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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**  
**FARNAN**;

15 Plaintiffs,

16 vs.

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

21 Defendants.  
22

Case No.: SACV07-1434 JVS (ANX)

23 **OPPOSITION TO DEFENDANTS'**  
24 **MOTION FOR A**  
25 **DETERMINATION THAT**  
26 **DR. CORBETT IS ENTITLED TO**  
27 **QUALIFIED IMMUNITY**

28 Date: August 31, 2009  
Time: 1:30 p.m.  
Dept: 10C  
Judge: James V. Selna

**TABLE OF CONTENTS**

1

2 MEMORANDUM OF POINTS AND AUTHORITIES ..... 1

3 INTRODUCTION..... 1

4 I. Dr. Corbett Waived Qualified Immunity As an Affirmative

5 Defense by Failing to Raise It at Any of the Proper Stages in

6 the Litigation, and This Court Should Not Consider It As an

7 Affirmative Defense Post-Judgment ..... 2

8 II. Plaintiffs’ Contentions Regarding the Amount of Constitutional

9 Violations and an Overarching Theme of Disapproval Should

10 Not Be Allowed to Confuse the Asserted Right That Has

11 Always Been at Issue..... 6

12 III. Dr. Corbett Is Not Entitled to Qualified Immunity Because the

13 Right to Government Neutrality with Regard to Religion Was

14 Clearly Established at the Time the Right Was Violated..... 7

15 IV. Dr. Corbett Is Not Entitled to Qualified Immunity Because the

16 Right He Violated Has Been at Issue from Day One and

17 Defendants Missed Every Practicable Opportunity to Assert the

18 Defense ..... 10

19 CONCLUSION ..... 12

20

21

22

23

24

25

26

27

28

**TABLE OF AUTHORITIES**

**Cases**

*Anderson v. Creighton*,  
483 U.S. 635 (1987) ..... 11

*Camarillo v. McCarthy*,  
998 F.2d 638 (9th Cir. 1993)..... 5

*Castaldo v. Stone*,  
192 F. Supp. 2d 1124 (D. Col. 2001) ..... 7

*Church of the Lukumi Babalu Aye, Inc. v. Hialeah*,  
508 U.S. 520 (1993) ..... 9

*Elk Grove Unified Sch. Dist. v. Newdow*,  
542 U.S. 1 (2004) ..... 9

*Epperson v. Arkansas*,  
393 U.S. 97 (1968) ..... 9

*Evans v. Fogarty*,  
2007 WL 2380990, at \* 6 n.9 (10th Cir. 2007)..... 4

*Gomez v. Toledo*,  
446 U.S. 635(1980) ..... 5

*Graves v. City of Coeur D’Alene*,  
339 F.3d 828 (9th Cir. 2003)..... 5

*Harlow v. Fitzgerald*,  
457 U.S. 800 (1982) ..... 6

*In re Adbox, Inc.*,  
488 F.3d 836 (9th Cir. 2007)..... 6

*Mitchell v. Forsyth*,  
472 U.S. 511 (1985) ..... 6

1	<i>Monterey Mech. Co. v. Wilson,</i>	
2	125 F.3d 702 (9th Cir. 1997).....	10
3	<i>Morrison v. Mahoney,</i>	
4	399 F.3d 1042 (9th Cir. 2005).....	6
5	<i>Pearson v. Callahan,</i>	
6	129 S. Ct. 808 (2009).....	12
7	<i>Ringuette v. City of Fall River,</i>	
8	146 F.3d 1 (1st Cir. 1998) .....	6
9	<i>Saucier v. Katz,</i>	
10	533 U.S. 194 (2001) .....	7, 11, 13
11	<i>Sch. Dist. of Abington Twp., Pa. v. Schempp,</i>	
12	374 U.S. 203 (1963) .....	10
13	<i>Sch. Distr. of Abington Twp., Pa. v. Schempp,</i>	
14	374 U.S. 203 (1963) .....	9
15	<i>Sonoda v. Cabera,</i>	
16	255 F.3d 1035 (9th Cir. 2001).....	5
17	<i>Van Orden v. Perry,</i>	
18	125 S. Ct. 2854 (2005).....	9
19	<i>Vernon v. City of Los Angeles,</i>	
20	27 F.3d 1385 (9th Cir. 1994).....	9

21  
22  
23  
24  
25  
26  
27  
28

**Rules**

5	Charles Alan Wright, Arthur R. Miller & Mary Kay Kane,	
	Federal Practice & Procedure § 1278 (2d ed. 1990).....	6
	Fed. R. Civ. P. 8(c).....	5, 6

1                   **PLAINTIFFS’ OPPOSITION TO DEFENDANTS’ MOTION FOR A**  
2                   **DETERMINATION THAT DR. CORBETT IS ENTITLED TO QUALIFIED**  
3                   **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’ Motion for a Determination that Dr. Corbett is Entitled to Qualified  
7 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’ Motion for a Determination that  
20 Dr. Corbett is Entitled to Qualified Immunity (“Motion”) now proclaims that it must be  
21 determined by this Court that the defense applies. Not only do Defendants fail to  
22 provide any authority for the proposition that the affirmative defense may be properly  
23 considered at this point, but they also fail to even provide any argumentation as to why  
24 it is proper. When confronted with the fact that qualified immunity is not available to  
25 Dr. Corbett now because they failed to raise it, Defendants attempt to close their eyes  
26 and wish it away, and instead seek to argue over whether or not Dr. Corbett is entitled  
27 to immunity. The defense of qualified immunity has been lost by Defendants’ repeated  
28 failure to raise it as an affirmative defense during the earlier stages of litigation.

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

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

23           Despite Defendants’ apparent exhaustive reading of Plaintiffs’ prior briefing in  
24 this matter, they have chosen to overlook their own briefing, which is most problematic  
25 to their present request. Defendants’ Motion attempts to avoid even acknowledging the  
26 paramount hurdle they must jump in order to succeed in obtaining qualified immunity  
27

28 \_\_\_\_\_  
<sup>1</sup> See Defendants’ Motion for a Determination that Dr. Corbett is Entitled to Qualified Immunity, 1:21-22 (emphasis added).

1 for Dr. Corbett. The hurdle was created by Defendants' failure to raise qualified  
2 immunity at any of the proper opportunities during litigation. Defendants urge this  
3 Court to determine the applicability of qualified immunity to Dr. Corbett while  
4 completing ignoring the hurdle that stands before them. Defendants have now had  
5 numerous opportunities to provide this Court with either case law or analysis showing  
6 that their failure to raise qualified immunity does not constitute waiver of the defense  
7 and has repeatedly failed in this endeavor. Unfortunately for Defendants the hurdle  
8 raised by the failure to claim qualified immunity at any of the appropriate times stands  
9 insurmountably in their path.

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

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

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

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

8 Defendants asserted in their Motion that this Court should determine the  
9 applicability of the qualified immunity defense to Dr. Corbett, once again without any  
10 precedent or support for such a conclusion. Defendants cite no cases in support of a  
11 right to raise qualified immunity for the first time after a final ruling on dispositive  
12 cross motions for summary judgment. While Defendants properly note that, according  
13 to the case law, "[q]ualified immunity may be raised by a motion to dismiss, motion for  
14 summary judgment and, of course, at trial," they fail to acknowledge the implications of  
15 their own words. (Motion, p. 14, lns. 23-25.) Noticeably absent, is authority indicating  
16 that qualified immunity may be raised for the first time at the current stage of this  
17 litigation. This is because the case law does not even contemplate the assertion and  
18 application of qualified immunity following a ruling on the merits.

19 Defendants also argue that "[c]ourts [] may raise the issue of qualified immunity  
20 sua sponte and even for the first time on appeal." (Motion, p. 15, lns. 1-3.) While  
21 Defendants cite to two cases to support their contention, they fail to acknowledge the  
22 simple distinction that renders these cases inapplicable here. Unlike Defendants in the  
23 present case, the defendants in both *Graves v. City of Coeur D'Alene*, 339 F.3d 828,  
24 845 fn. 23 (9th Cir. 2003) and *Sonoda v. Cabera*, 255 F.3d 1035 (9th Cir. 2001),  
25 asserted the defense of qualified immunity in their answers. *Graves*, at 846 ("The  
26 defendants asserted the qualified immunity defense in their answer to the complaint.");  
27 *Sonoda*, at 1037 fn 2 ("Although the district court sua sponte granted summary  
28 judgment in favor of the defendants based upon qualified immunity, the affirmative

1 defense was asserted by the defendants in their answer.”). Additionally, neither of these  
2 cases, nor any other case cited by Defendants, gives a court the authority to raise the  
3 issue of qualified immunity sua sponte where a defendant failed to raise qualified  
4 immunity prior to the court issuing a final ruling on the merits of the case. The Ninth  
5 Circuit follows the Supreme Court in holding that qualified immunity should be plead  
6 as an affirmative defense in an official pleading. *Camarillo v. McCarthy*, 998 F.2d 638,  
7 639 (9th Cir. 1993). The court in *Camarillo* relied on *Gomez v. Toledo*, 446 U.S. 635  
8 (1980) (noting that, in a § 1983 action, qualified immunity is an affirmative defense that  
9 must be pled) and Federal Rules of Civil Procedure, Rule 8(c) for its characterization of  
10 qualified immunity as an affirmative defense that should be pled by the defendant. *See*  
11 *also Harlow v. Fitzgerald*, 457 U.S. 800, 815 (1982).

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

20 While waiver of unpled affirmative defenses is the general rule, it is not always  
21 applied, and there are practical exceptions based on the circumstances of the cases. 5  
22 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice &*  
23 *Procedure* § 1278 (2d ed. 1990). Although exceptions exist permitting qualified  
24 immunity to be raised at later stages in the litigation, an important chord has been  
25 sounded by the Supreme Court and lower courts – if qualified immunity is not raised  
26 before a case goes to trial (or reaches the next “stage”), it is effectively lost as an  
27 affirmative defense. *See Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985) (holding that  
28 qualified immunity provides “an immunity from suit rather than a mere defense to

1 liability; and like an absolute immunity, it is effectively lost if a case is erroneously  
2 permitted to go to trial.”); *Saucier v. Katz*, 533 U.S. 194, 200-01 (2001), disapproved on  
3 other grounds (same); *Castaldo v. Stone*, 192 F. Supp. 2d 1124, 1138 (D. Col. 2001)  
4 (holding that “[t]he privilege is ‘an immunity from suit rather than a mere defense to  
5 liability; and like an absolute immunity, it is effectively lost if a case is erroneously  
6 permitted to go to trial.’ [citation] As a result, the Supreme Court has stressed ‘the  
7 importance of resolving immunity questions at the earliest possible stage in litigation.’”  
8 [citation]).

9 Defendants did not plead the qualified immunity affirmative defense, yet now  
10 they ask this Court to consider the question at an extraordinarily late stage in the  
11 litigation. Defendants filed a motion to dismiss, a motion for summary judgment, and  
12 an opposition to Plaintiffs’ motion for summary judgment and still never raised  
13 qualified immunity. This Court ruled on the dispositive motions, finding an  
14 Establishment Clause violation, and Defendants now desperately seek to raise a defense  
15 that was waived and lost.

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

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

1 In their Motion, Defendants seem intent on trying to use Plaintiffs' contentions  
2 regarding the continual and overarching nature of the violation to confuse the issue. To  
3 the contrary, Plaintiffs have consistently alleged that Dr. Corbett violated Chad's right  
4 to be free from a teacher that was anything but neutral with regard to religion in the  
5 public classroom. Just because Plaintiffs have alleged an overarching and consistent  
6 violation of that right in addition to individual violations does not change the right  
7 asserted, nor does it contravene the fact that the standard for a violation of that right is  
8 the disapproval of religion by a government actor. While Defendants try to state  
9 otherwise, Plaintiffs have never claimed that for the constitutional right at issue to be  
10 violated there must be a given number of statements disapproving of religion or an  
11 overarching theme of disapproval.

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

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

19 It has been clearly established for many years that the government must remain  
20 neutral with regard to religion, and it may not show its disapproval of religion. The  
21 Supreme Court has repeatedly affirmed the principle that "[the] First Amendment  
22 mandates government neutrality between . . . religion and nonreligion." *Epperson v.*  
23 *Arkansas*, 393 U.S. 97, 104 (1968). Further, the State certainly "may not establish a  
24 'religion of secularism' in the sense of affirmatively opposing or showing hostility to  
25 religion." *Sch. Distr. of Abington Twp., Pa. v. Schempp*, 374 U.S. 203, 225 (1963); *see*  
26 *also Van Orden v. Perry*, 125 S. Ct. 2854, 2856 (2005) (state may "neither abdicate [its]  
27 responsibility to maintain a division between church and state nor evince a hostility to  
28 religion."). This concept has been articulated as forbidding the disapproval of religion

1 by the Ninth Circuit, holding, “[t]he government neutrality required under the  
2 Establishment Clause is . . . violated as much by government disapproval of religion as  
3 it is by government approval of religion.” *Vernon v. City of Los Angeles*, 27 F.3d 1385,  
4 1396 (9th Cir. 1994) (citing *Church of the Lukumi Babalu Aye, Inc. v. Hialeah*, 508  
5 U.S. 520, 532 (1993)).

6 It has been equally as clear that there are no exceptions for “small” violations.  
7 The Supreme Court has stated, “[t]here are no de minimis violations of the Constitution  
8 – no constitutional harms so slight that the courts are obliged to ignore them.” *Elk*  
9 *Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 36 (2004); *see also Sch. Dist. of*  
10 *Abington Twp., Pa. v. Schempp*, 374 U.S. 203, 225 (1963) (noting, “[t]he breach of  
11 neutrality that is today a trickling stream may all too soon become a raging torrent”).  
12 So too the Ninth Circuit has held, “There is no such thing as a *de minimis* exception to  
13 the Equal Protection Clause.” *Monterey Mech. Co. v. Wilson*, 125 F.3d 702, 712 (9th  
14 Cir. 1997).

15 These cases made it objectively clear that the government must remain neutral  
16 towards religion, and that no “small” violation of that principle can be excused. Every  
17 one of them was existing case law at the time Dr. Corbett violated Chad’s First  
18 Amendment rights. It was objectively apparent to a reasonable person in 2007 that a  
19 public high school teacher must remain neutral with regard to religion. To argue  
20 otherwise contradicts case law, as well as basic notions of constitutional rights.

21 Nevertheless, Defendants still insist that Plaintiffs “ha[ve] not and cannot  
22 establish that the rights [they] claim were violated were ‘clearly established’” because it  
23 was not clear that “a teacher could violate the Establishment Clause by making a single  
24 statement in one lecture given during a year-long course.” (Motion, p. 10, lns. 23-26.)  
25 Unfortunately for Defendants, however, this argument holds no weight as this is not the  
26 appropriate inquiry in determining whether qualified immunity attaches. Rather, as  
27 Defendants state in their Motion, the inquiry as to whether a public employee has a  
28 right to qualified immunity is whether *the right the official is alleged to have violated is*

1 a “clearly established” federal statutory or constitutional right of which a reasonable  
2 person would have known. Defendants further note that the Supreme Court held that  
3 “[t]he inquiry is not whether a particular right is established in a vacuum but whether it  
4 was established on the specific facts of a particular case.” (Motion, p. 7, lns. 6-11.)

5 Defendants’ fail to note, however, that the Court in *Anderson v. Creighton*, 483  
6 U.S. 635, 639-640 (1987) clarified this point, stating that “[t]his is not to say that an  
7 official action is protected by qualified immunity *unless* the very action in question has  
8 previously been held unlawful, but is to say that in light of pre-existing law the  
9 unlawfulness must be apparent.” Plaintiffs repeatedly alleged that Dr. Corbett’s actions  
10 were unconstitutional because they were not neutral and pre-existing law was clear that  
11 neutrality was required. Moreover, they have now been adjudicated by this Court as not  
12 having been neutral. The unlawfulness must be apparent based on pre-existing law if  
13 the facts asserted are construed in the light most favorable to the Plaintiff. *See Saucier*  
14 *v. Katz*, 533 U.S. 194, 200-201 (2001). Additionally, if Defendants had properly  
15 construed the facts asserted in this case from the start, in the light favorable to the  
16 Plaintiffs they would have realized that they could have raised qualified immunity  
17 during the previous proper stages of litigation without prejudicing Plaintiffs with further  
18 inquiry. *Id.* at 200-02.

19 While Defendants attempt to cloud the issue by citing a panoply of Establishment  
20 Clause cases in an attempt to confuse the law, their attempt cannot change the facts.  
21 (Motion, pp. 11-14.) The law clearly mandated Dr. Corbett’s neutrality towards  
22 religion in 2007. Defendants’ litany of cases from different contexts, applying various  
23 legal standards in different circuits, is misplaced. This is not the proper time or place to  
24 re-litigate the Establishment Clause violation that has been found by this Court, and it is  
25 improper to attempt such action. While it is clear Defendants disagree with this Court’s  
26 ruling, that does not allow them to argue qualified immunity now. Further, it does not  
27 alter the fact that preexisting law mandated neutrality with no exception for what  
28 Defendants erroneously deem to be a small violation.

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

4 Defendants' passionate claim of qualified immunity for Dr. Corbett cannot be  
5 saved by their wishing the facts were different. As their own citation highlights,  
6 Defendants missed the opportunity to raise qualified immunity by motion to dismiss  
7 and motion for summary judgment – and at every practicable opportunity in the  
8 litigation before the dispositive ruling. (Motion, p. 14, lns. 23-25.)

9 While Defendants quote *Pearson v. Callahan*, 129 S. Ct. 808, 818 (2009), in an  
10 apparent attempt to generate sympathy for their own difficulty in deciding whether or  
11 not to plead qualified immunity, the case does not provide them any excuse. Instead,  
12 *Pearson* specifically deals with the steps courts may take in determining if a qualified  
13 immunity claim is valid *when it has already been properly raised by the defense*. In  
14 this matter, the defense was never properly raised, and the Court consequently need not  
15 examine the defense at all. While Defendants further try to treat the dispositive ruling  
16 in this matter as nothing more than a step of the qualified immunity analysis, it simply  
17 is not so. (Motion, p. 15, lns. 22-28.) This Court's ruling was not far-reaching or novel  
18 in affirming a right to neutrality towards religion in the public school classroom, nor did  
19 it discover the unlawfulness of Dr. Corbett's actions. This Court's ruling did, however,  
20 acknowledge that there is a line of neutrality that must be walked in the public school  
21 classroom according to preexisting law and that Dr. Corbett crossed that line as  
22 Plaintiffs had alleged.

23 A determination that Dr. Corbett did in fact violate Plaintiffs' right to be free of a  
24 government that directly expresses disapproval of religion did not put that constitutional  
25 right at issue for the first time or establish what the right at issue was, despite  
26 Defendants' claims otherwise. Further, whether or not Defendants had the right to  
27 claim qualified immunity is tied to the facts alleged, as construed in a light favorable to  
28 the Plaintiffs, not the violation found by this Court. *See Saucier v. Katz*, 533 U.S. 194,

1 200-01 (2001). As was outlined above, Plaintiffs have alleged facts showing alleged  
2 violations of constitutionally mandated neutrality towards religion from the filing of the  
3 Complaint.

4 Moreover, Defendants have acknowledged that at the time Dr. Corbett made the  
5 statements at issue, it was clearly established that an overarching theme of disapproval  
6 violated the Establishment Clause. At the same time, Defendants have protested that  
7 Plaintiffs have claimed that the violation at issue was the overarching theme. (Motion,  
8 p. 16, lns. 4-6.) Defendants cannot have it both ways. Since the right to claim qualified  
9 immunity is tied to the allegations of the case, even if Defendants truly misunderstood  
10 the allegations, it still should have been clear to them they could have pled qualified  
11 immunity at the proper stages. Their delay is without excuse, and there is no precedent  
12 for excusing it.

13 It has been clear from the start of this litigation what the violated right is, and  
14 Defendants failed to plead qualified immunity. It was doubtlessly true then, as it is  
15 now, that a student has the right not to have his religious beliefs attacked and ridiculed  
16 by his teacher in the public school classroom. As this Court pointed out in its Order of  
17 May 1, 2009, the basic right at issue in this matter is the right “to be free of a  
18 government that directly expresses disapproval of religion.” (Final Order Re Motions  
19 for Summary Judgment or Summary Adjudication, p. 36, lns. 12-13.) This has been the  
20 right Plaintiffs have been raising since the initial Complaint in which Plaintiffs stated,  
21 “[Dr. Corbett’s] conduct is a violation of the Establishment Clause through [the]  
22 exhibition of hostility towards religion and endorsement of irreligion in a public high  
23 school classroom.” (Complaint for Declaratory and Injunctive Relief and Damages,  
24 p. 2, lns. 6-9.) The allegations in this action clearly indicated what the alleged violation  
25 was, and preexisting law showed that it was constitutionally impermissible.

26 The right claimed in this action has never changed, and no attempted confusion  
27 on the part of the Defendants entitles them to assert qualified immunity at this late  
28 stage. The right alleged by Plaintiffs has always been clear, it was clearly established

1 under law at the time Dr. Corbett violated it, and Dr. Corbett is not entitled to qualified  
2 immunity.

3 **CONCLUSION**

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

14 DATED: August 17, 2009

ADVOCATES FOR FAITH & FREEDOM

15  
16  
17 By: s/Jennifer L. Monk  
18 Jennifer L. Monk  
19 Email: [jmonk@faith-freedom.com](mailto:jmonk@faith-freedom.com)  
20 Attorney for Plaintiffs  
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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  
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 August 17, 2009, I caused to be served the foregoing documents described  
7 below on the following interested parties in this action:

8 **OPPOSITION TO DEFENDANTS' MOTION FOR A**  
9 **DETERMINATION THAT DR. CORBETT IS ENTITLED TO**  
10 **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**  
16 dspradlin@wss-law.com

17 Executed on August 17, 2009, at Murrieta, California.

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  
Email: jmonk@faith-freedom.com