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DISTRICT and DR. JAMES CORBETT

7
8 UNITED STATES DISTRICT COURT
9 CENTRAL DISTRICT OF CALIFORNIA

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

13 Plaintiff,

14 v.

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

18 Defendants.

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

22 Union Intervenors/Defendants.
23

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

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

HEARINGS PENDING:

TYPE: Motions
DATE: August 31, 2009
TIME: 1:30 p.m.
COURTROOM: 10C/Judge Selna

24 TO: ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

25 PLEASE TAKE NOTICE that on August 31, 2009, at 1:30 p.m. or as soon
26 thereafter as the matter may be heard in Courtroom 10C of the above-entitled Court,
27 located in the Ronald Reagan Federal Building, 411 West Fourth Street, Santa Ana,
28 California 92701, Defendants CAPISTRANO UNIFIED SCHOOL DISTRICT

1 (“CUSD”) and DR. JAMES CORBETT (“Dr. Corbett”) (sometimes collectively
2 “Defendants”) will and hereby do move this Court, following its ruling on the parties’
3 motions for summary judgment, for a determination that Dr. Corbett is entitled to
4 qualified immunity in this matter.

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

10 DATED: July 24, 2009 WOODRUFF, SPRADLIN & SMART, APC

11
12
13 By: 

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UNIFIED SCHOOL DISTRICT and DR.
JAMES CORBETT

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1 MEMORANDUM OF POINTS AND AUTHORITIES

2 1. INTRODUCTION

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

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

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

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

26 _____

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 SHOULD 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 The United States Supreme Court has repeatedly rejected the position that
7 simply because a broad category of a right might be well established under the
8 Constitution, governmental actors who are alleged to have violated that right are not
9 entitled to qualified immunity. (See, Anderson v. Creighton, 483 U.S. 635, 638-640,
10 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987)) In Anderson, an FBI agent who participated
11 in a warrantless search of the plaintiff's home while looking for a bank robbery
12 suspect asserted a right to qualified immunity on summary judgment. The court of
13 appeal denied the motion, holding that the right of persons to be protected from
14 warrantless searches unless the searching officers have probable cause and/or there are
15 exigent circumstances was clearly established at the time of the search. The Supreme
16 Court reversed, noting:

17 “[T]he right to due process of law is quite clearly established by the Due
18 Process Clause, and thus there is a sense in which any action that violates
19 that Clause (no matter how unclear it may be that the particular action is
20 a violation) violates a clearly established right. Much the same could be
21 said of any other constitutional or statutory violation. But if the test of
22 ‘clearly established law’ were to be applied at this level of generality, it
23 would bear no relationship to the ‘objective legal reasonableness’ that is
24 the touchstone of Harlow. Plaintiffs would be able to convert the rule of
25 qualified immunity that our cases plainly establish into a rule of virtually
26 unqualified liability simply by alleging violation of extremely abstract
27 rights. Harlow would be transformed from a guarantee of immunity into a
28 rule of pleading. Such an approach, in sum, would destroy ‘the balance

1 that our cases strike between the interests in vindication of citizens'
2 constitutional rights and in public officials' effective performance of their
3 duties, by making it impossible for officials 'reasonably to anticipate
4 when their conduct may give rise to liability for damages.'" (Id. at 639,
5 citation omitted)

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

12 In Saucier, the court identified two inquiries to be made in determining whether
13 a public official is entitled to qualified immunity. The first is whether the alleged acts,
14 when construed in the light most favorable to the plaintiff, show that the official's
15 conduct violated a constitutional right. (Id. at 200-201) If no constitutional right was
16 violated even under the plaintiff's allegations, the official is entitled to judgment;
17 however, if a constitutional violation could be established under a favorable view of
18 the evidence submitted, the court must move to the second step in the analysis. That
19 step involves an inquiry into whether the constitutional right was clearly established
20 and "must be undertaken in light of the specific context of the case, not as a broad
21 general proposition." (Ibid.)⁴

22 Quoting Malley v. Briggs, 475 U.S. 335, 341, 106 S.Ct. 1092, 89 L.Ed.2d 271
23 (1986), the Saucier court stated that qualified immunity protects "all but the plainly
24

25 ⁴ More recently the United States Supreme Court held that while the sequence set
26 forth in Saucier is often appropriate, it should no longer be regarded as mandatory.
27 Instead, judges should be permitted to exercise their sound discretion in deciding
28 which of the two prongs of the qualified immunity analysis should be addressed first
in light of the circumstances in the particular case at hand. (Pearson v. Callahan, 555
U.S. --, 129 S.Ct. 808, 818, 172 L.Ed.2d 565 (2009)) The Pearson court also
recognized that the Saucier protocol, while not mandatory, often is beneficial.
(Pearson v. Callahan, supra, 129 S.Ct. at 818)

1 incompetent or those who knowingly violate the law.” (Saucier v. Katz, *supra*, 533
2 U.S. at 202) A public official or employee is entitled to qualified immunity even if
3 that official makes a good faith mistake about the law. (*Id.* at 205)

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

13 In United States v. Lanier, 520 U.S. 259, 270, 117 S.Ct. 1219, 137 L.Ed.2d 432
14 (1997), the court stated that a public official can be liable for a constitutional violation
15 “only if ‘the contours of the right [violated are] sufficiently clear that a reasonable
16 official would understand that what he is doing violates that right.’” Under qualified
17 immunity, public employees remain immune as long as their actions do not violate
18 clearly established [federal] statutory or constitutional rights of which a reasonable
19 person would have known. (Harlow v. Fitzgerald, *supra*, 457 U. S. at 817-818
20 [allegations of malice are insufficient to overcome application of qualified immunity])

21 The Ninth Circuit recently stated:

22 “The constitutional violation must be ‘clearly established’ at the time of
23 the alleged misconduct. [Citation] ‘The operation of this standard,
24 however, depends substantially upon the level of generality at which the
25 relevant “legal rule” is to be identified.’ [Citation] ‘[T]he right the
26 official is alleged to have violated must have been “clearly established”
27 in a more particularized, and hence more relevant, sense: The contours of
28 the right must be sufficiently clear that a reasonable official would

1 understand that what he is doing violates that right.’ [Citation] . . . ‘The
2 dispositive inquiry is “whether it would be clear to a reasonable [official]
3 that his conduct was unlawful in the situation he confronted.” [Citation]”
4 (Rodis v. City, County of San Francisco, 558 F.3d 964, 969 (9th Cir.
5 2009))

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

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

19 In another recent case – Fogel v. Collins, 531 F.3d 824 (9th Cir. 2008) – the
20 Ninth Circuit again reiterated this view. In Fogel, an arrestee brought a section 1983
21 action against the police department and police officers alleging a violation of his First
22 Amendment rights when he was arrested because of various messages painted on the
23 back of his van. The individual officers asserted a qualified immunity defense. In
24 analyzing this defense the court addressed the first prong of the defense, i.e., whether
25 there was a constitutional violation. In analyzing this issue the court applied an
26 objective standard and held that “a reasonable person would [not] foresee that the
27 statement [on the van] would be interpreted by those to whom [Fogel] communicates
28 the statement as a serious expression of intent to harm or assault.” (Id. at 831) The

1 court also found that there virtually was no evidence that Fogel subjectively intended
2 the speech as a true threat of serious harm. (Id. at 832) Therefore, the court concluded
3 that the message communicated on Fogel's van was protected by the First
4 Amendment, and that the police officers violated Fogel's First Amendment rights by
5 arresting him, impounding the van, and requiring him to paint over the message before
6 allowing him to retrieve the van. (Id. at 833)

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

12 “[I]n no case had a court held on identical or closely comparable facts
13 that the speech was protected by the First Amendment. That is, in May
14 2004, when the officers acted, there was no reported case in which a
15 person in the post-September 11 environment satirically proclaimed
16 himself or herself to be a terrorist in possession of weapons of mass
17 destruction.” (Ibid.)

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

20 The plaintiff has the burden of proving that the rights he claims were “clearly
21 established.” (Davis v. Scherer, 468 U.S. 183, 197, 104 S.Ct. 3012, 82 L.Ed.2d 139
22 (1984))

23 Here, Farnan has not and cannot establish that the rights he claims were
24 violated were “clearly established” under existing case law in 2007. At that time it
25 was not clearly established that a teacher could violate the Establishment Clause by
26 making a single statement in one lecture given during a year-long course. Cases that
27 have discussed or held that schools have violated the Establishment Clause have
28 looked at the *curriculum* or *theme* or ongoing conduct being challenged.

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

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

11 In School Dist. of Abington Township v. Schempp, 374 U.S. 203, 83 S.Ct.
12 1560, 10 L.Ed.2d 844 (1963), the court found unconstitutional Pennsylvania's practice
13 of permitting public schools to read Bible verses at the opening of each school day.
14 (See also, Wallace v. Jaffree, 472 U.S. 38, 70, 105 S.Ct. 2479, 86 L.Ed.2d 29 (1985)
15 [Alabama statute authorizing moment of silence for school prayer]; Stone v. Graham,
16 449 U.S. 39, 101 S.Ct. 192, 66 L.Ed.2d 199 (1980) [posting copy of Ten
17 Commandments on public classroom wall]; Engel v. Vitale, 370 U.S. 421, 430, 82
18 S.Ct. 1261, 1266, 8 L.Ed.2d 601 (1962) [recitation of "denominationally neutral"
19 prayer])

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

27 In Altman v. Bedford Cent. School Dist., 245 F.3d 49, 78 (2nd Cir. 2001), the
28 court looked at whether a school's Earth Day celebration endorsed the religion of

1 Gaia. In finding that it did not, the court stated:

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

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

16 Justices of the Supreme Court themselves have remarked on the confusion
17 surrounding the proper interpretation of the Establishment Clause. (See for example,
18 Rosenberger v. Rector, 515 U.S. 819, 861, 115 S.Ct. 2510, 2532, 132 L.Ed.2d 700
19 (1995) [Thomas, J., concurring: “[O]ur Establishment Clause jurisprudence is in
20 hopeless disarray . . .”]; Lynch v. Donnelly, 465 U.S. 668, 688-689, 104 S.Ct. 1355,
21 1367, 79 L.Ed.2d 604 (1984) [O'Connor, J., concurring: “It has never been entirely
22 clear . . . how the three parts of the [*Lemon*] test relate to the principles enshrined in
23 the Establishment Clause”]; Van Orden v. Perry, 545 U.S. 677, 125 S.Ct. 2854, 162
24 L.Ed.2d 607 (2005) [Thomas, J., concurring: “The unintelligibility of this Court's
25 precedent raises the further concern that, either in appearance or in fact, adjudication
26 of Establishment Clause challenges turns on judicial predilections”])

27 Recently, the Ninth Circuit in Krestan v. Deer Valley Unified School District
28 No. 97, of Maricopa County, 561 F.Supp.2d 1078, 1086 (D. Ariz., 2008), commented

1 on this confusion, stating:

2 “The analytical test to be applied in determining whether the video
3 violates the Establishment Clause is not easily identified. See *Card v.*
4 *City of Everett*, 520 F.3d 1009, 1013-16 (9th Cir.2008) (discussing the
5 somewhat confused state of Establishment Clause jurisprudence). The
6 Supreme Court has used a number of different tests. In the plurality
7 portion of her opinion for the Supreme Court in *Mergens*, Justice
8 O'Connor applied the traditional three-part test found in *Lemon v.*
9 *Kurtzman*, 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971). See
10 *Mergens*, 496 U.S. at 247-53, 110 S.Ct. 2356. That test asks (1) whether
11 the government action in question has a secular purpose, (2) whether its
12 principal or primary effect is one that neither advances nor inhibits
13 religion, and (3) whether the action would foster an excessive
14 government entanglement with religion. *Lemon*, 403 U.S. at 612-13, 91
15 S.Ct. 2105. [¶] Justice Kennedy concurred with the *Mergens* plurality,
16 but applied a different test. *Mergens*, 496 U.S. at 260-62, 110 S.Ct. 2356.
17 He asked whether the government action gives direct benefits to a
18 religion in such a degree that it in fact establishes a state religion, or
19 whether the government action coerces any student to participate in a
20 religious activity. *Id.* at 260, 110 S.Ct. 2356. [¶] The Supreme Court's
21 decision in *Good News Club v. Milford Central School*, 533 U.S. 98, 121
22 S.Ct. 2093, 150 L.Ed.2d 151 (2001), which was handed down after
23 *Mergens*, applied neither *Lemon* nor Justice Kennedy's test. The case
24 instead considered the school's neutrality toward religion, any coercive
25 pressure students might feel to engage in the club's activity, and whether
26 the school's action would be perceived as an endorsement of particular
27 religious views. *Id.* at 114-18, 121 S.Ct. 2093.”

28 ///

1 Given the confusion expressed both by the Ninth Circuit and the United States
2 Supreme Court over how to determine whether an activity violates the Establishment
3 Clause, it is not surprising that the law is not clear to a teacher that a single comment
4 made in a lecture in a year-long course might constitute a violation of the
5 Establishment Clause. This Court, apparently for the first time, made such a
6 determination when it ruled that Dr. Corbett violated the Establishment Clause when
7 he made the single statement during one lecture that the teaching of creationism in a
8 high school biology class was “religious, superstitious nonsense.”

9 By its ruling this Court determined that the first prong of the qualified immunity
10 inquiry. Now, Dr. Corbett is entitled to a determination of the second prong of the
11 inquiry, i.e., was the right deemed to have been violated clearly established in 2007. A
12 review of the applicable law, as discussed above, and applying the required objective
13 standard, mandates that this prong be decided in the negative – the right was *not*
14 clearly established. Although the parties have had ample opportunity to brief this
15 particular issue, to date no case has been presented where a school teacher was held to
16 have violated the Establishment Clause by making a single statement during a year-
17 long course. Accordingly, the right cannot be said to be clearly established and Dr.
18 Corbett is entitled to a determination of qualified immunity in his favor.

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

21 In Guzman-Rivera v. Rivera-Cruz, 98 F.3d 664, 667 (1st Cir. 1996), the Court
22 discussed the question of when, during the course of the litigation, the qualified
23 immunity defense may be raised. The court noted that the doctrine of qualified
24 immunity may be raised in a motion to dismiss, on a motion for summary judgment or
25 at trial. (See also, Skrnich v. Thornton, 280 F.3d 1295, 1306 (11th Cir. 2002)
26 [qualified immunity may be raised on a pretrial motion to dismiss under Rule
27 12(b)(6), as an affirmative defense in a request for judgment on the pleadings pursuant
28 to Rule 12(c), on a summary judgment motion pursuant to Rule 56(e), or at trial])

1 Courts also may raise the issue of qualified immunity *sua sponte* and even, for
2 the first time, on appeal. (See, Graves v. City of Coeur D'Alene, 339 F.3d 828, 845 fn.
3 23 (9th Cir. 2003); see also, Sonoda v. Cabrera, 255 F.3d 1035 (9th Cir.2001))

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

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

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

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

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

1 theme of Dr. Corbett's lectures. Farnan clearly stated that the gist of his action was the
2 "barrage of religious hostility" expressed throughout the Fall 2007 semester and that
3 his action did not concern "a few incidental statements" of Dr. Corbett.

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

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

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

19 There is no prejudice to Farnan by allowing Dr. Corbett to raise the qualified
20 immunity defense at this time. Farnan has argued that he would be prejudiced by
21 allowing the amendment because he already has undertaken extensive discovery and
22 the parties already filed dispositive motions. This argument is not well taken because
23 this discovery and these motions would have been filed anyway. First, Dr. Corbett is
24 not the only defendant in this matter – the District also was a named Defendant in
25 Farnan's complaint. As such, even if Dr. Corbett had raised the defense in his answer,
26 all of the discovery and dispositive motions would have been necessary due to the
27 District also being a party to the action. Further, in light of this Court's ruling on
28 Defendants' motion to dismiss (finding that sufficient facts had been alleged to show a

1 potential violation of the Establishment Clause), as well as the Court's ruling on
2 Farnan's motion for summary judgment (finding that a single, incidental statement
3 constituted a violation of the Establishment Clause) it is likely that a qualified
4 immunity defense would not have been sustained at the preliminary stages; thus
5 necessitating the conducting of discovery and the filing of the dispositive motions.


6 Thus, Defendants, by seeking a determination of the qualified immunity
7 defense as soon as possible after this Court's determination, have not unreasonably
8 delayed in raising this defense but have asserted it at the first practicable moment. The
9 qualified immunity defense is now ripe for this Court's determination and that
10 determination should be in Dr. Corbett's favor.

11 **3. CONCLUSION**

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

14 DATED: July 24, 2009

WOODRUFF, SPRADLIN & SMART, APC

15
16 By: 

17 DANIEL K. SPRADLIN
18 ROBERTA A. KRAUS
19 Attorneys for Defendants CAPISTRANO
20 UNIFIED SCHOOL DISTRICT and DR.
21 JAMES CORBETT
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1 **PROOF OF SERVICE**

2 **STATE OF CALIFORNIA, COUNTY OF ORANGE**

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

5 On July 24, 2009, I served the foregoing document(s) described as **DEFENDANTS'**
6 **MOTION FOR A DETERMINATION THAT DR. CORBETT IS ENTITLED TO**
QUALIFIED IMMUNITY; MEMORANDUM OF POINTS AND AUTHORITIES

7 by placing the true copies thereof enclosed in sealed envelopes addressed as stated on the
attached mailing list;

8 by causing the foregoing document(s) to be electronically filed using the Court's Electronic
9 Filing System which constitutes service of the filed document(s) on the individual(s) listed
on the attached mailing list:

10 **(BY MAIL)** I placed said envelope(s) for collection and mailing, following ordinary
11 business practices, at the business offices of WOODRUFF, SPRADLIN & SMART, and
12 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
13 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.

14 **(BY OVERNIGHT DELIVERY)** I placed said documents in envelope(s) for collection
15 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
16 to a courier authorized by _____ to receive said documents, with
delivery fees provided for. I am readily familiar with the practices of WOODRUFF,
17 SPRADLIN & SMART for collection and processing of documents for overnight delivery,
and said envelope(s) will be deposited for receipt by _____ on said
18 date in the ordinary course of business.

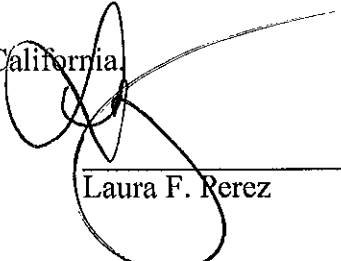
19 **(BY FACSIMILE)** I caused the above-referenced document to be transmitted to the
interested parties via facsimile transmission to the fax number(s) as stated on the attached
20 service list.

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

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

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

26 Executed on July 24, 2009 at Costa Mesa, California.

27 
28 Laura F. Rerez

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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