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14 UNITED STATES DISTRICT COURT
15 CENTRAL DISTRICT OF CALIFORNIA

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.

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

**REPLY TO OPPOSITION TO
MOTION FOR DETERMINATION
THAT DR. CORBETT IS ENTITLED
TO QUALIFIED IMMUNITY;
MEMORANDUM OF POINTS 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 Defendants CAPISTRANO UNIFIED SCHOOL DISTRICT ("CUSD") and
6 DR. JAMES CORBETT ("Dr. Corbett") (sometimes collectively "Defendants")
7 submit the following memorandum of points and authorities in reply to the opposition
8 of Plaintiff CHAD FARNAN ("Farnan") to Defendants' motion for this Court to
9 determine that Dr. Corbett is entitled to qualified immunity in this matter.

10 DATED: June 22, 2009

WOODRUFF, SPRADLIN & SMART, APC

11
12 By: 

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

13
14
15
16 DATED: June __, 2009

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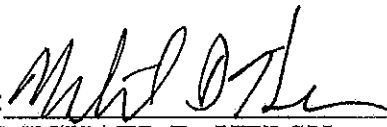
WOODRUFF, SPRADLIN & SMART, APC

11 By: _____

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14 Attorneys for Defendants CAPISTRANO
15 UNIFIED SCHOOL DISTRICT and DR.
16 JAMES CORBETT

16 DATED: June ²²__, 2009

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **1. INTRODUCTION**

3 Farnan argues that Dr. Corbett is not entitled to qualified immunity because the
4 contours of the right to be free from the government expressing disapproval of
5 religion were sufficiently clear such that Dr. Corbett should have known that his
6 comment was a violation of the Establishment Clause. In support of this position
7 Farnan relies on broad, general Establishment Clause principles and ignores the
8 context in which the comment at issue in this case occurred as is required when
9 considering the applicability of a qualified immunity defense. Farnan also argues that
10 Dr. Corbett's request that qualified immunity be applied to him at this time is too late
11 and, as such, should be denied. Farnan is incorrect on both arguments.

12 **2. BECAUSE THE RIGHT THAT DR. CORBETT HAS BEEN**
13 **DETERMINED TO HAVE VIOLATED WAS NOT CLEARLY**
14 **ESTABLISHED IN 2007 HE IS ENTITLED TO A FINDING OF**
15 **QUALIFIED IMMUNITY IN HIS FAVOR**

16 Farnan argues that because the right at issue here is the general right to be free
17 of a governmental actor disapproving of religion and that this right was clearly
18 established, Dr. Corbett is not entitled to qualified immunity. Farnan's argument, that
19 simply because such broad category of a right is well established under the
20 Constitution, governmental actors who are alleged to have violated this right are not
21 entitled to qualified immunity, was flatly rejected by the United States Supreme Court
22 in Anderson v. Creighton, 483 U.S. 635, 638-640, 107 S.Ct. 3034, 97 L.Ed.2d 523
23 (1987)). In Anderson, an FBI agent who participated in a warrantless search of the
24 plaintiff's home while looking for a bank robbery suspect asserted a right to qualified
25 immunity on summary judgment. The court of appeal denied the motion, holding that
26 the right of persons to be protected from warrantless searches unless the searching
27 officers have probable cause and/or there are exigent circumstances was clearly
28 established at the time of the search. The Supreme Court reversed, noting:

1 “[T]he right to due process of law is quite clearly established by the Due
2 Process Clause, and thus there is a sense in which any action that violates
3 that Clause (no matter how unclear it may be that the particular action is
4 a violation) violates a clearly established right. Much the same could be
5 said of any other constitutional or statutory violation. But if the test of
6 ‘clearly established law’ were to be applied at this level of generality, it
7 would bear no relationship to the ‘objective legal reasonableness’ that is
8 the touchstone of *Harlow*. Plaintiffs would be able to convert the rule of
9 qualified immunity that our cases plainly establish into a rule of virtually
10 unqualified liability simply by alleging violation of extremely abstract
11 rights. *Harlow* would be transformed from a guarantee of immunity into
12 a rule of pleading. Such an approach, in sum, would destroy ‘the balance
13 that our cases strike between the interests in vindication of citizens’
14 constitutional rights and in public officials’ effective performance of their
15 duties, by making it impossible for officials ‘reasonably to anticipate
16 when their conduct may give rise to liability for damages.’” (*Id.* at 639,
17 citation omitted)

18 The correct legal standard for judging whether a public employee is entitled to
19 the defense of qualified immunity was stated by the Supreme Court in Anderson v.
20 Creighton, supra, wherein the court held that whether a governmental official is
21 entitled to qualified immunity turns on the objective legal reasonableness of the
22 officials’ actions in light of the legal rules that were clearly established at the time the
23 action was taken. The question in this case, then, is not the abstract principal of
24 freedom from a public actor disapproving of religion, but whether Dr. Corbett, in light
25 of all of the facts and circumstances confronting him at the time, was aware that a
26 teacher could violate the Establishment Clause by making a single, incidental
27 statement to his class during a year-long course.

28 ///

1 The Supreme Court reiterated this view in Saucier v. Katz, 533 U.S. 194, 121
2 S.Ct. 2151, 150 L.Ed.2d 272 (2001), where it held that the inquiry is not whether a
3 particular right is established in a vacuum but whether it was established on the
4 specific facts of a particular case. (Id. at 202 [the court must find that the right was
5 clearly established in light of the specific facts of a particular case such that “a
6 reasonable official would understand that what he is doing violates that right”])

7 The Ninth Circuit noted the same in Walker v. Gomez, 370 F.3d 969, 978 (9th
8 Cir. 2004):

9 “The second prong of the Saucier inquiry operates at a *high level of*
10 *specificity*. It is *insufficient that the broad principle underlying a right is*
11 *well-established*. . . . While it is well-established that racial
12 discrimination in the assignment of prison jobs is unconstitutional, . . . it
13 has not been clearly established that such race-based differentiation is
14 unconstitutional in the context of a prison-wide lockdown instituted in
15 response to gang-or race-based violence. Defendants are therefore
16 entitled to qualified immunity.” (Emphasis added; see also, Rudebusch v.
17 Hughes, 313 F.3d 506, 518 (9th Cir. 2002) [finding that while the general
18 rules were well enough established, “the specific contours of the law . . .
19 were not well developed or sufficiently clear at the time”])

20 In Pearson v. Callahan, -- U.S. --, 129 S.Ct. 808, 172 L.Ed.2d 565 (2009), the
21 U.S. Supreme Court recently reiterated that governmental actors are entitled to
22 qualified immunity even if they make a mistake, “regardless of whether the
23 government official’s error is ‘a mistake of law, a mistake of fact, or a mistake based
24 on mixed questions of law and fact.’” In Saucier v. Katz, supra, 533 U.S. at 201, the
25 high Court stated that “qualified immunity protects ‘all but the plainly incompetent or
26 those who knowingly violate the law’.”

27 Recently, in Fogel v. Collins, 531 F.3d 824 (9th Cir. 2008), an arrestee brought
28 a section 1983 action against the police department and police officers alleging a

1 violation of his First Amendment rights when he was arrested because of various
2 messages painted on the back of his van. The individual officers asserted a qualified
3 immunity defense. In analyzing this defense the court addressed the first prong of the
4 defense, i.e., whether there was a constitutional violation. In analyzing this issue the
5 court applied an objective standard and held that “a reasonable person would [not]
6 foresee that the statement [on the van] would be interpreted by those to whom [Fogel]
7 communicates the statement as a serious expression of intent to harm or assault.” (Id.
8 at 831) The court also found that there virtually was no evidence that Fogel
9 subjectively intended the speech as a true threat of serious harm. (Id. at 832)
10 Therefore, the court concluded that the message communicated on Fogel's van was
11 protected by the First Amendment, and that the police officers violated Fogel's First
12 Amendment rights by arresting him, impounding the van, and requiring him to paint
13 over the message before allowing him to retrieve the van. (Id. at 833)

14 The Fogel court then went on to analyze the second prong of the qualified
15 immunity inquiry, i.e., whether the right was clearly established. As the court stated,
16 “Our inquiry focuses on the *precise circumstances* of a particular case as well as the
17 state of the law at the time of the alleged violation.” (Ibid.; emphasis added) In
18 making this analysis the court noted:

19 “[I]n no case had a court held on identical or closely comparable facts
20 that the speech was protected by the First Amendment. That is, in May
21 2004, when the officers acted, there was no reported case in which a
22 person in the post-September 11 environment satirically proclaimed
23 himself or herself to be a terrorist in possession of weapons of mass
24 destruction.” (Ibid.)

25 Thus, the court held that despite the officers’ violation of Fogel’s First Amendment
26 rights, qualified immunity applied. (Id. at 834)

27 Here, as noted in Defendants’ moving papers, there was no case law available
28 in 2007 that held that a teacher could violate the Establishment Clause by making a

1 single, incidental statement in a single lecture. Farnan has not disputed this and has
2 not presented any contrary case law that is on point. Defendants also presented case
3 law in its moving papers that shows that great confusion has been expressed both by
4 the Ninth Circuit and the United States Supreme Court over how to determine whether
5 an activity violates the Establishment Clause. Again, Farnan does not dispute this case
6 law.

7 It appears that this Court's ruling that a teacher can violate the Establishment
8 Clause by making a single, incidental statement is the first time such a ruling has been
9 made. As such, Dr. Corbett is entitled to a determination of the second prong of the
10 qualified immunity inquiry, i.e., was the right deemed to have been violated clearly
11 established in 2007. A review of the applicable law as presented by Defendants
12 mandates that this prong be decided in the negative – the right was *not* clearly
13 established.

14 **3. DR. CORBETT HAS TIMELY RAISED THE ISSUE OF QUALIFIED**
15 **IMMUNITY**

16 Farnan argues that because Dr. Corbett did not raise qualified immunity in a
17 motion to dismiss or motion for summary judgment he has waived the right to raise it
18 now. Farnan is incorrect.

19 In Guzman-Rivera v. Rivera-Cruz, 98 F.3d 664, 667 (1st Cir. 1996), the Court
20 discusses the question of when, during the course of the litigation, the defense may be
21 raised. The court noted that the doctrine of qualified immunity may be raised in a
22 motion to dismiss, on a motion for summary judgment or at trial. (See also, Skrnich v.
23 Thornton, 280 F.3d 1295, 1306 (11th Cir. 2002) [qualified immunity may be raised on
24 a pretrial motion to dismiss under Rule 12(b)(6), as an affirmative defense in a request
25 for judgment on the pleadings pursuant to Rule 12(c), on a summary judgment motion
26 pursuant to Rule 56(e), or at trial])

27 Courts also may raise the issue of qualified immunity sua sponte and even, for
28 the first time, on appeal. (See, Graves v. City of Coeur D'Alene, 339 F.3d 828, 845 fn.

1 23 (9th Cir. 2003); see also, Sonoda v. Cabrera, 255 F.3d 1035 (9th Cir.2001))

2 In Shepard v. Wapello County, 303 F. Supp.2d 1004, 1012 (S.D. Iowa 2003),
3 the court noted that generally qualified immunity should be decided long before trial;
4 however, in that case, as the court noted, the issue could not be decided before trial
5 because the defendants did not present it until their Rule 50(a) motions made during
6 trial. The defendants in Shepard did not present the qualified immunity defense in
7 their motion for summary judgment.

8 In Kwai Fun Wong v. United States, 373 F.3d 952, 956, 957 (9th Cir. 2004), the
9 court recognized that the qualified immunity issue cannot be resolved without first
10 deciding the scope of the constitutional rights at stake. Thus, the court recognized that
11 while a defendant has the right to raise the qualified immunity on a motion to dismiss,
12 often the exercise of that right is not a wise choice. (Ibid.)

13 Farnan relies on the case of Evans v. Fogarty, 241 Fed.Appx. 542, 2007 WL
14 2380990 (10th Cir. 2007), to support his argument that Dr. Corbett's raising of the
15 qualified immunity defense at this time is untimely, and thus, waived. Notably, in
16 Evans, the court noted that defenses not raised in the pretrial conference order under
17 Federal Rules of Civil Procedure, Rule 16, even if raised in the pleadings, are waived.
18 Here, however, no pretrial conference order was ever completed due to the parties'
19 pending motions for summary judgment. Thus, Defendants were precluded from
20 presenting this defense in the pretrial conference order. Undoubtedly, the qualified
21 immunity defense would have been included as a defense in the pretrial conference
22 order since the Union Intervenors had raised this defense on Dr. Corbett's behalf.

23 Farnan also relies on Camarillo v. McCarthy, 998 F.2d 638, 639 (9th Cir. 1993),
24 to support his argument that the failure to raise qualified immunity as a defense in the
25 answer waives it. This, however is not what Camarillo holds. In Camarillo the
26 plaintiff argued that the prison officials waived the defense of qualified immunity by
27 failing to raise it as an affirmative defense in their answer to the complaint. While
28 recognizing that qualified immunity is an affirmative defense that *should* be pled by

1 the defendant, where there is no showing of prejudice, it can be raised at a later time.
2 (Ibid.) In Camarillo, the later time that was acceptable was when the defendants raised
3 the issue for the first time at summary judgment. (Ibid.) Because the record did not
4 suggest any prejudice, the court held that the defense of qualified immunity was not
5 waived. (Ibid.)

6 Here, too, there is no prejudice to Farnan by allowing Dr. Corbett to raise the
7 qualified immunity defense at this time. In opposition to Defendants' motion to amend
8 their answer, Farnan argues that he would be prejudiced by allowing the amendment
9 because he already has undertaken extensive discovery and the parties already filed
10 dispositive motions. (Opposition to motion to amend, 9:6-21) This argument is not
11 well taken.

12 As pointed out in Defendants' concurrently filed reply to the opposition to the
13 motion for leave to amend, this discovery and these motions would have been filed
14 anyway. First, Dr. Corbett is not the only defendant in this matter – the District also
15 was a named Defendant in Farnan's complaint. As such, even if Dr. Corbett had raised
16 the defense in his answer, all of the discovery and dispositive motions would have
17 been necessary due to the District also being a party to the action. Further, in light of
18 this Court's ruling on Defendants' motion to dismiss (finding that sufficient facts had
19 been alleged to show a potential violation of the Establishment Clause), as well as the
20 Court's ruling on Farnan's motion for summary judgment (finding that a single,
21 incidental statement constituted a violation of the Establishment Clause) it is likely
22 that a qualified immunity defense would not have been sustained at the preliminary
23 stages; thus necessitating the conducting of discovery and the filing of the dispositive
24 motions.

25 Farnan also argues in his opposition to Defendants' motion for leave to amend
26 their answer that the Union Intervenors lacked standing to assert the qualified
27 immunity defense on Dr. Corbett's behalf, and even if they did have standing, the
28 defense was lost due to the Union Intervenors' failure to argue it. (Opposition to

1 motion to amend, 9:22-10:22) Again, Farnan’s arguments are not well taken.

2 In support of his “standing” argument, Farnan cites to Harlow v. Fitzgerald, 457
3 U.S. 800, 815, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982). Harlow should not be given
4 the narrow reading ascribed to it by Farnan. Nothing in Harlow would preclude an
5 intervenor on behalf of a defendant from raising an affirmative defense on behalf of
6 that defendant. Here, Union Intervenors have a special legal relationship to Dr.
7 Corbett, who is a dues-paying member of both the Capistrano Unified Education
8 Association and the California Teachers Association. This special relationship is
9 recognized under California law, which holds: “Any employee organization shall have
10 standing to sue in any action or proceeding . . . as representative and on behalf of one
11 or more of its members.” (Government Code section 3543.8)

12 Therefore, because there would be no prejudice to Farnan to allow a
13 determination of the qualified immunity to occur at this stage of the proceedings, it is
14 proper for this Court to make this determination at this time.

15 As previously noted by Defendants, which also is unrefuted by Farnan, this
16 Court’s May 1st decision was the first time that a court has held that a single comment
17 made by a teacher during the course of a single lecture in a year-long class could
18 constitute an Establishment Clause violation. The parties have submitted numerous
19 briefs in this case and no one has produced a case that has held that a teacher can
20 violate the Establishment Clause by making a single statement during the course of
21 one lecture.

22 Thus, Defendants and the Union Intervenors, by seeking a determination of the
23 qualified immunity defense as soon as possible after this Court’s determination, have
24 not unreasonably delayed in raising this defense but have asserted it at the first
25 practicable moment. There is no prejudice to Farnan to decide the qualified immunity
26 issue at this time. The qualified immunity defense is now ripe for this Court’s
27 determination and that determination should be in Dr. Corbett’s favor.

28 ///

