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12
13 **UNITED STATES DISTRICT COURT**
14 **FOR THE CENTRAL DISTRICT OF CALIFORNIA**
15 **SOUTHERN DIVISION**

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

19 Plaintiffs,

20 vs.

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

26 Defendants.

Case No.: SACV07-1434 JVS (ANX)

SUPPLEMENTAL BRIEFING
PURSUANT TO ORDER DATED
JUNE 1, 2009

Date: July 13, 2009
Time: 1:30 p.m.
Dept: 10C
Judge: James V. Selna

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1 **I. Plaintiffs Are Entitled to Equitable and Injunctive Relief Against Defendant**
2 **Dr. Corbett**

3 This Court has authority to issue declaratory relief under 28 U.S.C. §§ 2201,
4 providing that “any court of the United States, upon the filing of an appropriate
5 pleading, may declare the rights and other legal relations of any interested party seeking
6 such declaration, whether or not further relief is or could be sought. Any such
7 declaration shall have the force and effect of a final judgment or decree and shall be
8 reviewable as such,” and injunctive relief under 28 U.S.C. § 1343 (“[D]istrict courts
9 shall have original jurisdiction of any civil action authorized by law to be commenced
10 by any person ... [t]o recover damages or to secure equitable or other relief under any
11 Act of Congress providing for the protection of civil rights”).

12 Plaintiffs’ First Amended Complaint specifically sought declaratory and
13 injunctive relief pursuant to 42 U.S.C. § 1983 based upon Plaintiffs’ single cause of
14 action for violation of the First Amendment’s Establishment Clause. Dr. Corbett was
15 sued in his individual and official capacity. Following cross motions for summary
16 judgment, this court ruled in favor of Plaintiffs and declared that Dr. Corbett had
17 violated the Establishment Clause by expressing disapproval of religion in his public
18 school classroom. A declaratory judgment should therefore now be issued. Further,
19 this Court should additionally issue an injunction preventing further violations of the
20 Establishment Clause by Dr. Corbett in his individual and official capacity.
21 Specifically, Plaintiffs request a permanent injunction ordering Dr. Corbett to refrain
22 from expressing any disapproval of religion while acting in his official capacity as a
23 public school employee.

24 Section 1983 of the United States Code permits citizens and other persons within
25 the jurisdiction of the United States to seek legal and equitable relief from persons who,
26 under color of state law, deprive them of federally protected rights. 42 U.S.C. § 1983.
27 Here, this Court determined that Dr. Corbett violated Chad Farnan’s rights under the
28 Establishment Clause, which clause provides that Mr. Farnan has the right to be free

1 from governmental expression that disapproves of religion. “Once a right and a
2 violation have been shown, the scope of a district court’s equitable powers to remedy
3 past wrongs is broad, for breadth and flexibility are inherent in equitable remedies.”
4 *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971).

5 An injunction is particularly appropriate in this case due to Dr. Corbett’s
6 unrepentant attitude toward this Court’s ruling dated May 1, 2009. Dr. Corbett publicly
7 declared that he has no intention of changing his teaching methods. During an
8 interview with the *Orange County Register* following the May 1, 2009, ruling, it was
9 reported that Dr. Corbett said, “When people ask, ‘Are you doing anything different?’ I
10 say no, I wasn’t doing anything wrong before.” See Scott Martindale, *Capo Teacher:*
11 *‘I’m never negative toward religion,’* O.C. Register, May 9, 2009, available at
12 <http://www.ocregister.com/articles/corbett-class-religion-2402308-people-kids>.
13 (Attached hereto as Exhibit “A”). Therefore, issuing an injunction in this case would be
14 most appropriate in order to ensure that Dr. Corbett complies with this Court’s ruling.

15 To obtain permanent injunctive relief, a plaintiff must show

- 16 (1) that it has suffered an irreparable injury; (2) that remedies available at law,
17 such as monetary damages, are inadequate to compensate for that injury;
18 (3) that, considering the balance of hardships between the plaintiff and
19 defendant, a remedy in equity is warranted; and (4) that the public interest
20 would not be disserved by a permanent injunction.

21 *N. Cheyenne Tribe v. Norton*, 503 F.3d 836, 843 (9th Cir. 2007) (quoting *eBay v.*
22 *MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006)).

23 First, the loss of First Amendment freedoms, for even minimal periods of time,
24 unquestionably constitutes irreparable injury. See *Elrod v. Burns*, 427 U.S. 347, 373
25 (1976). It has already been determined by this Court that Mr. Farnan’s rights were
26 violated when Dr. Corbett expressed improper disapproval of religion in violation of the
27 Establishment Clause. Therefore, irreparable injury is clearly present.

28 ///

1 Second, Plaintiffs have no adequate remedy at law. As is typical in any civil
2 rights case, a violation of one's First Amendment rights cannot merely be remedied
3 through monetary compensation. The only proper remedy in this case is injunctive
4 relief.

5 Third, the balance of hardships weighs in favor of Plaintiffs. It would be
6 unreasonable to argue that Dr. Corbett should be allowed to continue to express
7 disapproval of religion because the hardship on him would be too great if he were
8 enjoined from doing so. Dr. Corbett should not be allowed to use his bully pulpit to
9 express disapproval of religion to school children.

10 Fourth, an injunction should issue because the public will not be served if
11 Dr. Corbett is allowed to continue violating the Establishment Clause in his public
12 school classroom. Instead, the public interest will obviously be served by requiring
13 Dr. Corbett to operate within the confines of the First Amendment.

14 Protecting public school children should be the benchmark in this case. This
15 court has jurisdiction to fashion equitable relief that will further constitutional
16 protections in public schools. *See Lemon v. Kurtzman*, 411 U.S. 192, 200 (1973) (“[I]n
17 constitutional adjudication as elsewhere, equitable remedies are a special blend of what
18 is necessary, what is fair, and what is workable.”).

19 It is fair and necessary in this case to issue an injunction, particularly in light of
20 Dr. Corbett's comments that he will not change his teaching because he believes he was
21 doing nothing wrong before. Although it would seem to be unnecessary, this Court has
22 the discretion to schedule a hearing to verify Dr. Corbett's comments to the *Orange*
23 *County Register*. Even if Dr. Corbett had not indicated flippancy toward his
24 unconstitutional actions and had instead said that he would no longer express
25 disapproval of religion in the classroom, an injunction would still be appropriate to
26 prevent the possibility of recurrence. *See, e.g., Fed. Trade Comm'n v. Affordable*
27 *Media, LLC*, 179 F.3d 1228, 1237 (9th Cir. 1999) (“[I]t is actually well-settled ‘that an
28 action for an injunction does not become moot merely because the conduct complained

1 of was terminated, *if there is a possibility of recurrence*, since otherwise the defendants
2 would be free to return to [their] old ways.”) (citing *FTC v. Am. Standard Credit Sys.,*
3 *Inc.* 874 F. Supp. 1080, 1087 (C.D. Cal. 1994)) (quoting *Allee v. Medrano*, 416 U.S.
4 802, 811 (1974)).

5 Therefore, Plaintiffs respectfully request that this Court issue an injunction
6 against Dr. Corbett in his individual and official capacity that prohibits him from
7 expressing disapproval of religion while acting as an employee of the school district.
8 With such an order, Plaintiffs do not believe it is necessary to have a separate injunction
9 issued against the Capistrano Unified School District. However, Plaintiffs request that
10 this Court retain jurisdiction over this case if it becomes necessary for Plaintiffs to
11 request monitoring or other compliance measures.

12 **II. As the Prevailing Party, Plaintiffs’ Motion for Attorneys’ Fees Should Be**
13 **Considered by This Court Following Entry of Final Judgment**

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

21 Plaintiffs brought this action under 42 U.S.C. § 1983 and have sought a
22 permanent injunction against Dr. Corbett, prohibiting him from conveying a message of
23 disapproval of religion in the classroom. Additionally, Plaintiffs seek nominal
24 damages and declaratory relief. Any time of relief, whether it be injunctive relief,
25 declaratory relief, or nominal damages, “materially alters the legal relationship”
26 between Plaintiff and Defendant “by modifying [Dr. Corbett’s] behavior.” *Farrar v.*
27 *Hobby*, 506 U.S. 103, 111-12 (1992). The Supreme Court has stated that neither the
28 type nor the extent of the relief is relevant. In *Buckhannon Bd. & Care Home, Inc.*, the

1 Court held that it had previously “reviewed the legislative history of § 1988 and found
2 that ‘Congress intended to permit the interim award of counsel fees only when a party
3 has prevailed on the merits of at least one of his claims.’ Our ‘[r]espect for ordinary
4 language requires that a plaintiff receive at least some relief on the merits of his claim
5 before he can be said to prevail.’ *We have held that even an award of nominal damages
6 suffices under this test.*” *Buckhannon Bd. & Care Home, Inc.*, 532 U.S. at 603
7 (emphasis added) (internal citations omitted) (quoting *Hewitt v. Helms*, 482 U.S. 755,
8 760 (1987); citing *Farrar*, 506 U.S. at 113).

9 Plaintiffs’ First Amended Complaint asserted a single cause of action for
10 violation of the First Amendment’s Establishment Clause. This Court’s ruling granting
11 Plaintiffs’ Motion for Summary Judgment held that Dr. Corbett did in fact violate the
12 Establishment Clause. Plaintiffs have requested both nominal damages and injunctive
13 relief. Either form of relief in and of itself is sufficient to alter the legal relationship
14 between the parties. Thus, Plaintiffs are a prevailing party in this matter. *See Hensley v.*
15 *Eckerhart*, 461 U.S. 424, 433 (1983) (“plaintiffs may be considered ‘prevailing parties’
16 for attorney’s fee purposes if they succeed on any significant issue in litigation which
17 achieves some of the benefit the party sought in bringing suit.”) (quoting *Nadean v.*
18 *Helgemoe*, 581 F.2d 275, 278-79 (1st Cir. 1978)).

19 Once a plaintiff is deemed to be a prevailing party, the court has narrow
20 discretion to deny attorneys’ fees under § 1988. “Congress’ intent in enacting § 1988
21 was to attract competent counsel to prosecute civil rights cases Therefore, ‘a
22 court’s discretion to deny fees under § 1988 is very narrow and . . . *fee awards should*
23 *be the rule rather than the exception.*’ The Supreme Court and we have thus denied a
24 prevailing plaintiff an attorney’s fee in only certain limited situations” *Mendez v.*
25 *County of San Bernardino*, 540 F.3d 1109, 1126 (9th Cir. 2008) (emphasis added)
26 (citing *Herrington v. County of Sonoma*, 883 F.2d 739, 743 (9th Cir.1989) (internal
27 citation and quotation marks omitted)).

28 ///

1 Other Circuits have interpreted Supreme Court precedent in a similar manner,
2 stating that the general rule is to grant attorneys' fees to a prevailing plaintiff. "[T]he
3 Supreme Court has held that although it is within the district court's discretion to award
4 attorney's fees under section 1988, in the absence of special circumstances a district
5 court not merely 'may' but *must* award fees to the prevailing plaintiff." *Morscott, Inc. v.*
6 *City of Cleveland*, 936 F.2d 271, 272 (6th Cir. 1991) (quotation marks and citations
7 omitted). In fact, "a prevailing plaintiff should receive fees almost as a matter of
8 course." *Smith v. Heath*, 691 F.2d 220, 228 (6th Cir. 1982) (quoting *Dawson v.*
9 *Pastrick*, 600 F.2d 70, 79 (7th Cir. 1979)); *see also Maloney v. City of Marietta*, 822
10 F.2d 1023, 1024 (11th Cir. 1987) (fees should be granted to a prevailing party "as a
11 matter of course") (citation omitted).

12 More importantly, however, the School District is not a "prevailing party," and a
13 "prevailing defendant" is not generally entitled to attorneys' fees pursuant to § 1988.
14 *See Allen v. City of Los Angeles*, 27 F.3d 1385, 1402 (9th Cir. 1994) ("A prevailing
15 defendant in a civil rights action is not entitled to attorney fees under 42 U.S.C. § 1988
16 merely because [it] prevails on the merits of the suit") (citing *Vernon v. City of Los*
17 *Angeles*, 27 F.3d 1385, 1402 (9th Cir.1994)).

18 Pursuant to this Court's Order on the cross motions for summary judgment dated
19 May 1, 2009, the only potential "prevailing Defendant" is Capistrano Unified School
20 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 School
27 District itself, as it has employed him for approximately 20 years. As a result, the
28 School District is not a "prevailing party."

1 A prevailing party is one who has “clear victory on one of his claims for relief.”
2 *Thomas v. City of Tacoma*, 410 F.3d 644, 649 (9th Cir. 2005) (holding that “[t]o deny
3 an award of attorney's fees notwithstanding Plaintiff's clear victory on one of his claims
4 for relief is an abuse of discretion”). This Court’s dismissal of the claim against
5 Capistrano Unified School District is not a “clear victory on one claim of relief,” as an
6 employee of the School District was found to have violated the Establishment Clause by
7 a statement made in a classroom. Further, this Court carefully considered whether other
8 statements made by Dr. Corbett violated the Establishment Clause. The only clear
9 victory on one claim, in fact the only victory at all, was that of the Plaintiffs. Defendant
10 Capistrano Unified School District is asserting a novel legal theory that a School
11 District whose employee was found to have violated the First Amendment can be a
12 “prevailing party” in order to recover attorneys’ fees and costs. Such an assertion is
13 both without legal authority and completely contrary to the plethora of case law from
14 the Supreme Court, this Circuit, and other Circuits stating that a prevailing plaintiff,
15 such as Chad Farnan, is entitled to attorneys’ fees and that a defendant is rarely entitled
16 to attorneys’ fees, even where a victory on the merits is achieved. That certainly did not
17 occur here.

18 Furthermore, even if this Court were to determine that the School District is a
19 “prevailing party”, attorneys’ fees are only recoverable by a defendant where a “§ 1983
20 plaintiff’s claims are groundless, without foundation, frivolous, or unreasonable.”
21 *Alaska Right to Life Political Action Comm. v. Feldman*, 504 F.3d 840, 852 (9th Cir.
22 2007) (internal citations omitted) (quoting *Karam v. City of Burbank*, 352 F.3d 1188,
23 1195 (9th Cir. 2003)); *see, e.g., Legal Serv. of N. Cal. v. Arnett*, 114 F.3d 135 (9th Cir.
24 1997). 42 U.S.C. § 1988 “does not differentiate between a prevailing plaintiff and
25 defendant, but case law has filled that gap. [A] prevailing plaintiff should ordinarily
26 recover an attorney's fee unless special circumstances would render such an award
27 unjust. Prevailing defendants, on the other hand, may only be awarded attorney’s fees
28 pursuant to 42 U.S.C. § 1988(b) when the plaintiff's civil rights claim is frivolous,

1 unreasonable, or groundless, or that the plaintiff continued to litigate after it clearly
2 became so.” *Thomas*, 410 F.3d at 647 (internal citations and quotations omitted) (citing
3 *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 422 (1978); *Hensley v. Eckerhart*,
4 461 U.S. 424, 429 (1983) (quoting S.Rep. No. 94-1011, p. 4 (1976)).

5 Here, Dr. Corbett, an employee of Capistrano Unified School District for
6 approximately twenty years, violated the Establishment Clause. Further, as the Court
7 discussed in its Order on the cross motions for summary judgment, Plaintiffs submitted
8 evidence evincing the School District’s knowledge of Dr. Corbett’s constitutional
9 violation and its subsequent failure to act, although this Court ultimately found the
10 evidence to be insufficient. Plaintiffs’ claims were therefore not groundless, frivolous,
11 or unreasonable. To the contrary, as evidenced by this Court’s ruling that Dr. Corbett’s
12 actions did violate the Establishment Clause, the single cause of action alleged was both
13 reasonable and meritorious.

14 **III. Dr. Corbett Waived Qualified Immunity As an Affirmative Defense by**
15 **Failing to Raise It at Any Stage in the Litigation**

16 “Although the defense of qualified immunity provides public officials important
17 protection from baseless and harassing lawsuits, it is not a parachute to be deployed
18 only when the plane has run out of fuel. Defendants must diligently raise the defense
19 during pretrial proceedings and ensure it is included in the pretrial order.” *Evans v.*
20 *Fogarty*, 2007 WL 2380990, at * 6 n.9 (10th Cir. August 22, 2007). Dr. Corbett has
21 had numerous opportunities to raise the affirmative defense of qualified immunity. The
22 plane ran out of fuel, and a ruling was entered in Plaintiffs’ favor regarding
23 Dr. Corbett’s Establishment Clause violation, forcing the deployment of a parachute:
24 qualified immunity.

25 Dr. Corbett now seeks to amend his Answer to add the affirmative defense, but
26 he provides no justifiable reason for why it was not argued in either Defendants’
27 Motion to Dismiss, Defendants’ Motion for Summary Judgment or, at the very
28 minimum, in Opposition to Plaintiffs’ Motion for Summary Judgment. Defendants’

1 failure to raise qualified immunity prior to this Court's ruling on the dispositive motions
2 renders it lost. In good faith, Plaintiffs proceeded with this litigation at great cost and
3 expense, and Dr. Corbett should not be permitted to use an affirmative defense as a
4 rescue parachute.

5 Dr. Corbett asserted in this Joint Proposal that "this Court must determine the
6 applicability of the qualified immunity defense to Dr. Corbett before proceeding with a
7 determination of damages" without any precedent or support for such a conclusion.
8 Defendant cites no cases in support of a right to raise qualified immunity for the first
9 time after a final ruling on dispositive cross motions for summary judgment. In fact,
10 Defendants state that "[q]ualified immunity may be raised by a motion to dismiss,
11 motion for summary judgment and, of course, at trial." Noticeably absent, however, is
12 authority indicating that qualified immunity may be raised for the first time at the
13 current stage of this litigation.
14

15 The Ninth Circuit follows the Supreme Court in holding that an official pleading
16 qualified immunity must plead it as an affirmative defense. *Camarillo v. McCarthy*,
17 998 F.2d 638, 639 (9th Cir. 1993) (holding that while it should have been pled by the
18 defendant in his answer, since prejudice could not be shown in allowing it to be raised
19 *at summary judgment*, it would be allowed) (emphasis added). The court in *Camarillo*
20 relied on *Gomez v. Toledo*, 446 U.S. 635 (noting that, in a § 1983 action, qualified
21 immunity is an affirmative defense that must be pled) and Federal Rules of Civil
22 Procedure, Rule 8(c) for its characterization of qualified immunity as an affirmative
23 defense that should be pled by the defendant. *See also Harlow v. Fitzgerald*, 457 U.S.
24 800, 815 (1982).

25 As a general rule, affirmative defenses must be pled as required by Rule 8(c), or
26 the result is a waiver of the defense by the defendant and the exclusion of that defense
27 from the case. *In re Adbox, Inc.*, 488 F.3d 836 (9th Cir. 2007) (citing *Morrison v.*
28 *Mahoney*, 399 F.3d 1042, 1046 (9th Cir. 2005)). Courts have held that this principle,
extrapolated from Rule 8(c), applies to the qualified immunity affirmative defense. *See*

1 *Ringuette v. City of Fall River*, 146 F.3d 1, 4 (1st Cir. 1998) (“Qualified immunity is an
2 affirmative defense, Fed. R. Civ. P. 8(c), and an affirmative [defense] is generally lost
3 unless it is raised in the pleadings.”).

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

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

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1 **IV. Defendants Should Not Be Granted Leave to Amend Their Answer to Assert**
2 **the Qualified Immunity Affirmative Defense**

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

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

16 According to courts and commentators, prejudice is the most important, and the
17 most oft used, reason to deny leave to amend. *See Jackson v. Bank of Haw.*, 902 F.2d
18 1385, 1387 (9th Cir. 1990); 6 Charles Alan Wright, Arthur R. Miller & Mary Kay
19 Kane, *Federal Practice & Procedure* § 1487 (2d ed. 1990). In considering prejudice,
20 the court generally looks to see what hardship the moving party will endure if leave is
21 not granted, the reason the moving party failed to include the material in the original
22 pleading, and the injustice that would result to the party opposing the motion. 6 Charles
23 Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice & Procedure* §
24 1487 (2d ed.1990) . Here, because Plaintiffs are seeking only nominal damages, the
25 hardship Dr. Corbett will endure if leave is not granted is non-existent. Furthermore,
26 this case involves a single cause of action for violation of the Establishment Clause
27 against a School District official and the School District itself. There is no justifiable
28 reason for Dr. Corbett’s failure to assert the defense in the Answer. Finally, the

1 injustice that would result to Plaintiffs if leave to amend is granted at this time is
2 significant. Both parties engaged in significant discovery and numerous motions that
3 would be rendered futile if qualified immunity were granted at this late stage. Allowing
4 the case to be fully litigated for approximately eighteen months only to grant immunity
5 at the tail end of the case would be an injustice to Plaintiffs. *Campbell v. Emory Clinic*,
6 166 F3d 1157, 1162 (11th Cir. 1999) (“[p]rejudice and undue delay are inherent in an
7 amendment asserted after the close of discovery and after dispositive motions have been
8 filed, briefed, and decided”); *see also, Solomon v. N. Am. Life & Cas. Ins. Co.*, 151 F3d
9 1132, 1139 (9th Cir. 1998) (motion “on the eve of the discovery deadline” properly
10 denied because it would have required reopening discovery, thus delaying proceedings).

11 The Ninth Circuit has found that, among other things: (1) the undue prejudice of
12 having to develop new legal theories by establishing facts through the expense of
13 depositions and (2) the undue delay caused by a party that unjustifiably delayed in
14 moving to amend create a situation where movant is not entitled to leave to amend.
15 *Jackson*, 902 F.2d at 1387-88 (9th Cir. 1990) (citing *Priddy v. Edelman*, 883 F.2d 438,
16 447 (6th Cir. 1989) (“Putting the defendants ‘through the time and expense of continued
17 litigation on a new theory, with the possibility of additional discovery, would be
18 manifestly unfair and unduly prejudicial.”) [other citations omitted].

19 In the present matter, at a minimum, more discovery would be required to look
20 into the knowledge and intent of Dr. Corbett with regard to the constitutional violation
21 to combat the affirmative defense of qualified immunity. If there had not been
22 significant delay in this defense being raised, the new legal matters that would be put at
23 issue if leave is granted could have been a part of the now completed discovery process.
24 Further, there has been undue delay in this matter on the part of Dr. Corbett in raising
25 the issues of the proposed additional affirmative defense. From the start of this case he
26 knew, or should have known, all of the facts and theories raised by this new claim of
27 qualified immunity. *See Jackson*, 902 F.2d at 1387-88 (9th Cir. 1990) (“Relevant to
28 evaluating the delay issue is whether the moving party knew or should have known the

1 facts and theories raised by the amendment in the original pleading.”) (citing *E.E.O.C.*
2 *v. Boeing Co.*, 843 F.2d 1213, 1222 (9th Cir.), *cert. denied*, 488 U.S. 889 (1988);
3 *Jordan v. County of Los Angeles*, 669 F.2d 1311, 1324 (9th Cir. 1982), vacated on other
4 grounds, 459 U.S. 810 (1982). Dr. Corbett had ample opportunity to raise this issue in
5 this matter in the Answer, in Defendants’ Motion to Dismiss, in his Opposition to
6 Plaintiffs’ Motion for Summary Judgment, and in Defendants’ Motion for Summary
7 Judgment. At each of those points in time he knew all of the same facts that he knows
8 now, and his failure to raise qualified immunity until this point thus constitutes undue
9 delay and forecloses leave to amend.

10 Plaintiffs object to Dr. Corbett’s attempt to raise an unpled defense for qualified
11 immunity and to the entry of any evidence or discussion in support of said defense.
12 Dr. Corbett waived his right to assert qualified immunity, and the defense is lost as a
13 result of his failure to raise it any stage of the litigation prior to this Court’s ruling on
14 the dispositive motions. At this point, all evidence has been submitted, and the merits
15 have been ruled upon. Furthermore, permitting Dr. Corbett to assert qualified immunity
16 in defense of nominal damages is both prejudicial and unduly burdensome. This Court
17 should deny Dr. Corbett’s request for leave to amend the Answer.

18
19 DATED: June 8, 2009

ADVOCATES FOR FAITH & FREEDOM

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28

EXHIBIT “A”



Saturday, May 9, 2009

Capo teacher: 'I'm never negative toward religion'

James Corbett, 62, defends his controversial teaching methods.

By **SCOTT MARTINDALE**

The Orange County Register

MISSION VIEJO – High school history teacher James Corbett is intentionally provocative in class – and proud of it.

The 36-year educator, found to have violated the First Amendment for referring to Creationism as "religious, superstitious nonsense," said in an interview Friday he won't change his teaching methods and won't self-censor any of his classroom comments.

"When people ask, 'Are you doing anything different?' I say no, I wasn't doing anything wrong before," said Corbett, speaking to The

Orange County Register for the first time since a former student accused him in a 2007 lawsuit of disparaging Christians in class.

Corbett, 62, who teaches at Capistrano Valley High School in Mission Viejo, routinely brings up divisive topics in class and often makes inflammatory statements about religion. It's all part of his effort to "provoke" students to think critically about "changes in religious thought and institutions," he says.

The class in question, after all, is a college-level Advanced Placement European history course that has religion as one of its key themes.

"I'm never negative toward religion," Corbett said. "I'm negative toward the actions of some churches toward religion. It's not disparaging religion to point out that the Renaissance popes were a bunch of whacks."

Corbett, who speaks his mind without reservation, says he's always eager to debate, clarify and defend. He waves both arms through the air when he's making an important point, and in class, he says he sometimes stands on a coffee table in the front of the room during lectures.

Corbett's classroom walls are covered with an eclectic array of artwork, ranging from an Irish Republican Army poster to an anti-

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Vietnam War propaganda poster. Upon entering his classroom, visitors will be greeted by, among other things, an artistic print of the Lord's Prayer in Irish to the right and a copy of the Anti-Defamation League's "ABCs of religion in the public schools" to the left.

There's also an "Obama/Biden" campaign poster hanging alongside a "McCain/Palin" poster – both put up last year by his students, Corbett said.

"It's not my room; it's their room," he said.

Corbett, who remains in his teaching position at Capistrano Valley High, said he has not decided yet whether to appeal the May 1 ruling by U.S. District Judge James Selna.

The Santa Ana judge found that by making the "nonsense" remark about Creationism, Corbett violated the First Amendment's establishment clause. The clause has been interpreted over the years to prohibit government employees from displaying hostility toward religion. Selna, however, dismissed more than 20 other statements attributed to Corbett that were cited in the lawsuit as not being violations.

Corbett said the lawsuit filed by Chad Farnan – who dropped out of Corbett's class in the fall 2007 semester and is now a junior

at the school – has had both negative and positive impacts on his life.

Initially, he was so worried he would lose his job that he had trouble sleeping and eating, he said. He lost 45 pounds in the six months after the suit was filed, he added.

Corbett also said he received death threats by phone and that his 13-year-old son was told by some classmates he was "an atheist and going to hell."

At the same time, he said he received more than 500 letters from his former students after the lawsuit was filed. All but one was a letter of support and thanks, he said.

"As a teacher, you get toward the end of your career and you never know if you've really made a difference," Corbett said. "I learned what most teachers will never know – I made a difference to an enormous number of people. It ratified my life in many respects."

Farnan, who has not spoken publicly about the case since the judge's ruling was handed down, did not return multiple phone calls seeking comment.

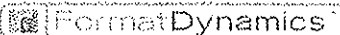
Q. How does your teaching style differ from your colleagues'?

A. Some teachers are more narrowly

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focused than I am on the curriculum, but that's because I try to relate what we read in history to what's going on now. When we see the research, the majority of the kids find history to be the most boring class. The reason they hate it is because it's dry and irrelevant.

Q. You were found to have violated the First Amendment's establishment clause when you discussed a 1993 court case involving your former colleague, science teacher John Pelozza, who sued for the right not to have to teach evolution. You told your class, "I will not leave John Pelozza alone to propagandize kids with this religious, superstitious nonsense." The court said you were referring to Creationism. Do you agree?

A. I was referring to the way John Pelozza was teaching in his biology classroom, not Creationism. He was leading kids to the understanding that there were major scientific flaws in evolution. As a matter of science, there really aren't. If that's offensive to someone's faith, I'm sorry.

Q. You routinely make provocative statements in class. How do you make sure you're not crossing any legal boundaries?

A. I just try to control myself. I am very careful with what I say to my class. It's

important to try to provoke the students into some interest. Just keeping them awake can be a challenge. ... There isn't a lot I can do for people who think I'm anti-Christian and that I'm trying to turn my kids into atheists.

Q. When the court ruling was handed down last week, the Register story generated more than 800 online comments from readers. Were you surprised?

A. In truth, it's an awfully hot topic. Religious and social conservatives believe that Christians are discriminated against, so this feeds into an existing political issue. People say Christians are the most persecuted people on earth. I think that should be investigated. There are venues where reason is supposed to prevail. ... Mostly the people who make nasty comments are making those comments only reading one side of the story. When people say, let's teach both sides of the evolution debate, well, there is no both sides. There is science and there is religion.

Q. What is your approach to addressing religion with your students?

A. So many people think that sitting around in a school or mosque or church or synagogue or temple and memorizing large amounts of information is knowledge. It's not knowledge; it's indoctrination. The fact that I force people to think about other ways

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doesn't mean I'm anti-Christian. I regularly say, "Look, there's belief and I don't care what you believe. But there's also history and science." Belief tends to be something that's rock-solid. It doesn't require proof. I go out of my way to separate the two.

Q. People have accused you of being anti-Christian. What are your personal religious convictions?

A. The most important words ever spoken are: "Love your neighbors as yourself," "Do unto others as you would have them do unto you," and "Judge not, lest you be judged." We hear those words from a lot of religions. That's what I believe – that's the core of it. I'm eclectic with religion. I was baptized Catholic and have worn a Celtic cross around my neck for the past 50 years. Right now, I'd call myself a smorgasbord Catholic. Occasionally, I go to a church on holidays. And I often stand behind the curtains at Crossline Church (a nondenominational Christian church that meets at Capistrano Valley High on Sundays) and listen to the sermon. They are intellectually stimulating, and they can often provide you with a perspective on major issues of the day. I like to hear what anybody has to say.

Q. You hold a Ph.D. and have taught at the college level in the past. What do you like about teaching high school kids?

A. I would rather teach bright high school kids than spend the rest of my life with rather average college students. My classroom is full of kids who are so bright and so open. They have so many interests. I call my kids my puppies. Everyday I get to go to work and play with 160 puppies. They are a little bit out of control, but they are eager to learn and they are an awful lot of fun. Tell me, what kind of job is better than that?

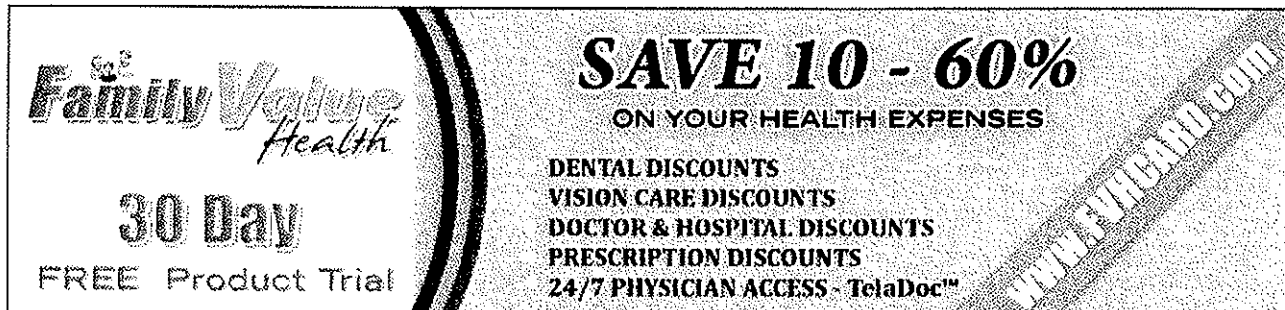
Q. Chad Farnan's lawsuit says other students have withdrawn from your class because of your attitudes toward religion. Are you aware of this?

A. I've had parents concerned in the past, but almost every time, I've been able to make them understand that I'm just trying to teach their child the best way I know how. Most parents come up to me at open house and say, "I'm so glad to meet you. For the first time, my child is talking about what is going on in the world. We have great conversations at dinner. Thank you." That's my goal, and I can't imagine how anything is wrong with that.

Q. Your legacy as a teacher is likely to be defined by this lawsuit. How does that make you feel?

A. The one thing I don't want people to see me as is intolerant. I am tolerant of almost everything, except intolerance. The

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Advocates for Faith & Freedom (Farnan's attorneys) have defended the right of a pharmacist on religious grounds to not sell birth control to an unmarried woman. They have defended the right of a doctor to refuse reproductive assistance to a lesbian. They have defended the right of a boy to wear a T-shirt that was offensive to homosexuals. We have children killing themselves and getting killed from the homophobic bullying that goes on in American schools. Going out of your way to encourage a kid to wear a shirt that he knows will hurt other students – I find it very disappointing.


Click on the photo above to view a slideshow of photos from James Corbett's classroom.

Contact the writer: 949-454-7394 or
smartindale@ocregister.com

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