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

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

17 Plaintiffs,

18 vs.

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

24 Defendants.

Case No.: SACV07-1434 JVS (ANX)

**PLAINTIFFS' REPLY TO DEFENDANTS'**  
**OPPOSITION TO PLAINTIFFS'**  
**SUPPLEMENTAL BRIEFING PURSUANT**  
**TO ORDER DATED JUNE 1, 2009**

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

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1 **INTRODUCTION**

2 Despite Defendants’ perceptible optimism that a case can be entirely re-argued  
3 following a ruling on a dispositive motion, it simply is not so. This Court’s May 1,  
4 2009, ruling was based on well-developed legal precedent. It is neither necessary nor  
5 proper for Defendants to re-assert their legal arguments under the guise of an  
6 affirmative defense that was never pled, much less argued. When taken together and  
7 stripped down to their core, Defendants arguments amount to one simple statement:  
8 “This case was wrongly decided.”

9 Defendants’ apparent failure to understand this Court’s ruling has led to a myriad  
10 of briefing that ignores the simple fact that constitutional violations, while often not  
11 appropriate for large compensatory damages awards, are not insignificant.  
12 Constitutional violations embody an affront to our most basic shared freedoms.

13 **ARGUMENT**

14 **I. PLAINTIFFS HAVE SATISFIED THE STANDARD TO RECEIVE**  
15 **INJUNCTIVE RELIEF AGAINST DR. CORBETT AND HE SHOULD BE**  
16 **ENJOINED FROM EXPRESSING HIS DISAPPROVAL OF RELIGION**

17 When the present matter is examined in light of the legal standard, it is clear that  
18 an injunction should issue. While Defendants attempt a far flung opposition to  
19 Plaintiffs’ request for an injunction, noticeably absent from their briefing is a simple  
20 step-by-step examination of each of the elemental requirements to obtain an injunction.  
21 When the elements are examined, it is evident the requested injunction should be  
22 granted. Further, Defendants’ own quotes belie their claims that an injunction should  
23 not issue.

24 To obtain permanent injunctive relief, a plaintiff must show:

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

28 *N. Cheyenne Tribe v. Norton*, 503 F.3d 836, 843 (9th Cir. 2007) (“*N. Cheyenne Tribe*”)

1 (quoting *eBay v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006)) (“*Cheyenne*”).

2 Plaintiffs have met each of the four requirements and are entitled to an injunction.

3 **A. An Injunction is Warranted Because, as this Court’s Ruling Shows,**  
4 **the Present Circumstances Satisfy the First and Second Requirements**  
5 **for an Injunction**

6 With regard to the first and second elements of the test outlined in *Cheyenne*, it is  
7 fundamental that this Court has found that Dr. Corbett violated Plaintiffs’ First  
8 Amendment right by showing his disapproval of religion in the classroom. As  
9 Defendants’ brief asserts, injunctions are not issued “as of course,” but only where  
10 there is “irreparable injury and the inadequacy of legal remedies.” (See Defendants’  
11 Opposition to Plaintiffs Supplemental Briefing Pursuant to Order Dated June 1, 2009;  
12 Memorandum of Points and Authorities, p. 5 (“Defendants’ Opposition”) (quoting  
13 *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 311-12 (1982)).) This Court’s  
14 determination with regard to the present circumstances shows the irreparable injury and  
15 the inadequacy of legal remedies for Plaintiffs.

16 It is a clearly established principle in the Ninth Circuit that “. . . constitutional  
17 violations cannot be adequately remedied through damages and therefore generally  
18 constitute irreparable harm.” *Nelson v. National Aeronautics and Space Admin.*, 530  
19 F.3d 865, 882 (9th Cir. 2008) (“*Nelson*”) (citing *Monterey Mech. Co. v. Wilson*, 125  
20 F.3d 702, 715 (9th Cir.1997)); see also *Associated General Contractors v. Coalition*  
21 *For Economic Equity*, 950 F.2d 1401, 1412 (9th Cir.1991); *Goldie's Bookstore v.*  
22 *Superior Ct.*, 739 F.2d 466, 472 (9th Cir.1984). Unlike monetary damage which can be  
23 rectified by providing the plaintiff with money to replace what was lost, courts have  
24 consistently recognized that constitutional rights are not fungible and therefore their  
25 violation is irreparable. Thus, since this Court has already found a constitutional  
26 violation, it has by extension found that Dr. Corbett’s actions constitute the infliction of  
27 irreparable injury upon Plaintiffs. The first element of the test for a permanent  
28 injunction has been met in this case.

1 Likewise, this Court's holding also shows the inadequacy of legal remedies. As  
2 noted above, constitutional violations are irreparably harmful due directly to the fact  
3 that they do not lend themselves to compensation by legal means. *See Nelson*, 530 F.3d  
4 at 882; *see also N. Cheyenne Tribe*, 503 F.3d at 843 (noting an injunction is warranted  
5 where money damages are not an adequate remedy).

6 Therefore, the fact that this Court has found a constitutional violation not only  
7 affirms the present circumstance's satisfaction of the first requirement to obtain an  
8 injunction, but the second as well.

9 Defendants appear to struggle under the intentional misconception that this Court  
10 did not find a constitutional violation, but this cannot alter this Court's ruling, or the  
11 fact that it shows the present situation satisfies the first two criteria for an injunction.  
12 The fact there is an established right and a violation before this Court is key. "Once a  
13 right and a violation have been shown, the scope of a district court's equitable powers  
14 to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable  
15 remedies." *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15 (1971)  
16 ("*Swann*"). As Defendants correctly note, *when* a violation is found, the scope of the  
17 constitutional violation dictates the scope of the injunction. (Defendants' Opposition, p.  
18 7, Ins. 11-22 (citing *Swann*.) While Defendants' cite case law expounding upon an  
19 overbroad injunction, they fail to make any connection to the injunctive relief at issue  
20 before this Court. Thus, it is illuminating that Plaintiffs are only seeking an injunction  
21 as broad as the violation in this matter, using the plain requirements of First  
22 Amendment law. Specifically, Plaintiffs are seeking an injunction that requires  
23 Dr. Corbett to refrain from conveying his disapproval of religion while acting as a  
24 public school employee – the very conduct he has been found to have carried out in  
25 violation of the Constitution. Despite Defendants' misunderstanding, this is a clearly  
26 discernable standard, in keeping with Supreme Court precedent, that walks the same  
27 line adhered to by this Court in limiting speech disapproving of religion while allowing  
28 the proper discussion of religion as an educational topic.

1           Additionally, as Defendants state, they essentially attempt to argue that the  
2 request for an injunction is moot because any violative conduct has ceased.  
3 (Defendants' Opposition, p. 6, lns. 5-11.) However, the injunction is not moot. It is:  
4 (1) the fact that the violative conduct happened, not the amount of times that it  
5 happened, and (2) the fact it can occur in the future, that keeps an issue ripe for  
6 injunction. *See LGS Architects, Inc. v. Concordia Homes of Nevada*, 434 F.3d 1150,  
7 1153-54 (9th Cir. 2006) (relying on *Jacobus v. Alaska*, 338 F.3d 1095, 1103 (9th Cir.  
8 2003) (finding that even though a statute that had been passed by the legislature had  
9 since been repealed, the fact it could be reenacted in the future kept the issue from being  
10 moot)). In the present matter, there is no question that violative conduct happened, and  
11 it could occur in the future. Moreover, the party arguing mootness "bears the  
12 formidable burden of showing that it is *absolutely clear* the allegedly wrongful behavior  
13 could not reasonably be expected to recur." *Friends of the Earth, Inc. v. Laidlaw*  
14 *Environmental Services, Inc.*, 528 U.S. 167, 190 (2000) (emphasis added). This Court's  
15 ruling shows clearly that violative conduct occurred, and it is possible it may occur in  
16 the future. Defendants have failed to even come close to making it absolutely clear this  
17 injunction is anything less than ripe.

18           Plaintiffs have suffered an irreparable injury for which there is no adequate  
19 remedy under law. Further, despite Defendants' contentions, the requested injunction is  
20 neither overbroad nor moot. Thus, the injunction meets the first two prongs of the  
21 established test for an injunction and is indeed warranted.

22           **B. An Injunction is Warranted Because Plaintiffs Also Meet the Third**  
23 **and Fourth Requirements for an Injunction**

24           While Defendants hint at, and tangentially aim at, making arguments with regard  
25 to the first two established requirements for Plaintiffs to obtain an injunction, they  
26 utterly fail to even hint at the second and third factors. The third factor is a balancing  
27 factor that seeks to find whether after balancing the hardship between the parties, an  
28 equitable remedy is warranted. *N. Cheyenne Tribe*, 503 F.3d at 843. The fourth factor

1 is whether or not the injunction serves the public interest. *Id.* Plaintiffs satisfy both of  
2 these factors as well.

3 The balance of hardships in these circumstances weighs in favor of Plaintiffs. It  
4 would be unreasonable to argue that Dr. Corbett should be allowed to continue to  
5 express disapproval of religion because the hardship on him would be too great if he  
6 were enjoined from doing so. Such an argument flouts the serious nature of the First  
7 Amendment violation at issue. Just as this Court wisely acknowledged in its ruling that  
8 there is a large difference between a teacher voicing their personal disapproval of  
9 religion and a teacher discussing religion as a proper educational topic, this Court may  
10 similarly acknowledge that same line in issuing an injunction. Dr. Corbett should not  
11 be allowed to use his bully pulpit to express disapproval of religion to school children.  
12 It is no great hardship to the Defendants to require that Dr. Corbett comply with the  
13 First Amendment. Thus, Plaintiffs have met this factor as well.

14 Lastly, an injunction should issue because the public will not be served if  
15 Dr. Corbett is allowed to continue violating the Establishment Clause in his public  
16 school classroom. Instead, the public interest will obviously be served by requiring Dr.  
17 Corbett to operate within the confines of the First Amendment. Protecting public  
18 school children should be the benchmark in this case. This Court has jurisdiction to  
19 fashion equitable relief that will further constitutional protections in public schools. *See*  
20 *Lemon v. Kurtzman*, 411 U.S. 192, 200 (1973) (“[I]n constitutional adjudication as  
21 elsewhere, equitable remedies are a special blend of what is necessary, what is fair, and  
22 what is workable.”).

23 Plaintiffs have met the final criteria for an injunction to issue. For all of the  
24 reasons outlined above, Plaintiffs respectfully request that this Court issue an injunction  
25 against Dr. Corbett in his individual and official capacity that prohibits him from  
26 expressing disapproval of religion while acting as an employee of the school district.

27 ///

28 ///

1 **II. DR. CORBETT HAS EXHIBITED EITHER IGNORANCE OR**  
2 **CONTEMPT FOR THE BOUNDS OF THE FIRST AMENDMENT, THUS**  
3 **AN INJUNCTION SHOULD ISSUE**

4 While Plaintiffs should prevail in their attempt to obtain an injunction based  
5 simply on the findings of this Court and the facts of this case, as applied to the legal  
6 standard, this Court may find additional impetus for enjoining further unconstitutional  
7 statements on the part of Dr. Corbett by virtue of the words of his own mouth. After the  
8 May 1, 2009, ruling in this matter, it was reported that Dr. Corbett made a public  
9 declaration that he had no intention of doing anything differently than what he has  
10 already done in the past. See Scott Martindale, *Capo Teacher: 'I'm never negative*  
11 *toward religion,* O.C. Register, May 9, 2009, available at  
12 <http://www.ocregister.com/articles/corbett-class-religion-2402308-people-kids>. He  
13 further asserted that he was never negative toward religion. *Id.* While there is ample  
14 reason for this Court to issue an injunction without delving further into Dr. Corbett's  
15 basic understanding of the constitutional mandates with regard to religion, or his intent  
16 to avoid displaying disapproval towards religion while acting as an employee of the  
17 school district, this Court has the discretion to schedule a hearing to verify Dr. Corbett's  
18 comments to the *Orange County Register*. Such attitudes and beliefs speak volumes as  
19 to the equitable nature of an injunction in this matter.

20 **III. AS THE PREVAILING PARTY, PLAINTIFFS' MOTION FOR**  
21 **ATTORNEYS' FEES SHOULD BE CONSIDERED BY THIS COURT**  
22 **FOLLOWING ENTRY OF FINAL JUDGMENT**

23 In any action to enforce federal civil rights laws, including 42 U.S.C. § 1983, 42  
24 U.S.C. § 1988 allows courts to award "the prevailing party, other than the United States,  
25 a reasonable attorney's fee as part of the costs." In order to qualify as a "prevailing  
26 party," a plaintiff must obtain at least some relief on the merits of its claim that  
27 materially alter the legal relationship between the parties by modifying defendant's  
28 behavior in a way that directly benefits plaintiff. See *Martinez v. Wilson*, 32 F.3d 1415,

1 1422 (9th Cir. 1994) (citing *Farrar v. Hobby, Jr.*, 506 U.S. 103, 111-12 (1992)  
2 (“*Farrar*”).

3 Plaintiffs are clearly the prevailing parties in this case. Plaintiffs brought this  
4 action under 42 U.S.C. § 1983 and have sought a declaratory judgment, nominal  
5 damages and a permanent injunction against Defendants. Any type of relief to which  
6 Plaintiffs are entitled will “materially alter[] the legal relationship” between Plaintiffs  
7 and Defendants “by modifying [Dr. Corbett’s] behavior” for the benefit of Plaintiffs.  
8 *Farrar*, 506 U.S. at 111-12 (“a judgment for damages in any amount, whether  
9 compensatory or nominal, modifies the defendant’s behavior for the plaintiffs benefit  
10 by forcing the defendant to pay an amount of money he otherwise would not pay.”).  
11 Therefore, Plaintiffs are the prevailing parties in this matter.

12 Defendants, dispute the fact that Plaintiffs are the prevailing party in this action  
13 because: (1) Plaintiffs “did not receive a ruling in [their] favor on all issues raised in  
14 [their] complaint,” (2) Plaintiffs prevailed only “against one defendant,” and (3)  
15 Plaintiffs “did not prevail on the majority of [their] claims.” (Defendants’ Opposition,  
16 p. 12, Ins. 10-12.) To begin with, and contrary to Defendants’ allegation, Plaintiffs  
17 need not “ultimately prevail on every claim asserted or obtain all the relief requested in  
18 order to be considered a prevailing party.” *Sablan v. Department of Finance of Com. of*  
19 *Northern Mariana Islands*, 856 F.2d 1317, 1324 (9th Cir. 1988) (citing *Doe v. Busbee*,  
20 684 F.2d 1375, 1379 (11th Cir.1982); *Reel v. Arkansas Department of Correction*, 672  
21 F.2d 693, 697 (8th Cir.1982)). Instead, “plaintiffs may be considered ‘prevailing  
22 parties’ for attorney’s fee purposes if they succeed on any significant issue in litigation  
23 which achieves some of the benefit the party sought in bringing suit.” *See Hensley v.*  
24 *Eckerhart*, 461 U.S. 424, 433 (1983) (quoting *Nadean v. Helgemoe*, 581 F.2d 275, 278-  
25 79 (1st Cir. 1978)). As a result, despite Defendants attempts to claim otherwise, success  
26 on the majority of Plaintiffs’ claims or against all Defendants is not necessary in order  
27 to be considered a prevailing party. *See Mendez v. County of San Bernardino*, 540 F.3d  
28 1109, 1125-26 (9th Cir. 2008) (“[a]lthough she did not prevail against all defendants or

1 on all of her claims, it is well established that “fail[ure] to recover on all theories of  
2 liability is not a bar to recovery of attorney's fees.”) (quoting *Thomas v. City of Tacoma*,  
3 410 F.3d 644, 649 (9th Cir.2005)).

4 Additionally, and more importantly, Defendants characterization of this case and  
5 Plaintiffs success is disingenuous at best. Despite Defendants’ unexplainable  
6 statements to the contrary, Plaintiffs did “receive a ruling in [their] favor on all issues  
7 raised in [their] complaint.” (Defendants’ Opposition, p. 12, lns. 10-12.) There is  
8 absolutely no legal authority cited by Defendants, or located elsewhere, stating that  
9 Defendants purported definition of “issues” and “claims” is relevant in determining  
10 whether Plaintiffs are the prevailing party. Plaintiffs did not raise an “issue” or a  
11 “claim” each time they asserted that a particular statement by Dr. Corbett expressed  
12 hostility towards religion. Defendants are attempting to re-characterize both the law  
13 generally and the single claim involved in this case in a desperate attempt to alter the  
14 inevitable. Plaintiffs’ First Amended Complaint asserted a single cause of action for  
15 violation of the First Amendment’s Establishment Clause. This Court’s ruling granting  
16 Plaintiffs’ Motion for Summary Judgment held that Dr. Corbett did in fact violate the  
17 Establishment Clause. Plaintiffs have succeeded on not only a significant issue in this  
18 litigation, but have succeeded on the only claim raised in Plaintiffs’ complaint. Thus,  
19 Plaintiffs are the prevailing party in this matter and should be awarded attorneys fees  
20 accordingly.

21 **IV. CAPISTRANO UNIFIED SCHOOL DISTRICT IS NOT A PREVAILING**  
22 **PARTY AND IS NOT ENTITLED TO ATTORNEYS’ FEES**

23 Capistrano Unified School District (hereinafter “School District”) is not the  
24 prevailing party in this matter. Defendants’ analysis attempting to assert otherwise is  
25 completely irrelevant as it applies an incorrect standard and provides no explanation as  
26 to why the correct standard would be satisfied in this case. Contrary to Defendants’  
27 assertions, Federal Rule of Civil Procedure, Rule 54(d) is inapplicable to civil rights  
28 actions brought under § 1983. Thus, Defendants’ assertion that “the defendant is the

1 prevailing party ‘when the proceeding is terminated by court-ordered dismissal or  
2 judgment in favor of defendants,” as outlined under the Central District’s Local Rule  
3 54-2.2, is not the appropriate standard to apply in this case. Additionally, Defendants  
4 rely on a single case as legal authority, *d’Hedouville v. Pioneer Hotel Co.*, 552 F.2d  
5 886, 896 (9th Cir. 1977), which also addresses the application of Rule 54. (Defendants’  
6 Opposition, p. 11, Ins. 8-17.)

7 The School District is not a prevailing party in this case because of its  
8 relationship to Dr. Corbett, who was sued both in his individual and official capacity,  
9 the School District cannot be considered to have “prevailed.” “[O]fficial-capacity suits  
10 generally represent only another way of pleading an action against an entity of which an  
11 officer is an agent. Suits against state officials in their official capacity therefore should  
12 be treated as suits against the State.” *Hafer v. Melo*, 502 U.S. 21, 24 (1991) (internal  
13 citations and quotations omitted). Here, the claim against Dr. Corbett in his official  
14 capacity should be treated as a suit against the School District itself, as it has employed  
15 him for approximately twenty years. As a result, the School District is not a “prevailing  
16 party.”

17 Defendants contend that the argument laid out above constitutes “a respondeat  
18 superior theory against [the School District], i.e. that the School District is not a  
19 prevailing party because its employee was found liable.” (Defendants’ Opposition, p.  
20 11, Ins. 20-21.) Plaintiffs, however, are not asserting a respondeat superior theory.”  
21 Rather, Plaintiffs merely argue that because suing an individual in their official capacity  
22 “should be treated as a suit against the State,” the School District itself cannot be  
23 considered a “prevailing party.” For Defendants argument to be relevant, Plaintiffs  
24 would need to assert liability against the School District for Dr. Corbett’s actions.  
25 Defendants are missing the point. Plaintiffs assert that because Dr. Corbett was sued in  
26 his official capacity it is “another way of pleading an action against an entity.” *Id.*  
27 Otherwise stated, there is no change in the legal relationship between the School  
28 District and Plaintiffs as a result.

1           Significantly, however, application of the correct standard requires additional  
2 analysis. Even if this Court were to determine that the School District is a “prevailing  
3 party,” the mere fact that defendant prevails does not automatically support [an] award  
4 of fees under § 1988. *See Allen v. City of Los Angeles*, 27 F.3d 1385, 1402 (9th Cir.  
5 1994) (“A prevailing defendant in a civil rights action is not entitled to attorney fees  
6 under 42 U.S.C. § 1988 merely because [it] prevails on the merits of the suit”) (citing  
7 *Vernon v. City of Los Angeles*, 27 F.3d 1385, 1402 (9th Cir.1994)).

8           Unlike a prevailing plaintiff who is entitled to an award of attorneys’ fees almost  
9 as a matter of right, “[a] prevailing defendant should *not* routinely be awarded attorneys’  
10 fees simply because he has succeeded.” *Vernon v. City of Los Angeles*, 27 F.3d 1385,  
11 1402 (9th Cir.1994). Prevailing defendants, may only be awarded attorneys’ fees  
12 pursuant to 42 U.S.C. § 1988(b) when the plaintiff’s civil rights claim is frivolous,  
13 unreasonable, or groundless, or that the plaintiff continued to litigate after it clearly  
14 became so.” *Thomas*, 410 F.3d at 647 (internal citations and quotations omitted) (citing  
15 *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 422 (1978); *Hensley v. Eckerhart*,  
16 461 U.S. 424, 429 (1983) (quoting S.Rep. No. 94-1011, p. 4 (1976)).

17           Here, Dr. Corbett, an employee of Capistrano Unified School District for  
18 approximately twenty years, violated the Establishment Clause. Although this Court  
19 ultimately found the evidence against the School District to be insufficient, Plaintiffs’  
20 claims were not groundless, frivolous, or unreasonable and Defendants’ do not argue  
21 otherwise. Therefore, this Court should find that the School District is not a “prevailing  
22 party,” and is not entitled to attorneys’ fees pursuant to §1988.

23 **V. THE “REASONABLENESS” OF ATTORNEYS’ FEES SHOULD BE**  
24 **CONSIDERED BY THIS COURT FOLLOWING A PROPER NOTICED**  
25 **MOTION AFTER ENTRY OF FINAL JUDGMENT**

26           Defendants contend that “should this Court determine that [Plaintiffs are] entitled  
27 to an award of attorney’s fees, [Plaintiffs] request for attorney’s fees under Section  
28 1988 should be reduced to reflect the level of success, i.e. the fact that [Plaintiffs’]

1 prevailed on only one claimed violation and lost on the 21 other claims he made.”  
2 (Defendants’ Opposition, p. 13, lns. 5-8.) To begin with, Defendants’ argument is  
3 untimely as this Court has not yet entered a final judgment in this case nor determined  
4 the relief to which Plaintiffs are entitled. As a result, no motion for attorneys’ fees has  
5 been filed. Defendants argument as to the “reasonableness” of an attorneys’ fee award  
6 is premature.

7       Once a plaintiff is deemed to be a prevailing party, the court has narrow  
8 discretion to deny attorneys’ fees under § 1988. “Congress’ intent in enacting § 1988  
9 was to attract competent counsel to prosecute civil rights cases . . . . Therefore, ‘a  
10 court’s discretion to deny fees under § 1988 is very narrow and . . . *fee awards should*  
11 *be the rule rather than the exception.*’ The Supreme Court and we have thus denied a  
12 prevailing plaintiff an attorney’s fee in only certain limited situations . . . .” *Mendez*,  
13 540 F.3d at 1126 (emphasis added) (citing *Herrington v. County of Sonoma*, 883 F.2d  
14 739, 743 (9th Cir.1989) (internal citation and quotation marks omitted)).

15       Additionally, Defendants’ contention that Plaintiffs’ “prevailed on only one  
16 claimed violation and lost on the 21 other claims he made” is factually erroneous and in  
17 no way impacts the reasonableness of an attorneys’ fees awarded to Plaintiffs. As was  
18 stated above, Plaintiffs asserted one cause of action, and therefore, one claim. The  
19 statements listed in the Complaint as examples of Dr. Corbett’s actions, which Plaintiffs  
20 alleged violated the Establishment Clause, are not “claims” as commonly understood in  
21 applicable legal authority. Defendants’ failure to cite a case beyond their bold  
22 assertions otherwise is telling.

23       Plaintiffs asserted two theories upon which the allegation of an Establishment  
24 Clause violation was based. Plaintiffs have argued that either (1) Dr. Corbett’s  
25 comments taken together as a whole, or (2) a single statement made by Dr. Corbett,  
26 could constitute a basis for an Establishment Clause violation. The fact that Plaintiffs  
27 prevailed on the latter theory as opposed to the former on Plaintiffs’ one and only cause  
28 of action should not reduce Plaintiffs’ award of attorneys’ fees. *See Rivera v. City of*

1 *Riverside*, 763 F.2d 1580 (9th Cir. 1985) (“Where a lawsuit consists of related claims, a  
2 plaintiff who has won substantial relief should not have his attorney's fee reduced  
3 simply because the district court did not adopt each contention raised.”) (quoting  
4 *Hensley v. Eckerhart*, 461 U.S. at 440). Plaintiffs’ have had complete and total success  
5 on their single cause of action and therefore no reduction in Plaintiffs’ attorneys’ fees is  
6 warranted.

7 Defendants next cite to *Farrar* in an apparent attempt to persuade this Court that  
8 while a civil rights plaintiff who receives a nominal damages award may be a  
9 “prevailing party” they are not entitled to an award of attorneys’ fees due to the  
10 “technical and de minimus nature” of nominal damages. (See Defendants’ Opposition,  
11 p. 13, lns. 19-24.) *Farrar*, however, does not stand for this proposition. The Court in  
12 *Farrar* held that, while a plaintiff who had originally sought \$17 million dollars in  
13 compensatory damages and received only nominal damages in a civil right action was  
14 technically a “prevailing party” under § 1988, the plaintiff was not entitled to receive an  
15 award of attorneys fees. *Farrar*, 506 U.S. at 114. The court found that the degree of  
16 the plaintiffs’ success on its claims bears on the “reasonableness” of the attorneys fees  
17 awarded and that “[w]hen a plaintiff recovers only nominal damages because of his  
18 failure to prove an essential element of his claim for monetary relief, the only  
19 reasonable fee is usually no fee at all.” *Farrar*, 506 U.S at 115.

20 *Farrar* is clearly inapposite to the facts before this court. Plaintiffs’ are not  
21 seeking and have not sought compensatory damages from Defendants. This Court’s  
22 award of nominal damages to Plaintiffs would not be due to Plaintiffs’ failure to prove  
23 an essential element of their claim for monetary relief, but, instead, would be awarded  
24 in light of the fact that Plaintiffs requested these damages along with their request for  
25 declaratory relief and injunctive relief against Dr. Corbett. See *Lowry ex rel. Crow v.*  
26 *Watson Chapel School Dist.*, 540 F.3d 752, 765 (8th Cir. 2008). “Congress made clear  
27 that it intended that the amount of fees awarded under [§ 1988] be governed by the  
28 same standards which prevail in other types of equally complex Federal litigation, such

1 as antitrust cases and not be reduced because the rights involved may be nonpecuniary  
2 in nature.” *Id.* Defendants also rely on *Mendez v. County of San Bernardino*, 540 F.3d  
3 1109, 1126 (9th Cir. 2008), to support their assertion that Plaintiffs’ are not entitled to  
4 attorneys fees. In *Mendez*, the court noted that “a denial [of attorneys’ fees] is  
5 appropriate only where ‘the plaintiff’s success is purely technical or de minimis.’” A  
6 violation of a constitutional right is significant, regardless of whether it is nonpecuniary  
7 in nature. As the *Mendez* court stated, “Congress’ intent in enacting § 1988 was to  
8 attract competent counsel to prosecute civil rights cases . . . . Therefore, ‘a court’s  
9 discretion to deny fees under § 1988 is very narrow and . . . *fee awards should be the*  
10 *rule rather than the exception.*’ The Supreme Court and we have thus denied a  
11 prevailing plaintiff an attorney’s fee in only certain limited situations . . . .” *Mendez*,  
12 540 F.3d at 1126 (emphasis added) (citing *Herrington v. County of Sonoma*, 883 F.2d  
13 739, 743 (9th Cir.1989) (internal citation and quotation marks omitted)).

14 Defendants initially assert that Plaintiffs “only seek nominal damages, i.e. \$1.00,  
15 from Dr. Corbett.” (Defendants’ Opposition, p. 14, lns. 10-12.) Defendants again  
16 blatantly mischaracterize the facts of this case, and fail to recognize the significance of  
17 the constitutional violation that occurred. Plaintiffs have sought nominal damages,  
18 declaratory relief, and injunctive relief from Defendants. Furthermore, Defendants cite  
19 no legal authority that would support their contention that an award of nominal damages  
20 is purely technical or de minimus. Contrary to Defendants’ allegations, a “district court  
21 [may] choose to award attorney’s fees after a judgment for only nominal damages”  
22 when it can “point to some way in which the litigation succeeded, in addition to  
23 obtaining a judgment for nominal damages.” *See Benton v. Oregon Student Assistance*  
24 *Com’n*, 421 F.3d 901, 906 (9th Cir. 2005) (finding that factors such as (1) a policy  
25 change, (2) collateral estoppel, (3) achievement of a public goal, or (4) the significance  
26 of the legal issue on which plaintiffs have prevailed are relevant factors in determining  
27 the success of the litigation.) Plaintiffs’ success in this case is anything but de minimus.  
28 The significance of the legal issue on which Plaintiffs prevailed is clear and a public

1 goal was achieved. Defendants disregard for Plaintiffs constitutional rights and  
2 inability to acknowledge the significance of the declaratory relief and injunctive relief  
3 sought does not establish that this case is de minimus. The purpose of Section 1988  
4 was to assure that cases of importance, those that define and structure our constitutional  
5 rights, are litigated even when they are nonpecuniary in nature. What Section 1988  
6 seeks to protect and even encourage, Defendants refuse to even acknowledge.

7 Upon the filing of a properly noticed motion for attorneys' fees, this Court should  
8 award Plaintiffs attorneys' fees commensurate with the amount of work required in  
9 order to further secure a constitutional right that protects the millions of public school  
10 children. Furthermore, the attorneys' fees award should be appropriate in light of the  
11 intent of Section 1988 and the applicable standard.

12 **VI. DR. CORBETT IS NOT ENTITLED TO QUALIFIED IMMUNITY**  
13 **BECAUSE SUCH A CLAIM IS UNTIMELY, THE RIGHT VIOLATED**  
14 **WAS CLEARLY ESTABLISHED AT THE TIME OF THE VIOLATION,**  
15 **AND THE RIGHT AT ISSUE IN THIS CASE HAS NEVER CHANGED**

16 Defendants' brief concludes with one final rehashing of their arguments  
17 regarding the issue of qualified immunity and amending their answer to assert said  
18 affirmative defense.<sup>1</sup> While they note Plaintiffs' contention that any request for  
19 qualified immunity is now untimely, Defendants provide no legal precedent to  
20 controvert Plaintiffs' arguments; instead, choosing to recount their prior argumentation  
21 absent any law. Further, Defendants erroneously assert that Plaintiffs have argued  
22 Dr. Corbett is not entitled to qualified immunity solely based on the affirmative defense  
23 being waived. While Plaintiffs have focused heavily on the untimely nature of the  
24

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25  
26 <sup>1</sup> Plaintiffs incorporate by this reference the law and argument included in their  
27 Opposition to Defendants' "Post-Summary Judgment Motion for a Determination that  
28 Dr. Corbett is Entitled to Qualified Immunity," and Opposition to Defendants' Motion  
For Leave to File an Amended Answer, which were filed with this Court on June 15,  
2009.

1 defense, and strongly object to any discussions or determinations with regard to Dr.  
2 Corbett's right to qualified immunity, five pages of Plaintiffs' Opposition to  
3 Defendants' "Post-Summary Judgment Motion for a Determination that Dr. Corbett is  
4 Entitled to Qualified Immunity" were dedicated to refuting the merits of the defense in  
5 the present circumstances. Defendants' brief does not respond to any of Plaintiffs'  
6 argumentation regarding the merits of Dr. Corbett's claim of qualified immunity.

7 Defendants' assertion of qualified immunity is barred because they have waived  
8 that affirmative defense. Further, even if this Court finds that the Defendants did not  
9 waive the defense, Dr. Corbett is not entitled to qualified immunity because the right he  
10 violated was clearly established at the time of the violation.

11 **CONCLUSION**

12 Therefore, this Court should issue a permanent injunction, find that Plaintiffs are  
13 the prevailing party in this action and are entitled to an appropriate award of attorneys'  
14 fees, and deny Defendants improper attempts to assert an affirmative defense at this  
15 stage in the litigation.

16  
17 DATED: June 22, 2009

ADVOCATES FOR FAITH & FREEDOM

18  
19  
20 By: s/Jennifer L. Monk  
21 Jennifer L. Monk  
22 Email: [jmonk@faith-freedom.com](mailto:jmonk@faith-freedom.com)  
23 Attorney for Plaintiffs  
24  
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26  
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28

1 **CERTIFICATE OF SERVICE**

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

5 On June 22, 2009, I caused to be served the foregoing documents described below on the  
6 following interested parties in this action:

7 **PLAINTIFFS' REPLY TO DEFENDANTS' OPPOSITION TO PLAINTIFFS'**  
8 **SUPPLEMENTAL BRIEFING PURSUANT TO ORDER DATED JUNE 1, 2009**

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

- 11 • **Michael D Hersh**  
mhersh@cta.org
- 12 • **Roberta A Kraus**  
bkraus@wss-law.com
- 13 • **Daniel K Spradlin**  
dspradlin@wss-law.com

14 Executed on June 22, 2009, at Murrieta, California.

15  
16  (Federal) I declare that I am a member of the Bar of this Court at whose direction the service  
17 was made.

18  
19 s/ Jennifer L. Monk  
20 Email: jmonk@faith-freedom.com