DANIEL K. SPRADLIN - State Bar No. 82950
dspradlin@wss-law.com
ROBERTA A. KRAUS - State Bar No. 117658
rakraus@wss-law.com
WOODRUFF, SPRADLIN & SMART, APC
555 Anton Boulevard, Suite 1200
Costa Mesa, California 92626-7670
Telephone: (714) 558-7000
Facsimile: (714) 835-7787

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

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

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

Plaintiff,

v.

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

Defendants.

CALIFORNIA TEACHERS ASSOCIATION/NEA; and CAPISTRANO UNIFIED EDUCATION ASSOCIATION,

Union Intervenors/Defendants.

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

DEFENDANTS' MOTION FOR LEAVE TO FILE AN AMENDED ANSWER; MEMORANDUM OF POINTS AND AUTHORITIES; DECLARATION OF DANIEL K. SPRADLIN

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

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TO: ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on July 13, 2009, at 1:30 p.m. or as soon thereafter as the matter may be heard in Courtroom 10C of the above-entitled Court, located in the Ronald Reagan Federal Building, 411 West Fourth Street, Santa Ana, California 92701, Defendants CAPISTRANO UNIFIED SCHOOL DISTRICT ("CUSD") and DR. JAMES CORBETT ("Dr. Corbett") (sometimes collectively "Defendants") will and hereby do move this Court for leave to file an amended answer in order to plead qualified immunity as an affirmative defense in this matter. A copy of this amended answer is attached as Exhibit A.

This motion is based on this notice, the attached memorandum of points and authorities and declaration of Daniel K. Spradlin, the Court's order re the parties' motions for summary judgment, the evidence filed by the parties' in support of their motions for summary judgment, such matters of which this Court may be asked to take judicial notice, as well as the pleadings and records on file in this matter.

DATED: June 8, 2009 WOODRUFF, SPRADLIN & SMART, APC

By: Daniel K. Spradlin
DANIEL K. SPRADLIN
ROBERTA A. KRAUS
Attorneys for Defendants CAPISTRANO UNIFIED SCHOOL DISTRICT and DR. JAMES CORBETT

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1. INTRODUCTION

Throughout this litigation Plaintiff CHAD FARNAN, a minor, by and through his parents BILL FARNAN and TERESA FARNAN ("Farnan") has asserted that "the gravamen of [his] case was and remains the barrage of religious hostility expressed by Dr. Corbett throughout the Fall 2007 semester during his Advanced Placement European History class."[1] As posited by Farnan, this case at no time "concern[ed] a few incidental statements of a teacher that may periodically reflect upon the teacher's personal beliefs" but concerned Dr. Corbett's alleged "continual and incessant actions."[2]

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

It is because of this ruling that it has become apparent that Dr. Corbett is entitled to a determination of qualified immunity in his favor. While the Court has held that the single statement by Dr. Corbett violated the Establishment Clause, in

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[1] See, Plaintiff's reply to Defendants' opposition to Plaintiff's motion for summary judgment, 1:4-6.

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

2007 the law was not established that a single statement by a teacher made during one lecture given in the course of a year-long class could trigger an Establishment Clause violation. Accordingly, it did not become apparent that Dr. Corbett would be entitled to a qualified immunity defense until the Court's ruling on the parties' motions for summary judgment on May 1, 2009. As a direct result of the Court's May 1, 2009 ruling, Defendants now seek leave to amend Defendants' answer to include qualified immunity as an affirmative defense.[3]

A. Statement of Facts

On December 13, 2007, Farnan filed his complaint against CUSD and Dr. Corbett seeking damages and injunctive relief. A first amended complaint subsequently was filed and Defendants answered the first amended complaint on March 19, 2008. On April 28, 2008 the motion of Intervenors, CALIFORNIA TEACHERS ASSOCIATION/NEA and CAPISTRANO UNIFIED EDUCATION ASSOCIATION ("Union Intervenors") was granted and the Union Intervenors' answer to Farnan's first amended complaint was filed. In their answer the Union Intervenors' asserted the qualified immunity defense on Dr. Corbett's behalf. (See, Exhibit B)

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

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[3] Pursuant to the Joint proposal for disposition of the equitable and other remaining issues, this motion is filed concurrently with Defendants' post-summary judgment motion for a determination that Dr. Corbett is entitled to qualified immunity ("motion for determination")

(1) Farnan's first amended complaint in which Farnan asserts: "On a regular basis during the Fall 2007 semester . . ." (4:7-11); "Parents and/or students have complained to the District for many years regarding Dr. Corbett's religious hostility expressed in his classroom" (9:26-27); and "Dr. Corbett continues to spend a large portion of class time . . . , he clearly demonstrates hostility towards religion . . .", "As a result of his ongoing comments . . ." (10:3-7);

(2) Farnan's opposition to Defendants' motion to dismiss in which Farnan asserts: "statements made by Dr. Corbett are continual and incessant" (10:14); "continual and incessant disapproval of religion" (10:23); "For months Chad Farnan sat in an AP European History class . . . learning . . . about Dr. Corbett's own propagation of a 'religion of secularism'" (12:11-14); and "When taken together, [Dr. Corbett's comments] are clearly anti-Christian diatribes" (15:12-13);

(3) Farnan's responses to Defendants' special interrogatories, response nos. 5 and 7 in which Farnan asserts: "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) Farnan'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); and "When applying the correct standard, and reviewing all of Dr. Corbett's comments instead of singling out a few comments . . ." (14:24-26);

(6) Farnan's memorandum of points and authorities in support of motion for summary judgment: "[T]eachers, including [Dr. Corbett] violate the Establishment Clause when they use the classroom to *repeatedly express* disapproval of religion, religious faith, and the resulting worldviews" (1:6-8; emphasis added); "Defendants' decision to 'teach' anti-Christian themes" (15:8-9); "barrage of hostility aimed at Dr. Corbett's students over the years past" (17:16-17); "the statements of Dr. Corbett are continual and incessant" (18:3-4);

(7) Declaration of Chad Farnan in support of Farnan's' motion for summary judgment:[4] "Dr. James Corbett spent a significant amount of class time discussing topics and issues not relevant to European history" (2:19-20); "On a regular basis during the fall 2007 semester, Dr. Corbett discussed a wide variety of topics not related to Advanced Placement European History" (3:3-4); "While teaching the subject of the class and while discussing various other topics, Dr. Corbett made statements and expressed viewpoints that were derogatory, disparaging, and belittling regarding religion and Christianity in particular" (3:5-9); "These comments were not limited to one particular day, but instead occurred on most days that I was in his

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

classroom" (3:10-11); "Dr. Corbett's anti-Christian viewpoints are well-known by the students at my high school as they are often presented through comments he makes during class" (3:12-14); "Dr. Corbett made many comments regarding his personal bias against Christianity" (3:15-16); "When Dr. Corbett was talking to my class, he regularly included his own ideas about God and religion" (3:16-17); "As a result of his ongoing comments . . ." (3:19-20);

(8) Farnan's reply to Defendants' opposition to Farnan's motion for summary judgment: "*The gravamen of Plaintiffs' case was and remains the barrage of religious hostility expressed by Dr. Corbett throughout the Fall 2007 semester* during his Advanced Placement European History class" (1:4-6; emphasis added); and

(9) Farnan's response to Defendants' objections to Farnan's evidence submitted by Farnan in support of his motion for summary judgment: "Dr. Corbett's habit or routine practice of making negative or hostile comments about religion and Christianity . . ." (3:21-22)

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

Now, following the ruling by this Court on the parties' motions for summary judgment, it has become apparent that Dr. Corbett is entitled to a qualified immunity defense. As noted above, up until that ruling Farnan at all times asserted that it was the barrage of comments made by Dr. Corbett that violated the Establishment Clause and that this case was not about "a few incidental statements;" however, that is exactly what this Court ruled when it granted Farnan's motion for summary judgment on the single, incidental statement that in essence stated the teaching of creationism in a high school biology class was "religious, superstitious nonsense." Thus, with this ruling it has become apparent to Defendants' counsel that Dr. Corbett is entitled to qualified immunity; however, that defense was not asserted in the answer filed on behalf of Dr.

Corbett. Thus, leave to amend is sought and should be granted.

2. THE FEDERAL RULES OF CIVIL PROCEDURE REQUIRE THAT LEAVE TO AMEND BE "FREELY GIVEN"

Rule 15(a) of the Federal Rules of Civil Procedure provides that leave of court is required to amend any pleading more than 20 days after that pleading is served; however, Rule 15(a) expressly provides that such leave "shall be freely given when justice so requires." Reg arding Rule 15(a), the United States Supreme Court in Foman v. Davis, 371 U.S. 178, 182, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962), held that "this mandate *is to be heeded.*" (Emphasis added) Indeed, the United States Supreme Court and the Ninth Circuit have repeatedly reaffirmed that leave to amend is to be granted with extreme liberality. (See for example, Ibid [leave to amend should be freely given]; U.S. v. Webb, 655 F.2d 977, 979 (9th Cir. 1981) [courts should be guided by the policy favoring decisions on the merits "rather than on the pleadings or technicalities"]; 3-15 J. Moore, Moore's Federal Practice ¶ 15.14 (3d ed. 2008) ["A liberal, pro-amendment ethos dominates the intent and judicial construction of Rule 15(a)"])

The decision to grant or deny leave to amend lies within the discretion of the district court. (Foman v. Davis, supra, 371 U.S. at 182) In Foman, the plaintiff sought to amend her complaint after the district court entered judgment dismissing the complaint. In holding that the district court abused its discretion when it refused to grant the requested leave to amend, the Foman court stated:

> "In the absence of any apparent or declared reason – such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc. – the leave sought should, as the rules require, be 'freely given.'" (Ibid.)

The Court continued that:

". . . outright refusal to grant the leave without justifying reason appearing for the denial is not an exercise of discretion; it is merely abuse of that discretion and inconsistent with the spirit of the Federal Rules." (Ibid.)

Leave to amend should be granted unless the amendment would cause prejudice to the opposing party, is sought in bad faith, is futile, or creates undue delay. (Ascon Properties, Inc. v. Mobil Oil Company, 866 F.2d 1149, 1160 (9th Cir. 1989)) The Ninth Circuit has held that mere delay in seeking leave to amend is not a sufficient basis for denying a motion to amend. (Morongo Band of Mission Indians v. Rose, 893 F.2d 1074, 1079 (9th Cir. 1990) [finding that even a two-year delay is "not alone enough to support denial"])

A. The Amendment is Not Sought in Bad Faith

In determining whether an amendment is sought in bad faith, courts have inquired whether the party seeking amendment has previously engaged in dilatory tactics and have evaluated the value of the proposed amendment. (See, Thornton v. McClatchy Newspapers, Inc., 261 F.3d 789, 799 (9th. Cir. 2001) [magistrate's finding of bad faith based on plaintiff's history of dilatory tactics during the proceedings and the doubtful value of the proposed amendment])

Here, Defendants are raising the qualified immunity defense at the first practicable moment. The qualified immunity defense was not available to Defendants until the court's ruling on May 1, 2009, when this Court determined that Dr. Corbett violated the Establishment Clause when Dr. Corbett stated "religious, superstitious nonsense" during a discussion about the lawsuit filed against CUSD, Dr. Corbett and others by former biology teacher John Peloza. Mr. Peloza refused to teach the state mandated curriculum (the theory of evolution) but instead taught creationism in the classroom. This ruling, as explained below, rendered the qualified immunity defense available to Defendants for the first time in this litigation.

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As set forth in Harlow v. Fitzgerald, 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982), the qualified-immunity defense "shield[s] [government agents] from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." (Id. at 818; see also, Behrens v. Pelletier, 516 U.S. 299, 305-306, 116 S.Ct. 834, 133 L.Ed.2d 773 (1996))

Under Saucier v. Katz, 533 U.S. 194, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001), two inquiries are to be made in determining whether a public official is entitled to qualified immunity. The first is whether the alleged acts, when construed in the light most favorable to the plaintiff, show that the official's conduct violated a constitutional right. (Id. at 200-201) If no constitutional right was violated even under the plaintiff's allegations, the official is entitled to judgment; however, if a constitutional violation could be established under a favorable view of the evidence submitted, the court must move to the second step in the analysis.

The second step involves an inquiry into whether the constitutional right was clearly established and "must be undertaken in light of the specific context of the case, not as a broad general proposition." (Ibid.) Quoting Malley v. Briggs, 475 U.S. 335, 341, 106 S.Ct. 1092, 89 L.Ed.2d 271 (1986), the Saucier court stated that qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law." (Saucier v. Katz, supra, 533 U.S. at 202) The inquiry on this prong is not whether a particular right is established in a vacuum but whether it was established on the specific facts of a particular case. (Id. at 202 [the court must find that the right was clearly established in light of the specific facts of a particular case such that "a reasonable official would understand that what he is doing violates that right")

Under qualified immunity, public employees remain immune as long as their actions do not violate clearly established [federal] statutory, or constitutional rights of which a reasonable person would have known. (Harlow v. Fitzgerald, supra, 457 U. S. at 818-819 [allegations of malice are insufficient to overcome application of qualified

immunity]; see also, Anderson v. Creighton, 483 U. S. 635, 640-641 (1987) [an official's subjective belief is irrelevant; court applies an objective standard])

When this Court ruled on May 1, 2009, it determined the first prong of the inquiry, i.e., Dr. Corbett violated the Establishment Clause when he made the single statement during one lecture that creationism was "religious, superstitious nonsense." This determination triggered, for the first time, the possibility of a qualified immunity defense.

Up until the Court rendered its decision, Farnan was contending that Dr. Corbett made anti-Christian or anti-religious comments on a daily basis throughout the 2007 semester and that anti-Christian comments essentially were the theme of Dr. Corbett's lectures. Farnan clearly stated that the gist of his action was the "barrage of religious hostility" expressed throughout the Fall 2007 semester and that his action did not concern "a few incidental statements" of Dr. Corbett.

While case law did exist in 2007 that would seem to support Farnan's claim that a curriculum or class theme based on anti-Christian or anti-religious teachings could be a violation of the Establishment Clause no such case law existed at that time that a single comment by a teacher during a year-long course would be such a violation. Thus, if Farnan's contentions were accepted as true, it did not appear that a viable qualified immunity defense existed.

This Court's ruling, however, is not based on Dr. Corbett making anti-Christian or anti-religious comments on a daily basis such that it was a theme of Dr. Corbett's AP European History course. Instead, this Court has held that a single comment made during a single lecture is sufficient to trigger an Establishment Clause violation. It is this ruling that now requires this Court to decide the second prong of the qualified immunity defense. As explained here and in Defendants' concurrently filed motion for determination, the qualified immunity defense was not available until the Court's ruling on May 1, 2009. Following the Court's ruling, Defendants diligently brought this matter to the Court's attention as quickly as possible. Defendants' request for

leave to amend was motivated by the Court's ruling, not by an interest in delaying the proceedings.

B. The Amendment is not Futile

Where the legal basis for an amendment is tenuous, futility supports the refusal to grant leave to amend. (Morongo Band, supra, 893 F.2d at 1079) Here, as more fully explained in Defendants' concurrently filed motion for determination, the amendment would not be futile. Qualified immunity now appears to provide a complete defense to Farnan's claims due to this Court's May 1st ruling. In fact, an argument could be made that a request for leave to amend made *prior* to the Court's May 1st ruling most likely would have been considered legally tenuous in light of Farnan's allegations up until that time. It is this Court's May 1st ruling that supports the viability of the proposed amendment and renders this request anything but futile.

C. The Amendment will not Cause Undue Prejudice to Farnan

Regarding the "prejudice" element, it is the opposing party who has the burden of demonstrating such prejudice. (See, In re Circuit Breaker Litigation, 175 F.R.D. 547, 551 (C.D. Cal. 1997)) The prejudice demonstrated *must be substantial.* (Morongo Band of Mission Indians v. Rose, supra, 893 F.2d at 1079) Prejudice is the touchstone inquiry under Rule 15(a). (Eminence Capital, LLC v. Aspeon, Inc., 316 F.3d 1048, 1052 (9th Cir. 2003) "Absent prejudice, or a strong showing of any of the remaining factors, there exists a presumption under Rule 15(a) in favor of granting leave to amend." (Ibid.)

Here, Farnan has known since April 28, 2008 that a qualified immunity defense could be asserted in this matter. The Union Intervenors' answer to Farnan's first amended complaint asserted qualified immunity as an affirmative defense. (See, Union Intervenors' addendum to the joint proposal for disposition of the equitable and other remaining issues, filed May 22, 2009 and the Union Intervenors' answer filed with this Court on April 28, 2008) Accordingly, Farnan has been on notice for over one year that the qualified immunity defense would be asserted by the Union

Intervenors on Dr. Corbett's behalf. In fact, based on the Union Intervenors' assertion of the affirmative defense, Dr. Corbett already is entitled to a determination of qualified immunity. Defendants, therefore, bring this motion in an abundance of caution. On this basis, there can be little, if any, prejudice to Farnan if Defendants are granted leave to amend.

In addition, contrary to Farnan's prior contentions, Farnan will not be required to conduct further discovery if leave to amend is granted. Previously, Farnan asserted that if leave to amend is granted Farnan will need to investigate "into the knowledge and intent of Dr. Corbett with regard to the constitutional violation to combat the affirmative defense of qualified immunity." (Joint proposal for disposition of the equitable and other remaining issues, pp. 9-10) Farnan is incorrect.

The determination of whether Dr. Corbett is entitled to a qualified immunity defense is not based on a subjective standard. Rather, under the second prong of the test now at issue, a public official can be liable for a constitutional violation "only if 'the contours of the right [violated are] sufficiently clear that a *reasonable* official would understand that what he is doing violates that right'." (United States v. Lanier, 520 U.S. 259, 270, 117 S.Ct. 1219, 137 L.Ed.2d 432 (1997) (Emphasis added)

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

Thus, Dr. Corbett's subjective belief is irrelevant because this Court is required to apply an objective standard. (See, Anderson v. Creighton, supra, 483 U.S. at 640-641)) As such, there will be no need to conduct further discovery to determine the knowledge and intent of Dr. Corbett should leave to amend be granted and any claimed prejudiced to Farnan on this basis is inaccurate.

D. The Amendment will not Create Undue Delay

As discussed previously, no further discovery would be required in order to determine the viability of the qualified immunity defense. The defense is based on an objective standard, not what Dr. Corbett believed at the time; therefore, further discovery would be without merit. Additionally, the Court has already approved a briefing schedule to facilitate a determination of whether Dr. Corbett is entitled to the defense. As such, the amendment will not create any undue delay. If anything, the consideration of the qualified immunity defense will expedite this action. If Farnan's claim is barred by the defense, the issue can be resolved now and the necessity of a trial or further consideration regarding injunctive relief or damages will be obviated.

3. CONCLUSION

In light of the above, this Court should grant Defendants leave to file an amended answer asserting qualified immunity as an affirmative defense and should deem the answer attached as Exhibit A filed and served as of the date of the hearing on this motion.

DATED: June 8, 2009

WOODRUFF, SPRADLIN & SMART, APC

By: Daniel K. Spradlin
DANIEL K. SPRADLIN
ROBERTA A. KRAUS
Attorneys for Defendants CAPISTRANO UNIFIED SCHOOL DISTRICT and DR. JAMES CORBETT

DECLARATION OF DANIEL K. SPRADLIN

I, Daniel K. Spradlin, declare as follows:

1. I am an attorney admitted to practice law in the State of California and the United States District Court for the Central District of California. I am a director with the law firm of Woodruff, Spradlin & Smart, counsel of record for Defendants Capistrano Unified School District ("CUSD") and Dr. James Corbett (collectively "Defendants"). As the primary handling attorney for this litigation, I have reviewed the pleadings and files maintained by my office in connection with this case, including the pleadings, discovery files, and materials relating to this incident. If called as a witness, I could and would competently testify to the following facts:

2. On December 13, 2007, Farnan filed his complaint against CUSD and Dr. Corbett seeking damages and injunctive relief. A first amended complaint subsequently was filed and Defendants answered the first amended complaint on March 19, 2008. On April 28, 2008 the motion of Intervenors, CALIFORNIA TEACHERS ASSOCIATION/NEA; and CAPISTRANO UNIFIED EDUCATION ASSOCIATION ("Union Intervenors") was granted and the Union Intervenors' answer to Farnan's first amended complaint was filed. In their answer the Union Intervenors asserted the qualified immunity defense on Dr. Corbett's behalf. (A copy of the Union Intervenors' answer is attached as Exhibit B)

3. Because of the way that Farnan postured his case, an affirmative defense on the basis of qualified immunity was not asserted on Dr. Corbett's behalf. For example, in his first amended complaint, Farnan asserted: "On a regular basis during the Fall 2007 semester . . ." (4:7-11); "Parents and/or students have complained to the District for many years regarding Dr. Corbett's religious hostility expressed in his classroom" (9:26-27); and "Dr. Corbett continues to spend a large portion of class time . . . , he clearly demonstrates hostility towards religion . . .", "As a result of his ongoing comments . . ." (10:3-7). Additionally, Farnan made the following assertions in his opposition to Defendants' motion to dismiss: "statements made by 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); and "When applying the correct standard, and reviewing all of Dr. Corbett's comments instead of singling out a few comments . . ." (14:24-26);[5]

- "[T]eachers, including [Dr. Corbett] violate the Establishment Clause when they use the classroom to *repeatedly express* disapproval of religion, religious faith, and the resulting worldviews" (1:6-8; emphasis added); "Defendants' decision to 'teach' anti-Christian themes" (15:8-9); "barrage of hostility aimed at Dr. Corbett's students over the years past" (17:16-17); "the statements of Dr. Corbett are continual and incessant" (18:3-4);[6]
- "Dr. James Corbett spent a significant amount of class time discussing topics and issues not relevant to European history" (2:19-20); "On a regular basis during the fall 2007 semester, Dr. Corbett discussed a wide variety of topics not related to Advanced Placement European History" (3:3-4); "While teaching the subject of the class and while discussing various other topics, Dr. Corbett made statements and expressed viewpoints that were derogatory, disparaging, and belittling regarding religion and Christianity in particular" (3:5-9); "These comments were not limited to one particular day, but instead occurred on most

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[5] Farnan's opposition to Defendants' motion for summary judgment

[6] Farnan's memorandum of points and authorities in support of motion for summary judgment

days that I was in his classroom" (3:10-11); "Dr. Corbett's anti-Christian viewpoints are well-known by the students at my high school as they are often presented through comments he makes during class" (3:12-14); "Dr. Corbett made many comments regarding his personal bias against Christianity" (3:15-16); "When Dr. Corbett was talking to my class, he regularly included his own ideas about God and religion" (3:16-17); "As a result of his ongoing comments . . ." (3:19-20);[7]

- "*The gravamen of Plaintiffs' case was and remains the barrage of religious hostility expressed by Dr. Corbett throughout the Fall 2007 semester* during his Advanced Placement European History class" (1:4-6; emphasis added);[8] and
- "Dr. Corbett's habit or routine practice of making negative or hostile comments about religion and Christianity . . ." (3:21-22)[9]

6. After this Court made its May 1, 2009 ruling on the parties' motions for summary judgment this office diligently began researching whether a qualified immunity defense was now available to Dr. Corbett. After determining that Dr. Corbett now was entitled to a finding of qualified immunity on his behalf, this office engaged in a meet and confer conference with Farnan's counsel and with counsel for the Union Intervenors in order to complete the Court ordered joint proposal for disposition of equitable and other issues. In that conversation I advised all counsel that this office would seek a determination of qualified immunity on Dr. Corbett's behalf. That issue was again raised and partially briefed in Defendants' portion of the joint proposal of counsel filed with this Court on May 22, 2009.

7. A copy of Defendants' proposed amended answer is attached as Exhibit A.

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[7] Declaration of Chad Farnan in support of Farnan's motion for summary judgment

[8] Farnan's reply to Defendants' opposition to Farnan's motion for summary judgment

[9] Farnan's response to Defendants' objections to Farnan's evidence submitted by Farnan in support of his motion for summary judgment

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I declare under penalty of perjury under the laws of the United States that the foregoing facts are true and correct, and if called upon to do so, I could and would competently testify thereto.

Executed on June 8th, 2009, in Costa Mesa, California.

Daniel K. Spradlin

DANIEL K. SPRADLIN

DANIEL K. SPRADLIN - State Bar No. 82950
dspradlin@wss-law.com
WOODRUFF, SPRADLIN & SMART, APC
555 Anton Boulevard, Suite 1200
Costa Mesa, California 92626-7670
Telephone: (714) 558-7000
Facsimile: (714) 835-7787

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

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

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

Plaintiff,

v.

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

Defendants.

CALIFORNIA TEACHERS ASSOCIATION/NEA; and CAPISTRANO UNIFIED EDUCATION ASSOCIATION,

Union Intervenors/Defendants.

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

BEFORE THE HONORABLE JAMES V. SELNA; COURTROOM 10C

[PROPOSED] FIRST AMENDED ANSWER OF DEFENDANTS CAPISTRANO UNIFIED SCHOOL DISTRICT AND DR. JAMES CORBETT TO PLAINTIFF'S FIRST AMENDED COMPLAINT AND DEMAND FOR TRIAL BY JURY

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Defendants CAPISTRANO UNIFIED SCHOOL DISTRICT and DR. JAMES CORBETT answer the first amended complaint on file herein as follows:

ALLEGATIONS COMMON TO ALL CLAIMS FOR RELIEF

1. Answering Paragraphs 1, 2, 3, 4, 6, 9, 12 and 13 of the first amended complaint, these answering Defendants have no information or belief sufficient to enable them to answer the allegations contained in said Paragraphs, and basing their denial on said grounds, deny generally and specifically, all and singular, each and every allegation contained therein.

2. Answering Paragraph 5 of the first amended complaint, these answering Defendants based upon information and belief admit that Chad Farnan is a minor and was a student at Capistrano Valley High School at the times alleged in the complaint. Except as so admitted, these answering Defendants deny the balance of the allegations on lack of information and belief.

3. Answering Paragraph 7 of the first amended complaint, these answering Defendants admit the allegations contained therein.

4. Answering Paragraph 8 of the first amended complaint, these answering Defendants admit that Dr. James Corbett was at all times relevant to this lawsuit an employee and teacher for the Capistrano Unified School District and that on the face of the first complaint Plaintiff is suing Dr. Corbett in his individual and official capacity.

5. Answering Paragraph 10 of the first amended complaint, these answering Defendants admit the allegations contained therein.

6. Answering Paragraph 11 of the first amended complaint, these answering Defendants admit that they are informed and believe that Chad Farnan is a sophomore at Capistrano Valley High School. Except as so admitted, these answering Defendants deny the balance of the allegations on lack of information and belief.

7. Answering Paragraph 14 of the first amended complaint, these answering Defendants admit that on a regular basis in the fall 2007 semester Dr. Corbett

discussed a wide variety of topics to enrich his students in the instruction of Advanced Placement European History. These answering Defendants further admit that unbeknownst to Dr. Corbett statements may have been made which were intended to provoke discussion which were beyond the comprehension level of Plaintiff Chad Farnan. Except as so admitted, these Defendants deny specifically the remaining allegations contained in Paragraph 14.

8. Answering Paragraph 15 of the first amended complaint, these answering Defendants admit, based upon information and belief, that the Plaintiff has apparently misunderstood and/or misconstrued a number of comments made by Dr. Corbett in his classroom. As to the specific allegations, Defendants are informed and believe that Plaintiff Chad Farnan surreptitiously recorded portions of Dr. Corbett's lectures and classroom discussion all in violation of California Education Code section 51512, and in violation of California Penal Code section 632. These answering Defendants further allege that Plaintiff edited and/or extracted portions of such transcripts to convey Dr. Corbett's meaning in classroom discussion in a false light. Defendants lack information and belief as to the authenticity of the specific comments, and note that they are taken out of context, and therefore deny the allegations contained therein until the completion of discovery.

9. Answering Paragraph 17 of the first amended complaint, these answering Defendants deny generally and specifically, all and singular, each and every allegation contained therein, and more particularly deny that by reason of the premises alleged, or for any cause whatever, Plaintiff suffered injuries or damages as alleged, or any other sum or sums, or at all.

10. Answering Paragraph 18 of the first amended complaint, these answering Defendants have no information or belief sufficient to enable them to answer the allegations contained in said Paragraphs, and basing their denial on said grounds, deny generally and specifically, all and singular, each and every allegation contained therein.

11. Answering Paragraph 19 of the first amended complaint, these answering Defendants admit that Dr. Corbett was acting in the course and scope of his employment and except as so admitted, deny the balance of the allegations.

12. Answering Paragraphs 20 and 21 of the first amended complaint, these answering Defendants deny generally and specifically, all and singular, each and every allegation contained therein, and more particularly deny that by reason of the premises alleged, or for any cause whatever, Plaintiff suffered injuries or damages as alleged, or any other sum or sums, or at all.

AS TO THE FIRST CLAIM FOR RELIEF

13. Answering Paragraph 21 [sic] of the first amended complaint, these answering Defendants refers to their answer to the allegations incorporated by reference into said Paragraph and incorporate said answer herein by reference as though fully set forth and for the same effect.

14. Answering Paragraphs 22, 23, 24 and 25 of the first amended complaint, these answering Defendants deny generally and specifically, all and singular, each and every allegation contained therein, and more particularly deny that by reason of the premises alleged, or for any cause whatever, Plaintiff[suffered injuries or damages as alleged, or any other sum or sums, or at all.

FIRST AFFIRMATIVE DEFENSE TO EACH CLAIM FOR RELIEF

As an affirmative defense, Defendants allege at all times alleged herein Dr. Corbett acted in an objectively reasonable manner and is entitled to the qualified immunity of good faith as a defense to actions brought as civil rights violations under 42 U.S.C. section 1983.

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WHEREFORE, Defendants pray that Plaintiff take nothing by way of his complaint and that said Defendants be dismissed with costs herein incurred and for such other and further relief as the Court deems just and proper.

DATED: June 8, 2009

WOODRUFF, SPRADLIN & SMART, APC

By: Daniel K. Spradlin

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

DEMAND FOR JURY TRIAL

Defendants CAPISTRANO UNIFIED SCHOOL DISTRICT and DR. JAMES CORBETT hereby request a trial by jury.

DATED: June 8, 2009

WOODRUFF, SPRADLIN & SMART, APC

By: Daniel K. Spradlin
DANIEL K. SPRADLIN
Attorneys for Defendants CAPISTRANO UNIFIED SCHOOL DISTRICT and DR. JAMES CORBETT