FARNAN et al. v. CAPISTRANO UNIFIED SCHOOL DISTRICT**

2 **USDC CASE NO. SACV07-1434-JVS (ANx)**
3 **ASSIGNED TO: HON. JAMES V. SELNA**

4 **ATTACHED SERVICE LIST**

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