

1 MICHAEL D. HERSH - [State Bar No.144095]  
mherh@cta.org  
2 CALIFORNIA TEACHERS ASSOCIATION - LEGAL DEPARTMENT  
11745 East Telegraph Road  
3 Santa Fe Springs, California 90670  
Telephone: 562.478.1348  
4 Fax: 562.478.1434

5 Attorneys for Union Intervenors CALIFORNIA TEACHERS ASSOCIATION;  
6 and CAPISTRANO UNIFIED EDUCATION ASSOCIATION

7  
8 UNITED STATES DISTRICT COURT  
9 FOR THE CENTRAL DISTRICT OF CALIFORNIA - SANTA ANA DIVISION

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

13  
14 Plaintiff,

15 v.

16  
17 CAPISTRANO UNIFIED SCHOOL  
DISTRICT; DR. JAMES CORBETT,  
18 et al.,

19 Defendants.

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

24 Union Intervenors for Defendants.

**Case No. : SACV-07-1434 JVS (ANx)**

*BEFORE THE HONORABLE  
JAMES V. SELNA – COURTROOM 10C*

**UNION INTERVENORS'  
OPPOSITION TO PLAINTIFF'S  
SUPPLEMENTAL BRIEF ON  
REMAINING ISSUES**

**MOTION**

**DATE:** July 13, 2009  
**TIME:** 1:30 p.m.  
**COURTROOM:** 10C/Judge Selna

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1 **I. PLAINTIFF'S DE MINIMUS VICTORY IN THE MIDST OF**  
2 **MERITLESS AND DECEPTIVE ALLEGATIONS DOES NOT**  
3 **SUPPORT A GRANTING OF ATTORNEYS' FEES NOR MAKE**  
4 **PLAINTIFF A PREVAILING PARTY**

5 Plaintiff claims to be a prevailing party, but the Court's ruling on the  
6 motions for summary judgment, valiantly attempting to navigate the competing  
7 public policies at issue in this case, is not a victory for religious liberty or persons  
8 of faith such as Plaintiff. Teachers who need or wish to educate their students  
9 concerning the misrepresentations and unscientific methods of young-earth  
10 creationists will be wary in light of the Court's ruling lest a single statement be  
11 perceived as a potential violation of the Establishment Clause, and teachers who  
12 wish to speak of their religious faith to students to explain their own biases and  
13 motivations must also be wary lest a single statement be taken as an unequivocal  
14 statement endorsing religion. The loss of candor between teachers and students,  
15 the chilling impact upon religious discussions in public education, and the  
16 encouragement of frivolous pupil-driven litigation that are likely to result should  
17 the Court make its ruling on the motions for summary judgment the basis of a final  
18 judgment deprives students, including Plaintiff, of a secular environment to  
19 explore and consider the impact of religions and religious beliefs on the world and  
20 in their own lives. A Plaintiff deprived of that exploration and education cannot  
21 be said to have prevailed.

22 Nor has Plaintiff prevailed on his sole legal claim. Plaintiff claims that he  
23 prevailed because the Court ruled that one statement of Defendant Corbett violated  
24 the Establishment Clause. However, the statement upon which this finding was  
25 made was one not pleaded in the Complaint or First Amended Complaint. The  
26 First Amended Complaint's sole legal claim was that Defendants' practice and  
27 policy were hostile to religion and treated religious students as second-class  
28 citizens and that Dr. Corbett's statements [in the plural] treated religious students

1 as outsiders. FAC ¶¶ 22 - 24 at 11. Plaintiff proved no such practice or policy,  
2 and produced only one statement among thousands that Plaintiff recorded and  
3 transcribed for the Court that the Court has found to violate the Establishment  
4 Clause. The Court found that all the statements of Dr. Corbett that Plaintiff  
5 alleged in the First Amended Complaint passed Constitutional muster, and  
6 therefore Plaintiff cannot be said to have prevailed on the merits of even one of his  
7 claims. *Buckhannon Bd. & Care Home, Inc.*, 542 U.S. 598, 603 (2001).<sup>1</sup> Nor has  
8 the legal relationship between Dr. Corbett and Plaintiff been altered as a result of  
9 this litigation, as Plaintiff dropped Dr. Corbett's AP European History course, and  
10 according to Plaintiff himself, Dr. Corbett has not altered his behavior as a result  
11 of the Court's ruling.

12 Even if the Court deemed Plaintiff a prevailing party and granted Plaintiff  
13 nominal damages or equitable relief, attorneys' fees should not be granted to  
14 Plaintiff. In light of the dozens of statements which Plaintiff wrongly claimed  
15 violated the Establishment Clause by being hostile to religion, including  
16 statements that placed Christians and Christian beliefs in a positive light, though  
17 edited by Plaintiff to appear otherwise, and the single statement found by the  
18 Court to violate the Establishment Clause, Plaintiff can be said to have prevailed  
19 in only a technical and *de minimus* way. "Chimerical accomplishments are simply  
20 not the kind of legal change that Congress sought to promote in the fee statute."  
21 *Farrar v. Hobby*, 506 U.S. 103, 116-119, 113 S.Ct. 566, 575 - 577 (1992).  
22 Plaintiff's meager and technical victory in the midst of such defeat on the pleaded  
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24 <sup>1</sup> Given this result, Defendant's failure to plead the sovereign immunity  
25 defense, and Union Intervenors failure to raise that defense, though pleaded in  
26 their Answer, in the motion for summary judgment should not preclude the raising  
27 of the affirmative defense now. Because Union Intervenors believe that the  
28 motions to amend Dr. Corbett's answer and raise the qualified immunity defense  
have already addressed the merits of that issue, they will not repeat those points  
here.

1 allegations is not the kind of legal change that Congress sought to promote in the  
2 fee statute.

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4 II. EQUITABLE RELIEF IS UNWARRANTED AND UNWORKABLE IN  
5 THIS CASE

6 Plaintiff requests a permanent injunction “ordering Dr. Corbett to refrain  
7 from expressing any disapproval of religion while acting in his official capacity as  
8 a public school employee.” (Pl. Supp. Brief at 1:21-23) Plaintiff further requests  
9 that the Court “retain jurisdiction over this case if it becomes necessary for  
10 Plaintiffs to request monitoring or other compliance measures.” (Id. at 4:9-11.)  
11 Such overbroad and vague equitable relief accompanied by continued judicial  
12 involvement in local school affairs are not warranted here.

13 “[I]njunctive relief is not automatic, and there is no rule requiring automatic  
14 issuance of a blanket injunction when a violation is found.” *Northern Cheyenne*  
15 *Tribe v. Norton*, 503 F.3d 836, 843 (9<sup>th</sup> Cir. 2007) When injunctive relief is  
16 appropriate, “the court must balance the equities between the parties and give due  
17 regard to the public interest.” *Id.* Plaintiff correctly quotes *Lemon v. Kurtzman*  
18 [II], 411 U.S. 192, 200 (1973) for the proposition that “in Constitutional  
19 adjudication, equitable remedies are a special blend of what is necessary, what is  
20 fair, and what is workable.” Pl. Supp. Brief at 3:14-18. The equitable remedies  
21 sought by Plaintiff are, however, unnecessary, unfair and unworkable.

22 The equitable relief is unnecessary because even nominal damages or a  
23 judgment that his single statement was unconstitutionally hostile to religion are  
24 devastating to any professional educator who sincerely believes he or she operates  
25 in the best interests of the youth under his or her care. Plaintiff provides the Court  
26 with an article from the Orange County Register in an attempt to show “Dr.  
27 Corbett’s unrepentant attitude toward this Court’s ruling dated May 1, 2009.” (Pl.  
28 Suppl. Brief at 2:6-7) Union Intervenors will stipulate that these unauthenticated

1 hearsay statements offered by Plaintiff may be admitted to evidence as direct  
2 testimony of Dr. Corbett. The statements attributed to Dr. Corbett in that article  
3 actually show that the Court's ruling has shaken Dr. Corbett by attributing  
4 unconstitutional motivation and effect to his Pelozo comment, but without  
5 providing Dr. Corbett or other teachers exercising their professional judgment in  
6 good faith a workable basis to avoid violations of the Establishment Clause.  
7 Without such a clear guideline, equitable relief cannot be effective without also  
8 enjoining or discouraging constitutionally valid and necessary speech. In effect,  
9 Plaintiff seeks to have the Court enjoin Dr. Corbett from making statements that  
10 the Court has already determined passed Constitutional muster and which  
11 injunction would chill all teacher speech which offends Plaintiff. It is Plaintiff,  
12 not Dr. Corbett, who is unrepentant, despite the Court ruling against Plaintiff on  
13 every matter other than the Pelozo statement.

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15 III. THE HARM TO DEFENDANTS AND INTERVENORS FROM  
16 GRANTING AN INJUNCTION FAR OUTWEIGHS THE HARM TO  
17 PLAINTIFF FROM DENYING SUCH RELIEF

18 The harm to Defendants of granting Plaintiff's request for equitable relief  
19 far outweighs the harm to Plaintiff should his request be denied. Further, Plaintiff  
20 would not benefit from the injunctive relief he seeks.

21 The Court has already witnessed how many constitutionally permissible  
22 statements of Dr. Corbett were unreasonably deemed by Plaintiff to be hostile to  
23 religion - even statements placing Christian beliefs and believers in a positive  
24 light. The damage of such an injunction where each individual statement of Dr.  
25 Corbett would be scrutinized by overzealous students, parents and non-educators  
26 for evidence of hostility would be enormous and irreparable. Denying the request  
27 for injunctive relief, on the other hand, does not harm Plaintiff in the least, as he is  
28 no longer a student of Dr. Corbett. Nor has it been shown that Plaintiff or any

1 student was harmed in particular by the individual statement found by the Court to  
2 violate the Establishment Clause, as opposed to the damage he claimed from  
3 statements that the Court has found to not violate the Establishment Clause. In the  
4 course of any day, students are exposed to thousands of individual statements and  
5 hundreds of thousands of such statements over the course of a semester. It would  
6 be wrong to exaggerate the benefits or damages that result from any one statement,  
7 especially where there is no overall pattern of constitutionally valid speech and  
8 other statements that placed religion and religious believers in a positive and  
9 respectful light.

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11 IV. THE LIKELY DAMAGE TO THE PUBLIC INTEREST IN PUBLIC  
12 EDUCATION FROM GRANTING PLAINTIFF'S REQUEST FOR  
13 INJUNCTIVE RELIEF IS GREAT

14 The damage to the public interest in public education from granting  
15 Plaintiff's request is two-fold. First, the injunction would be a prior restraint on  
16 teacher speech that would inevitably chill constitutionally necessary and valuable  
17 speech and retard the educational mission of our public schools. Numerous court  
18 decisions have emphasized the pernicious impact of prior restraints on discussions  
19 of current events, the keystone of the First Amendment. See, e.g., *Goldblum v.*  
20 *National Broadcasting Corp.*, 584 F.2d 904 (9<sup>th</sup> Cir. 1978) & *Nebraska Press Ass'n*  
21 *v. Stuart*, 427 U.S. 539, 559 (1976).

22 In addition, the monitoring and enforcement of such an injunction in light of  
23 Plaintiff's demonstrated inability to distinguish the grain from the chaff would  
24 entail excessive entanglement of the State and improper Federal intervention in  
25 matters best left to local school districts to police. Even if equitable relief could  
26 be fashioned that would declare or enjoin speech that is unequivocally hostile to  
27 religion without declaring or enjoining constitutionally protected speech as well,  
28 the entanglement of Federal Courts in religious matters would be so excessive as

1 to itself violate the Establishment Clause. See, *Lemon v. Kutzman*, 411 U.S. 192,  
2 203, fn. 3 [Concurrence of Justice White on the paradox of Judicial entanglement  
3 in Establishment Clause enforcement]. Had plaintiff shown a practice or policy of  
4 hostility toward religion, such entanglement might be a necessary evil but here it is  
5 not.

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7 V. THE MAY 1 RULING OF THE COURT SHOULD NOT BE THE BASIS  
8 OF A FINAL JUDGMENT IN THIS CASE

9 The declaratory and injunctive relief that Plaintiff seeks, as set forth in his  
10 Supplemental Briefing Pursuant to Order Dated June 1, 2009 (Suppl. Brief) sadly  
11 demonstrates why the Court's May 1, 2009 ruling on the motions for summary  
12 judgment fails to set forth a viable framework for teachers to discuss controversial  
13 topics without running afoul of the Establishment Clause.

14 Dr. Corbett's reported statements in the newspaper article that Plaintiff  
15 proffers to the Court show that the Court's May 1, 2009 ruling erred in finding  
16 that the Pelozo comment violated the purpose and effect prongs of the  
17 Establishment Clause. Dr. Corbett explains in that interview that the Pelozo  
18 comment was directed not at "creationism" but rather at specific unscientific  
19 teachings of Pelozo in his Biology classroom. The context of the remark, a  
20 recitation of Dr. Corbett's involvement in the Pelozo litigation told for the purpose  
21 of showing students that Dr. Corbett viewed himself as a protector of students  
22 against forces in the school and community that would pervert their education to  
23 improperly impose unfounded criticisms of scientific methodology would have  
24 precluded reasonable listeners from understanding it otherwise. Union Intervenors  
25 respectfully ask the Court to revisit that finding, one that the Court has already  
26 recognized to be both difficult and worthy of such review.

27 The May 1 ruling, though not yet a final judgment, due to media coverage  
28 and the import of the ruling throughout the public education system, already

1 effectively serves as a prior restraint on speech, and as such it will discourage  
2 controversial speech and cause teachers to shy away from legitimate critical  
3 statements about the scientific pretensions of Creationism. It will make each  
4 individual statement of a teacher a potential federal court case, and encourage  
5 more of the largely meritless litigation that Plaintiff has already foisted upon the  
6 Defendants and the Court. Had the Court found Dr. Corbett to be the person that  
7 Plaintiff had painted him to be, an atheist engaged in an ongoing pattern of  
8 harassment and hostility towards Christianity, such a finding would have had less  
9 impact on teachers who have no ideological agenda. But where a single statement  
10 has been found to violate the Establishment Clause, every teacher must now weigh  
11 each individual statement on a potentially offensive subject. One need look no  
12 further than the long list of statements which Plaintiff urged the Court to find  
13 offensive to the Constitution, many purposefully taken out of context, in order to  
14 see what an impossible position this places teachers and how corrosive such a  
15 restraint would be to public education.

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17 VI. UNION INTERVENORS ARE PREVAILING PARTIES ALONG WITH  
18 THE DEFENDANT SCHOOL DISTRICT

19 Union Intervenors found it necessary to intervene in this case primarily for  
20 two reasons: First, the remedies that Plaintiff sought to impose upon Defendant  
21 School District implicated the statutory and contractual rights of the Union  
22 Intervenors as legal representatives of the School District's teachers. Second,  
23 Union Intervenors understood that this litigation could have profound implications  
24 for principals of Academic Freedom and their members' exercise of professional  
25 discretion in determining how to present controversial topics. The First concern  
26 appears to have been addressed with the Court's ruling that the defendant School  
27 District did not violate the Establishment Clause, which would appear to preclude  
28 injunctive relief that interferes with the Union's statutory and contractual rights to

1 negotiate terms and conditions of employment with the School District. The  
2 Second concern, despite the Unions' disagreement with the Court's ruling on the  
3 Pelosa statement, appears to have been vindicated in the Court's thoughtful and  
4 thorough examination of the evidentiary record and acknowledgment of the  
5 latitude that teachers need to educate our citizens. In addition, but for the Pelosa  
6 comment, the Union Intervenors' motion for summary judgment or adjudication  
7 was granted by the Court's May 1 ruling. For all these reasons, the Union  
8 Intervenors and Defendant School District are prevailing parties in this litigation.

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11 DATED: June 15, 2009

Respectfully submitted,  
CALIFORNIA TEACHERS ASSOCIATION

12  
13 By:                   /S/                    
14 Michael D. Hersh  
15 Attorneys for Union Intervenors CTA  
16 and CUEA  
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