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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.

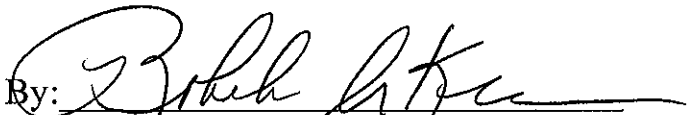
5 TO: ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

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

