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9
10 **UNITED STATES DISTRICT COURT**
11 **FOR THE CENTRAL DISTRICT OF CALIFORNIA**
12 **SOUTHERN DIVISION**

13 **CHAD FARNAN**, a minor, by and through
14 his parents **BILL FARNAN** and **TERESA**
15 **FARNAN**;

16 Plaintiffs,

17 vs.

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

23 Defendants.

Case No.: SACV07-1434 JVS (ANX)

OPPOSITION TO DEFENDANTS’
“POST-SUMMARY JUDGMENT
MOTION FOR A
DETERMINATION THAT
DR. CORBETT IS ENTITLED TO
QUALIFIED IMMUNITY”

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

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1 **PLAINTIFFS’ OPPOSITION TO DEFENDANTS’ “POST-SUMMARY**
2 **JUDGMENT MOTION FOR A DETERMINATION THAT DR. CORBETT IS**
3 **ENTITLED TO QUALIFIED IMMUNITY”**

4 Plaintiff, Chad Farnan, a minor, by and through his parents, Bill Farnan and
5 Teresa Farnan (hereinafter referred to as “Plaintiffs”), submit the following Opposition
6 To Defendants’ “Post-Summary Judgment Motion for a Determination that Dr. Corbett
7 is Entitled to Qualified Immunity”:

8 **MEMORANDUM OF POINTS AND AUTHORITIES**

9 **INTRODUCTION**

10 “Facts are stubborn things; and whatever may be our wishes, our inclinations, or
11 the dictates of our passion, they cannot alter the state of facts and evidence.” John
12 Adams, “Argument in Defense of the Soldiers in the Boston Massacre Trials,”
13 December 1770. While Defendants may wish that they had raised qualified immunity
14 at an earlier stage in the present litigation, while Defendants may be inclined to blindly
15 assume it is still proper to raise the affirmative defense now, and while Defendants may
16 passionately believe that Dr. Corbett is entitled to qualified immunity – the facts
17 stubbornly show it simply is not so.

18 Despite repeated failures to raise the affirmative defense of qualified immunity at
19 any of the appropriate stages of litigation, Defendants’ Post-Summary Judgment Motion
20 for a Determination that Dr. Corbett is Entitled to Qualified Immunity (“Motion”) now
21 proclaims that it must be determined by this Court that the defense applies now. Not
22 only do Defendants fail to provide any authority for the proposition that the affirmative
23 defense may be properly considered at this point, but they also fail to even provide any
24 argumentation as to why it is proper. When confronted with the fact that qualified
25 immunity is not available to Dr. Corbett now because they failed to raise it, Defendants
26 attempt to close their eyes and wish it away, and instead seek to argue over whether or
27 not Dr. Corbett is entitled to immunity. The defense has been lost by Defendants’

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1 repeated failure to raise it as an affirmative defense during the earlier stages of
2 litigation.

3 Additionally, Defendants claim that, “[b]ased on [the] ruling, it is apparent that
4 Dr Corbett *now* is entitled to a qualified immunity defense,”¹ as if the ruling changed
5 something about the entire nature of the case, or qualified immunity is tied to what was
6 found to be the constitutional violation. The ruling in this matter is only relevant to
7 qualified immunity as an indication that it is now too late to raise the defense, not as an
8 indication that the defense can now be raised. Further, the affirmative defense of
9 qualified immunity is tied to the allegations in the action, not the judgment. The
10 indication that this defense could have been raised was found in Plaintiffs’ Complaint,
11 Plaintiffs’ First Amended Complaint, Plaintiffs’ Opposition to Defendants’ Motion to
12 Dismiss, Plaintiffs’ Response to Defendants’ Special Interrogatories, and Plaintiffs’
13 Motion for Summary Judgment – at any and every stage prior to the dispositive ruling.
14 Plaintiffs have always argued facts showing the alleged violation of the right of a public
15 school student to experience neutrality towards religion from his teacher in the
16 classroom. The right Plaintiffs have been alleging has been clearly and consistently
17 outlined throughout the case and is thoroughly and soundly established by law that
18 predates the violation. Moreover, it is the very same right the Court based its ruling on.
19 Nothing can save Defendants’ failure to raise qualified immunity earlier, and, further,
20 the facts show Dr. Corbett is not entitled to qualified immunity even if it had been
21 properly raised.

22 **I. Dr. Corbett Waived Qualified Immunity As an Affirmative Defense by**
23 **Failing to Raise It at Any of the Proper Stages in the Litigation, and This**
24 **Court Should Not Consider It As an Affirmative Defense Post-Judgment**

25 Despite Defendants’ apparent exhaustive reading of the prior briefing in this
26 matter, they have chosen to overlook the briefing that is most problematic to their
27

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¹ See Defendants’ Post-Summary Judgment Motion for a Determination that Dr. Corbett is Entitled to Qualified Immunity, 1:21-22 (emphasis added).

1 present request. Defendants’ Motion attempts to avoid even acknowledging the
2 paramount hurdle they must jump in order to succeed in obtaining qualified immunity
3 for Dr. Corbett. The hurdle was created by Defendants’ failure to raise qualified
4 immunity at any of the proper opportunities during litigation. Defendants urge that this
5 Court “*must*” determine the applicability of qualified immunity and begin their
6 argument there. Unfortunately for Defendants, despite their attempts to ignore the
7 impediment to their claim, the hurdle raised by the failure to claim qualified immunity
8 at any of the appropriate times stands insurmountably in their path.

9 The benefits of qualified immunity have already been lost at this late stage in the
10 litigation, and Defendants’ continued attempts to assert it are improper and unfair to
11 Plaintiffs, and additionally appear to be in bad faith. Allowing Defendants to assert
12 qualified immunity now will necessitate further briefing and discovery. Additionally,
13 asserting qualified immunity now will not shield Dr. Corbett from the expense of
14 litigation, the discovery process, or trial. Further, Plaintiffs are not seeking more than
15 nominal damages in this matter – thus, Defendants’ attempt amounts to nothing more
16 than an improper Hail Mary, as evidenced by the unique Motion now before this Court.

17 While Plaintiffs realize that they have already raised these points and contentions
18 previously, they are compelled to reassert them because Defendants refuse even to
19 acknowledge that they must address the fact they are fundamentally too late in raising
20 the issue of qualified immunity to have it be considered. As the Tenth Circuit has held,
21 “Although the defense of qualified immunity provides public officials important
22 protection from baseless and harassing lawsuits, it is not a parachute to be deployed
23 only when the plane has run out of fuel. Defendants must diligently raise the defense
24 during pretrial proceedings and ensure it is included in the pretrial order.” *Evans v.*
25 *Fogarty*, 2007 WL 2380990, at * 6 n.9 (10th Cir. August 22, 2007).

26 Not only has Dr. Corbett failed to diligently raise the defense, but he did not even
27 mention it once until after Plaintiffs had been granted summary judgment. Despite the
28 numerous opportunities to raise the affirmative defense of qualified immunity in

1 Defendants' Motion to Dismiss, Defendants' Motion for Summary Judgment or, at the
2 very minimum, in Opposition to Plaintiffs' Motion for Summary Judgment, Dr. Corbett
3 is now arguing for the first time that he is entitled to the defense, a last-ditch effort to
4 avoid a favorable ruling. It is too late, however. Defendants' failure to raise qualified
5 immunity prior to this Court's ruling on the dispositive motions renders it lost. In good
6 faith, Plaintiffs proceeded with this litigation at great cost and expense, and Dr. Corbett
7 should not be permitted to use an affirmative defense as a rescue parachute.

8 Defendants asserted in their Motion that this Court "*must*" determine the
9 applicability of the qualified immunity defense to Dr. Corbett without any precedent or
10 support for such a conclusion. Defendants cite no cases in support of a right to raise
11 qualified immunity for the first time after a final ruling on dispositive cross motions for
12 summary judgment. While Defendants properly note that, according to the case law,
13 "[q]ualified immunity may be raised by a motion to dismiss, motion for summary
14 judgment and, of course, at trial," they fail to acknowledge the implications of their own
15 words. (Motion, p. 12, lns. 8-9.) Noticeably absent, is authority indicating that
16 qualified immunity may be raised for the first time at the current stage of this litigation.
17 This is because the case law does not even contemplate applying qualified immunity
18 following a ruling on the merits.

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

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1 As a general rule, affirmative defenses must be pled as required by Rule 8(c), or
2 the result is a waiver of the defense by the defendant and the exclusion of that defense
3 from the case. *In re Adbox, Inc.*, 488 F.3d 836 (9th Cir. 2007) (citing *Morrison v.*
4 *Mahoney*, 399 F.3d 1042, 1046 (9th Cir. 2005)). Courts have held that this principle,
5 extrapolated from Rule 8(c), applies to the qualified immunity affirmative defense. *See*
6 *Ringuette v. City of Fall River*, 146 F.3d 1, 4 (1st Cir. 1998) (“Qualified immunity is an
7 affirmative defense, Fed. R. Civ. P. 8(c), and an affirmative [defense] is generally lost
8 unless it is raised in the pleadings.”).

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

26 Defendants did not plead the qualified immunity affirmative defense, yet now
27 they ask this Court to consider the question at an extraordinarily late stage in the
28 litigation. Defendants filed a motion to dismiss, a motion for summary judgment, and

1 an opposition to Plaintiffs’ motion for summary judgment and still never raised
2 qualified immunity. This Court ruled on the dispositive motions, finding an
3 Establishment Clause violation, and Defendants now desperately seek to raise a defense
4 that was waived and lost.

5 **II. Plaintiffs’ Contentions Regarding the Amount of Constitutional Violations**
6 **and an Overarching Theme of Disapproval Should Not Be Allowed to**
7 **Confuse the Asserted Right That Has Always Been at Issue**

8 The right at issue in this case has always been the right to be free from a
9 governmental actor disapproving of religion, specifically, a teacher in a public high
10 school classroom. Plaintiffs have consistently asserted that Dr. Corbett violated the
11 Establishment Clause by showing disapproval of religion when speaking to his students.
12 Plaintiffs have never argued it was the fact Dr. Corbett’s statements were continual and
13 incessant that made them unconstitutional. Instead, Plaintiffs have always asserted it
14 was the fact Dr. Corbett was not neutral with regard to religion that made his actions
15 unconstitutional. Plaintiffs have pointed to many individual statements they felt were
16 unconstitutional, as well as to an overarching theme of Dr. Corbett’s “teaching” they
17 felt was unconstitutional.

18 In their Motion, Defendants seem intent on trying to use Plaintiffs’ contentions
19 regarding the continual and overarching nature of the violation to confuse the issue. To
20 the contrary, Plaintiffs have consistently alleged that Dr. Corbett violated Chad’s right
21 to be free from a teacher that was anything but neutral with regard to religion in the
22 public classroom. Just because Plaintiffs have alleged an overarching and consistent
23 violation of that right in addition to individual violations does not change the right
24 asserted, nor does it contravene the fact that the standard for a violation of that right is
25 the disapproval of religion by a government actor. While Defendants try to state
26 otherwise, Plaintiffs have never claimed that for the constitutional right at issue to be
27 violated there must be a given number of statements disapproving of religion or an
28 overarching theme of disapproval.

1 **III. Dr. Corbett Is Not Entitled to Qualified Immunity Because the Right to**
2 **Government Neutrality with Regard to Religion Was Clearly Established at**
3 **the Time the Right Was Violated**

4 Plaintiffs once again must raise their strong objection to even discussing the
5 standards for qualified immunity at this late stage. However, even if this Court finds
6 that Defendants did not waive the defense, Dr. Corbett is not entitled to qualified
7 immunity.

8 It has been clearly established for many years that the government must remain
9 neutral with regard to religion, and it may not show its disapproval of religion. The
10 Supreme Court has repeatedly affirmed the principle that “[the] First Amendment
11 mandates government neutrality between . . . religion and nonreligion.” *Epperson v.*
12 *Arkansas*, 393 U.S. 97, 104 (1968). Further, the State certainly “may not establish a
13 ‘religion of secularism’ in the sense of affirmatively opposing or showing hostility to
14 religion.” *Sch. Distr. of Abington Twp., Pa. v. Schempp*, 374 U.S. 203, 225 (1963); *see*
15 *also Van Orden v. Perry*, 125 S. Ct. 2854, 2856 (2005) (state may “neither abdicate [its]
16 responsibility to maintain a division between church and state nor evince a hostility to
17 religion.”). This concept has been articulated as forbidding the disapproval of religion
18 by the Ninth Circuit, holding, “[t]he government neutrality required under the
19 Establishment Clause is . . . violated as much by government disapproval of religion as
20 it is by government approval of religion.” *Vernon v. City of Los Angeles*, 27 F.3d 1385,
21 1396 (9th Cir. 1994) (citing *Church of the Lukumi Babalu Aye, Inc. v. Hialeah*, 508
22 U.S. 520, 532 (1993)).

23 It has been equally as clear that there are no exceptions for “small” violations.
24 The Supreme Court has stated, “[t]here are no de minimis violations of the Constitution
25 – no constitutional harms so slight that the courts are obliged to ignore them.” *Elk*
26 *Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 36 (2004); *see also Sch. Dist. of*
27 *Abington Twp., Pa. v. Schempp*, 374 U.S. 203, 225 (1963) (noting, “[t]he breach of
28 neutrality that is today a trickling stream may all too soon become a raging torrent”).

1 So too the Ninth Circuit has held, “There is no such thing as a *de minimis* exception to
2 the Equal Protection Clause.” *Monterey Mech. Co. v. Wilson*, 125 F.3d 702, 712 (9th
3 Cir. 1997).

4 These cases made it objectively clear that the government must remain neutral
5 towards religion, and that no “small” violation of that principle can be excused. Every
6 one of them was existing case law at the time Dr. Corbett violated Chad’s First
7 Amendment rights. As Defendants state in their Motion, “[u]nder qualified immunity,
8 public employees remain immune as long as their action do not violate clear established
9 [federal] statutory or constitutional rights of which a reasonable person would have
10 known. [citations] . . . [A]n official’s subjective belief is irrelevant; court applies an
11 objective standard.” (Motion, p. 7, lns. 18-23.) “While there need not be case law on
12 all fours, the unlawfulness of a particular action ‘must be apparent’ in light of
13 *preexisting law* before liability will be imposed. [citation]” (Motion, p. 7, lns. 14-17
14 (emphasis added).) It was objectively apparent to a reasonable person in 2007 that a
15 public high school teacher must remain neutral with regard to religion. To argue
16 otherwise contradicts case law, as well as basic notions of constitutional rights.

17 Further, Dr. Corbett’s alleged actions were not neutral. Plaintiffs repeatedly
18 claimed they were unconstitutional because they were not neutral, and, moreover, they
19 have now been adjudicated by this Court as not having been neutral. If Defendants had
20 properly construed the facts asserted in this case from the start, in the light favorable to
21 the Plaintiffs, *see Saucier v. Katz*, 533 U.S. 194, 200-201 (2001), they would have
22 realized that they could have raised qualified immunity during the previous proper
23 stages of litigation without prejudicing Plaintiffs with further inquiry. *Id.* at 202.

24 While Defendants attempt to cloud the issue by citing a panoply of Establishment
25 Clause cases in an attempt to confuse the law, their attempt cannot change the facts.
26 (Motion, pp. 8-12.) The law clearly mandated Dr. Corbett’s neutrality towards religion
27 in 2007. Defendants’ litany of cases from different contexts, applying various legal
28 standards in different circuits, is misplaced. This is not the proper time or place to re-

1 litigate the Establishment Clause violation that has been found by this Court, and it is
2 improper to attempt such action. While it is clear Defendants disagree with this Court’s
3 ruling, that does not allow them to argue qualified immunity now. Further, it does not
4 alter the fact that preexisting law mandated neutrality with no exception for what
5 Defendants erroneously deem to be a small violation.

6 **IV. Dr. Corbett Is Not Entitled to Qualified Immunity Because the Right He**
7 **Violated Has Been at Issue from Day One and Defendants Missed Every**
8 **Practicable Opportunity to Assert the Defense**

9 Defendants’ passionate claim of qualified immunity for Dr. Corbett cannot be
10 saved by their wishing the facts were different. As their own citation highlights,
11 Defendants missed the opportunity to raise qualified immunity by motion to dismiss
12 and motion for summary judgment – and at every practicable opportunity in the
13 litigation before the dispositive ruling. (Motion, p. 12, lns. 8-10.)

14 While Defendants quote *Pearson v. Callahan*, 129 S. Ct. 808, 818 (2009), in an
15 apparent attempt to generate sympathy for their own difficulty in deciding whether or
16 not to plead qualified immunity, the case does not provide them any excuse. Instead,
17 *Pearson* specifically deals with the steps courts may take in determining if a qualified
18 immunity claim is valid *when it has already been properly raised by the defense*. In
19 this matter, the defense was never properly raised, and the Court consequently need not
20 examine the defense at all. While Defendants further try to treat the dispositive ruling
21 in this matter as nothing more than a step of the qualified immunity analysis, it simply
22 is not so. (Motion, p. 12, lns. 21-24.) This Court’s ruling was not far-reaching or novel
23 in affirming a right to neutrality towards religion in the public school classroom, nor did
24 it “discover” the unlawfulness of Dr. Corbett’s actions. This Court’s ruling did,
25 however, acknowledge that there is a line of neutrality that must be walked in the public
26 school classroom according to preexisting law and that Dr. Corbett crossed that line as
27 Plaintiffs had alleged.

28 ///

1 A determination that Dr. Corbett did in fact violate Plaintiffs’ right to be free of a
2 government that directly expresses disapproval of religion did not put that constitutional
3 right at issue for the first time or establish what the right at issue was, despite
4 Defendants’ claims otherwise. Further, whether or not Defendants had the right to
5 claim qualified immunity is tied to the facts alleged, as construed in a light favorable to
6 the Plaintiffs, not the violation found by this Court. *See Saucier v. Katz*, 533 U.S. 194,
7 200-01 (2001). As was outlined above, Plaintiffs have alleged facts showing alleged
8 violations of constitutionally mandated neutrality towards religion from the filing of the
9 Complaint.

10 Moreover, Defendants have acknowledged that at the time Dr. Corbett made the
11 statements at issue, it was clearly established that an overarching theme of disapproval
12 violated the Establishment Clause. At the same time, Defendants have protested that
13 Plaintiffs have claimed that the violation at issue was the overarching theme. (Motion,
14 p. 13, lns. 3-5.) Defendants cannot have it both ways. Since the right to claim qualified
15 immunity is tied to the allegations of the case, even if Defendants truly misunderstood
16 the allegations, it still should have been clear to them they could have pled qualified
17 immunity at the proper stages. Their delay is without excuse, and there is no precedent
18 for excusing it.

19 It has been clear from the start of this litigation what the violated right is, and
20 Defendants failed to plead qualified immunity. It was doubtlessly true then, as it is
21 now, that a student has the right not to have his religious beliefs attacked and ridiculed
22 by his teacher in the public school classroom. As this Court pointed out in its Order of
23 May 1, 2009, the basic right at issue in this matter is the right “to be free of a
24 government that directly expresses disapproval of religion.” (Final Order Re Motions
25 for Summary Judgment or Summary Adjudication, p. 36, lns. 12-13.) This has been the
26 right Plaintiffs have been raising since the initial Complaint in which Plaintiffs stated,
27 “[Dr. Corbett’s] conduct is a violation of the Establishment Clause through [the]
28 exhibition of hostility towards religion and endorsement of irreligion in a public high

1 school classroom.” (Complaint for Declaratory and Injunctive Relief and Damages,
2 p. 2, lns. 6-9.) The allegations in this action clearly indicated what the alleged violation
3 was, and preexisting law showed that it was constitutionally impermissible.

4 The right claimed in this action has never changed, and no attempted confusion on the
5 part of the Defendants entitles them to assert qualified immunity at this late stage. The
6 right alleged by Plaintiffs has always been clear, it was clearly established under law at
7 the time Dr. Corbett violated it, and Dr. Corbett is not entitled to qualified immunity.

8 **CONCLUSION**

9 Defendants’ Motion amounts to a statement, “We failed to raise it, but as soon as
10 we lost, we decided we should have pled qualified immunity.” There is no allowance
11 for such a position under law. While Defendants try to contort Plaintiffs’ claims, the
12 legal authority, and this Court’s ruling in a desperate attempt to unwind the clock, such
13 an attempt is impermissible. Defendants missed every practicable opportunity to raise
14 the affirmative defense. Further, even if it was found that Defendants were not barred
15 by the failure to properly raise qualified immunity, Dr. Corbett’s disregard for the
16 requirement that he be neutral towards religion in the classroom was a violation of
17 reasonably apparent law existing prior to his actions. The qualified immunity defense is
18 not ripe for this Court’s determination, and Dr. Corbett is not entitled to such protection.

19 DATED: June 15, 2009

ADVOCATES FOR FAITH & FREEDOM

20
21
22 By: s/Jennifer L. Monk
23 Jennifer L. Monk
24 Email: jmonk@faith-freedom.com
25 Attorney for Plaintiffs
26
27
28

1 **CERTIFICATE OF SERVICE**

2
3 I am employed in the county of Riverside, State of California. I am over the age
4 of 18 and not a party to the within action. My business address is 24910 Las Brisas
5 Road, Suite 110, Murrieta, California 92562.

6 On June 15, 2009, I caused to be served the foregoing documents described
7 below on the following interested parties in this action:

8 **OPPOSITION TO DEFENDANTS’ “POST-SUMMARY JUDGMENT**
9 **MOTION FOR A DETERMINATION THAT DR. CORBETT IS**
10 **ENTITLED TO QUALIFIED IMMUNITY”**

11 Via **ELECTRONIC CASE FILING**, by which listed counsel will automatically
12 receive e-mail notices with links to true and correct copies of said documents:

- 13 • **Michael D Hersh**
mherh@cta.org
- 14 • **Roberta A Kraus**
bkraus@wss-law.com
- 15 • **Daniel K Spradlin**
dspradlin@wss-law.com

16 Executed on June 15, 2009, at Murrieta, California.

17
18 (Federal) I declare that I am a member of the Bar of this Court at whose
19 direction the service was made.

20
21
22 s/ Jennifer L. Monk
23 Email: jmonk@faith-freedom.com