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DISTRICT and DR. JAMES CORBETT

7
8 UNITED STATES DISTRICT COURT
9 CENTRAL DISTRICT OF CALIFORNIA

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

13 Plaintiff,

14 v.

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

18 Defendants.

19
20 CALIFORNIA TEACHERS
ASSOCIATION/NEA; and
21 CAPISTRANO UNIFIED EDUCATION
ASSOCIATION,

22 Union Intervenors/Defendants.
23

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

**DEFENDANTS' OPPOSITION TO
PLAINTIFF'S SUPPLEMENTAL
BRIEFING PURSUANT TO ORDER
DATED JUNE 1, 2009;
MEMORANDUM OF POINTS AND
AUTHORITIES**

HEARING DATES PENDING:

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

24
25 Defendants CAPISTRANO UNIFIED SCHOOL DISTRICT ("CUSD") and
26 DR. JAMES CORBETT ("Dr. Corbett") (sometimes collectively "Defendants")
27 submit the following memorandum of points and authorities in opposition to the
28 supplemental briefing pursuant to order dated June 1, 2009 filed by Plaintiff CHAD

1 FARNAN, a minor, by and through his parents BILL FARNAN and TERESA
2 FARNAN ("Farnan").

3 DATED: June 15, 2009

WOODRUFF, SPRADLIN & SMART, APC

4
5 By: 

6 DANIEL K. SPRADLIN
7 ROBERTA A. KRAUS
8 Attorneys for Defendants CAPISTRANO
9 UNIFIED SCHOOL DISTRICT and DR.
10 JAMES CORBETT
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MEMORANDUM OF POINTS AND AUTHORITIES

1. INTRODUCTION

By his supplemental brief, Farnan seeks an injunction against Dr. Corbett ordering him “to refrain from expressing any disapproval of religion while acting in his official capacity as a public school employee” and also seeks recovery of his attorney’s fees. As stated to this Court, Farnan does not seek damages against Dr. Corbett other than “nominal” damages. Farnan also seeks to preclude CUSD from recovering its attorney’s fees and seeks to prevent Dr. Corbett from obtaining a determination on the issue of qualified immunity. As discussed below, Farnan’s requested injunction is unwarranted, overbroad and unworkable. Further, Farnan has failed to establish that he is the prevailing party entitling him to an award of all of his attorney’s fees in this matter. Finally, as discussed here and in Defendants’ previously filed motions to amend and for determination of qualified immunity, Dr. Corbett is entitled to a finding of qualified immunity in his favor.

A. Background Facts

Throughout this litigation Farnan has postured this case as being about a teacher’s alleged constant expression of disapproval of religion and Christianity in particular. “[T]he gravamen of Plaintiffs’ case was and remains the *barrage of religious hostility* expressed by Dr. Corbett throughout the Fall 2007 semester during his Advanced Placement European History class.”¹ This case has never concerned “a few incidental statements of a teacher that may periodically reflect upon the teacher’s personal beliefs.”² Farnan has always asserted that this case concerns Dr. Corbett’s alleged “continual and incessant actions.”³

///

¹ See, Plaintiff’s reply to Defendants’ opposition to Plaintiff’s motion for summary judgment, 1:4-6; emphasis added.
² See, Plaintiff’s opposition to Defendants’ motion for summary judgment, 10:14-16.
³ Ibid.

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

7 Additionally, Farnan made the following assertions in his opposition to
8 Defendants’ motion to dismiss: “statements made by Dr. Corbett are continual and
9 incessant” (10:14); “continual and incessant disapproval of religion” (10:23); “For
10 months Chad Farnan sat in an AP European History class . . . learning . . . about Dr.
11 Corbett’s own propagation of a ‘religion of secularism’” (12:11-14); and “When taken
12 together, [Dr. Corbett’s comments] are clearly anti-Christian diatribes” (15:12-13). In
13 fact, when this Court denied Defendants’ motion to dismiss, it noted that the gist of
14 Farnan’s claim against Defendants is based on Farnan’s claim that his rights were
15 violated by a “practice and policy hostile toward religion and favoring irreligion over
16 religion.” (Court’s minute order denying motion to dismiss, ¶2)

17 In his interrogatory responses, Farnan asserted: “Throughout the Fall 2007
18 semester, Dr. Corbett made numerous statements regarding Christianity and religion
19 generally that expresses a viewpoint that is derogatory, disparaging, and belittling
20 regarding religion and Christianity in particular. . . . While there are individual
21 comments that are particularly offensive and expressive of said viewpoints, those and
22 all of his comments must be taken in context of the entire lecture and class
23 environment . . .” (6:16-25 and 7:20-28)

24 In his motion for summary judgment Farnan contended that Dr. Corbett
25 violated the Establishment Clause on a daily basis when he made anti-Christian or
26 anti-religious statements during the 2007 AP European History course. Farnan
27 specifically pointed to 22 *separate statements* made by Dr. Corbett that he contended,
28 when taken as a whole, constituted such a violation. When the parties filed their cross-

1 motions for summary judgment Farnan continued to posit that it was the sum total of
2 the statements – the “constant barrage” of statements – that violated the Establishment
3 Clause.

4 Farnan made the following assertions in his opposition to Defendants’ motion
5 for summary judgment: “Plaintiffs brought this action with the intent to quell the
6 religious hostility that has germinated for many years in Dr. Corbett’s public
7 classroom at Capistrano Valley High School” (1:2-4); “numerous hostile comments of
8 Dr. Corbett” (4:4-5); “the Court must inquire into the purpose for the overreaching
9 theme established by Dr. Corbett’s lectures” (6:6-7); “[Dr. Corbett] states it many
10 times, and in many ways, both indirectly and directly” (6:16-17); “Dr. Corbett is using
11 his bully pulpit to spew his propaganda . . .” (8:12-13); “Dr. Corbett’s statements
12 regarding religion and Christianity, both in Chad’s class and other classes, send
13 primarily a message of disapproval of religion” (9:2-4); “Defendants’ actions fail the
14 third prong of the Lemon test because the statements made by Dr. Corbett are
15 continual and incessant, and the School District has done nothing to lessen them”
16 (9:18-20); “*This case does not concern a few incidental statements of a teacher that*
17 *may periodically reflect upon the teacher’s personal beliefs. Instead, it concerns Dr.*
18 *Corbett’s continual and incessant actions . . .*” (10:14-16; emphasis added); and
19 “When applying the correct standard, and reviewing all of Dr. Corbett’s comments
20 instead of singling out a few comments . . .” (14:24-26)

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

28 ///

1 In his declaration in support of his motion for summary judgment Farnan made
2 the following assertions: “Dr. James Corbett spent a significant amount of class time
3 discussing topics and issues not relevant to European history” (2:19-20); “On a regular
4 basis during the fall 2007 semester, Dr. Corbett discussed a wide variety of topics not
5 related to Advanced Placement European History” (3:3-4); “While teaching the
6 subject of the class and while discussing various other topics, Dr. Corbett made
7 statements and expressed viewpoints that were derogatory, disparaging, and belittling
8 regarding religion and Christianity in particular” (3:5-9); “These comments were not
9 limited to one particular day, but instead occurred on most days that I was in his
10 classroom” (3:10-11); “Dr. Corbett’s anti-Christian viewpoints are well-known by the
11 students at my high school as they are often presented through comments he makes
12 during class” (3:12-14); “Dr. Corbett made many comments regarding his personal
13 bias against Christianity” (3:15-16); “When Dr. Corbett was talking to my class, he
14 regularly included his own ideas about God and religion” (3:16-17); “As a result of his
15 ongoing comments . . .” (3:19-20)

16 Farnan’s reply to Defendants’ opposition to Farnan’s motion for summary
17 judgment stated that “[t]he gravamen of Plaintiffs’ case was and remains the barrage
18 of religious hostility expressed by Dr. Corbett throughout the Fall 2007 semester
19 during his Advanced Placement European History class” (1:4-6; emphasis added).

20 Finally, Farnan’s response to Defendants’ objections to Farnan’s evidence
21 submitted by Farnan in support of his motion for summary judgment stated that “Dr.
22 Corbett[] [had a] habit or routine practice of making negative or hostile comments
23 about religion and Christianity . . .” (3:21-22)

24 **B. This Court’s Ruling on the Parties’ Motions for Summary Judgment**

25 On May 1, 2009, this Court found that Dr. Corbett did *not* engage in a continual
26 and incessant barrage of religious hostility. Instead, this Court determined that Dr.
27 Corbett violated the Establishment Clause when Dr. Corbett made the single statement
28 “religious, superstitious nonsense” during a discussion about the lawsuit filed against

1 CUSD, Dr. Corbett and others by former biology teacher John Peloza who had refused
2 to teach the state-mandated curriculum (the theory of evolution) but instead taught
3 creationism in the classroom. Dr. Corbett made this single statement during the course
4 of one lecture while teaching his year-long AP European History course. The Court
5 found that no other statement attributed to Dr. Corbett during this year-long AP
6 European History course violated the Establishment Clause and that there was no
7 evidence presented sufficient to establish that Dr. Corbett had a pattern and practice of
8 violating the Establishment Clause.

9 **2. FARNAN IS NOT ENTITLED TO AN INJUNCTION AGAINST DR.**
10 **CORBETT**

11 Farnan asks that an injunction issue against Dr. Corbett ordering him “to refrain
12 from expressing any disapproval of religion while acting in his official capacity as a
13 public school employee.” (Farnan’s supplemental brief, 1:21-23) As discussed below,
14 Farnan’s requested injunction simply is overbroad, unenforceable and unwarranted.

15 An injunction is an equitable remedy that is not issued “as of course.” (See,
16 Weinberger v. Romero-Barcelo, 456 U.S. 305, 311, 102 S.Ct. 1798, 72 L.Ed.2d 91
17 (1982)) To obtain injunctive relief, a plaintiff must establish “irreparable injury and
18 the inadequacy of legal remedies.” (Id. at 312)

19 Moreover, the purpose of an injunction is to prevent future violations. Thus,
20 Farnan must show “some cognizable danger of recurrent violation, something more
21 than the mere possibility.” (See, for example, United States v. W.T. Grant Co., 345
22 U.S. 629, 634, 73 S.Ct. 894, 97 L.Ed. 1303 (1953); see also, Jews for Jesus, Inc. v.
23 Hillsborough County Aviation Authority, 162 F.3d 627, 629 (11th Cir. 1998) [a case
24 is moot when events subsequent to the commencement of a lawsuit create a situation
25 in which the court can no longer give the plaintiff meaningful relief]; and Cotterall v.
26 Paul, 755 F.2d 777, 780 (11th Cir. 1985) [“Past exposure to illegal conduct does not in
27 itself show a pending case or controversy regarding injunctive relief if unaccompanied
28 by any continuing, present injury or real and immediate threat of repeated injury.”])

1 The Supreme Court has stated that plaintiffs must demonstrate that a “credible
2 threat” exists that they will again be subject to the specific injury for which they seek
3 injunctive or declaratory relief. A “reasonable showing” of a “sufficient likelihood”
4 that plaintiff will be injured again is necessary. (Sample v. Johnson, 771 F.2d 1335,
5 1340 (9th Cir. 1985)) In other words, claims for injunctive relief become moot when
6 the plaintiff no longer is subject to the conditions of which he or she complains. (See,
7 for example, Williams v. Griffin, 952 F.2d 820, 823 (4th Cir. 1991) [inmate’s transfer
8 mooted claims for injunctive and declaratory relief, but claims for monetary damages
9 were not moot]; and Magee v. Waters, 810 F.2d 451, 452 (4th Cir. 1987) [holding that
10 the transfer of a prisoner rendered the prisoner’s claim for injunctive relief moot but
11 his claim for monetary damages remained])

12 Further, when an injunction burdens speech, the Court must ask whether the
13 provisions of the injunction burden no more speech than necessary to serve a
14 significant government interest. (See, Madsen v. Women's Health Center, Inc., 512
15 U.S. 753, 765, 114 S.Ct. 2516, 129 L.Ed.2d 593 (1994))

16 In Van Dyke v. Regents of University of California, 815 F.Supp. 1341, 1346
17 (C.D. Cal. 1993), the plaintiffs requested a preliminary and permanent injunction
18 enjoining Dr. West and his associates from “using state funds administered by
19 defendants Regents and Young to fund anti-religious activities of West which have the
20 purpose or effect of disrupting, destroying, impeding and interfering with the free
21 exercise by plaintiffs of their religion’ from ‘using state funds to finance his anti-
22 religious and CAN/AFF activities,’ and a declaratory judgment that these activities
23 ‘were and are illegal and improper.’” The court noted that it could not grant the
24 requested injunction, stating:

25 “The court has neither the power to grant such relief nor to enforce it if
26 granted. *It is both vague*, since defendants would have no idea of what
27 activity was proscribed by the ban on ‘anti-religious’ activity, *and*
28 *overbroad*, because a blanket ban on ‘anti-religious’ activity would

1 encompass a great deal of academic speech and scholarly inquiry clearly
2 protected by the First Amendment. [¶] It is difficult to imagine any form
3 of relief that would not raise similarly insurmountable First Amendment
4 concerns. Even if the court could craft injunctive language neither vague
5 nor overbroad, the injunction would still designate a certain category of
6 activity as impermissible and punishable by contempt. The probable
7 result would be a chilling of Dr. West's rights of free speech, since the
8 fear of being held in contempt of court might lead him to exercise
9 excessive caution and to steer well clear of the prohibited subject matter.”

10 (Ibid.; emphasis added)

11 In support of his requested injunction Farnan relies on Swann v. Charlotte-
12 Mecklenburg Bd. of Educ., noting that the district court has “breadth and flexibility”
13 in fashioning equitable remedies. The Swann court also stated, however:

14 “The task is to correct, by a balancing of the individual and collective
15 interests, the condition that offends the Constitution. [¶] In seeking to
16 define even in broad and general terms how far this remedial power
17 extends it is important to remember that *judicial powers may be*
18 *exercised only on the basis of a constitutional violation.*” (Swann v.
19 Charlotte-Mecklenburg Bd. of Ed., 402 U.S. 1, 16, 91 S.Ct. 1267, 28
20 L.Ed.2d 554 (1971); emphasis added)

21 Swann further states: “As with any equity case, the nature of the violation
22 determines the scope of the remedy.” (Ibid.)

23 Farnan also cites Northern Cheyenne Tribe, which sets forth the showing a
24 plaintiff must make in order to obtain an injunction. In addition to listing the elements
25 a plaintiff must meet to satisfy the required showing for an injunction, the Cheyenne
26 court also stated:

27 “Injunctive relief is typically appropriate in environmental cases (and
28 was granted in this case) because ‘[e]nvironmental injury, by its nature,

1 can seldom be adequately remedied by money damages and is often
2 permanent or at least of long duration, i.e., irreparable.' . . . *But injunctive*
3 *relief is not automatic*, and there is no rule requiring automatic issuance
4 of a blanket injunction when a violation is found. 'The grant of
5 jurisdiction to ensure compliance with a statute hardly suggests an
6 absolute duty to do so under any and all circumstances, and *a federal*
7 *judge sitting as chancellor is not mechanically obligated to grant an*
8 *injunction for every violation of law.'* [Citation omitted]" (Northern
9 Cheyenne Tribe v. Norton, 503 F.3d 836, 843 (9th Cir. 2007); emphasis
10 added)

11 Farnan seems to think that all he has to show is a first amendment violation and
12 the granting of an injunction is automatic. In support of his position, Farnan cites
13 Elrod v. Burns, 427 U.S. 347, 373-374, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976). Elrod,
14 however, is inapposite as it was determined in the *preliminary injunction* context.
15 Elrod, a plurality opinion in which only three justices joined, involved the claim by
16 non-civil-service employees of the Sheriff's office that after the Democratic candidate
17 was elected sheriff, they had been or were faced with imminent discharge solely
18 because they were not affiliated with or sponsored by the county Democratic Party.
19 The Elrod court found the patronage system placed a severe restriction on the
20 employees' First Amendment right to freedom of political belief and association.

21 In Elrod, after noting the district court had denied the requested preliminary
22 injunction because it found an insufficient showing of irreparable harm, the appellate
23 court observed that some of the employees had been threatened with discharge while
24 others had agreed to provide support to the Democratic party to avoid discharge. It
25 was this situation that then led the plurality to state: "It is clear therefore that First
26 Amendment interests were either threatened or in fact being impaired at the time relief
27 was sought. The loss of First Amendment freedoms for even minimal periods of time
28 unquestionably constitutes irreparable injury." (Ibid.) Clearly, this same situation does

1 not exist here.

2 Farnan's reliance on a case dealing with voluntary cessation of the
3 objectionable conduct also is inapposite. The Fed. Trade Comm'n v. Affordable
4 Media, LLC, 179 F.3d 1228 (9th Cir. 1999) case involved a situation where the
5 defendants were involved in ongoing and continuous telemarketing activities. Here,
6 there is no evidence that Dr. Corbett was involved in continuous and ongoing
7 violations of the Establishment Clause. This Court has found that a single comment
8 made in 2007 constituted a violation of the Establishment Clause. At the same time
9 the Court found that 21 other comments attributable to Dr. Corbett did not violate the
10 Establishment Clause. Thus, unlike in the Fed. Trade Comm'n case there is no
11 unlawful course of conduct for Dr. Corbett to voluntarily cease engaging in. Thus,
12 because there is no evidence of ongoing violations, Farnan's requested injunction
13 should be denied.

14 For these same reasons Farnan's attempt to rely on the Orange County
15 Register's interview of Dr. Corbett is inapposite. Farnan holds out this article as
16 purported proof that Dr. Corbett will continue to engage in conduct and make
17 statements that are a violation of the Establishment Clause unless an injunction is
18 imposed on Dr. Corbett. Even if one were to assume that the statements attributed to
19 Dr. Corbett by the Register reporter are true, the statements are irrelevant under the
20 undisputed facts here and do not support Farnan's claim that Dr. Corbett will continue
21 to violate the Establishment Clause absent an injunction preventing him from doing
22 so. Farnan did not establish – and this Court did not find – that Dr. Corbett engaged in
23 continuing and ongoing conduct that violates the Establishment Clause. In fact, this
24 Court's findings were to the contrary. This Court found that a single statement out of
25 many violated the Establishment Clause. Certainly this single statement is not proof of
26 continuing and ongoing conduct.

27 Simply put, Farnan cannot make the showing necessary to obtain an injunction
28 against Dr. Corbett. Farnan contended that Dr. Corbett violated the Establishment

1 Clause on a daily basis when he made anti-Christian or anti-religious statements
2 during the 2007 AP European Course. Farnan specifically pointed to 22 separate
3 statements made by Dr. Corbett that he contended constituted such a violation. This
4 Court, however, ruled that only one of the 22 statements constituted a violation. There
5 is no evidence of repeated, ongoing violations justifying the imposition of an
6 injunction. In fact, when discussing the “excessive entanglement” issue, this Court
7 stated that the evidence was “not sufficient to demonstrate ongoing, excessive
8 entanglement.” (Court’s Order, 31:27-32:1)

9 Further, Farnan no longer is in Dr. Corbett’s class. He completed and received a
10 grade for the fall 2007 semester of the AP European History course. It is unlikely that
11 Farnan will re-take that course. Thus, he will not be exposed to any further purported
12 violations.

13 Finally, the injunction that Farnan seeks will be unenforceable. Farnan seeks an
14 injunction preventing Dr. Corbett from making any anti-religion statements; however,
15 there is no workable procedure to determine what is or is not anti-religion. Farnan set
16 forth 22 statements that he thought were anti-religion; however, this Court ruled that
17 only one was a violation. Further, the requested injunction would prevent purported
18 anti-religious statements that would be part of the curriculum or would have a secular
19 purpose.

20 Farnan’s requested injunction simply is too overbroad and completely
21 unfeasible. It constitutes an improper prior restraint on speech that will chill the
22 speech of not only Dr. Corbett but of all other teachers. Further, Farnan has failed to
23 make even a threshold showing of the need for an injunction. There is no evidence
24 that there will be any future violations of the Establishment Clause. As such, Farnan’s
25 request for an injunction should be denied in its entirety.

26 ///

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28 ///

1 **3. FARNAN HAS NOT ESTABLISHED THAT HE IS THE PREVAILING**
2 **PARTY OR THAT HE IS ENTITLED TO HIS FULL ATTORNEY'S**
3 **FEES**

4 **A. The Court must Determine Who is the Prevailing Party before any**
5 **Costs or Fees are Awarded**

6 Under Federal Rule of Civil Procedure, Rule 54(d), "costs other than attorney's
7 fees shall be allowed as of course to the prevailing party unless the court otherwise
8 directs." (Federal Rules of Civil Procedure, Rule 54(d)(1)) Local Rule 54-1 provides
9 that, as a general rule "a prevailing party shall be entitled to costs." The plaintiff is the
10 prevailing only if "it recovers on the entire complaint." (See, Local Rule 54-2.1) The
11 defendant is the prevailing party "when the proceeding is terminated by court-ordered
12 dismissal or judgment in favor of defendant." (Local Rule 54-2.2) Under Local Rule
13 54-2.3, "[t]he Court shall determine the prevailing party when there is a partial
14 recovery or a recovery by more than one party."

15 "A party in whose favor judgment is rendered is generally the prevailing party
16 for purposes of Rule 54(d)." (d'Hedouville v. Pioneer Hotel Co., 552 F.2d 886, 896
17 (9th Cir. 1977))

18 Here, it cannot be disputed that CUSD is the prevailing party on Farnan's
19 complaint. In an effort to obtain a determination that CUSD is not a prevailing party
20 Farnan is trying to argue, in essence, a respondeat superior theory against CUSD, i.e.,
21 that CUSD is not a prevailing party because its employee was found liable. Farnan,
22 however, ignores that there is no respondeat superior liability in a section 1983 action.
23 When this Court granted Defendants' motion for summary judgment in its entirety on
24 CUSD's behalf the Court noted that "Farnan has produced almost no evidence that the
25 District was aware, prior to this action, that Corbett made any statements hostile to
26 religion." (Final order, p. 32) Further, the Court stated:

27 " [T]he District did not directly violate the Establishment Clause. [¶] Nor
28 can the District be held vicariously liable for Corbett's statement

1 regarding Pelozza under 42 U.S.C. § 1983. 'Liability under section 1983
2 arises only upon a showing of personal participation by the defendant.
3 There is no respondeat superior liability under section 1983.' [Citation]"
4 (Final order, p. 34)

5 Yet, despite this clear statement of the law in this Court's final order, Farnan
6 argues that CUSD should not be deemed a prevailing party because it is the employer
7 of the defendant that was found liable. This argument is not supported by any law.
8 CUSD received a clear judgment in its favor. All issues on Farnan's complaint were
9 decided in CUSD's favor. Thus, CUSD should be deemed a prevailing party.

10 Farnan, on the other hand, did not receive a ruling in his favor on all issues
11 raised in his complaint. Farnan prevailed on only one claim within his complaint
12 against one defendant. He did not prevail on the majority of his claims. Farnan clearly
13 stated throughout this litigation that "the gravamen of [his] case was and remains the
14 *barrage of religious hostility* expressed by Dr. Corbett throughout the Fall 2007
15 semester during his Advanced Placement European History class." This case never
16 concerned "a few incidental statements of a teacher that may periodically reflect upon
17 the teacher's personal beliefs." Farnan has always asserted that this case concerns Dr.
18 Corbett's alleged "continual and incessant actions."

19 Farnan did not receive a ruling that supported his position that there was a
20 constant barrage of religious hostility expressed by Dr. Corbett. Instead, contrary to
21 Farnan's posturing of this case, this Court found that a single *incidental statement* by
22 Dr. Corbett constituted a violation of the Establishment Clause. Further, Farnan has
23 stated that he only is seeking an award of nominal damages against Dr. Corbett.
24 Additionally, as discussed above, Farnan is not entitled to the permanent injunction
25 that he seeks.

26 In light of the status of the parties to this case given this Court's ruling on the
27 motions for summary judgment, this Court must determine who the prevailing party is
28 before any costs or fees are sought or awarded. Such determination should be in favor

1 of CUSD as the prevailing party.

2 **B. Should this Court determine that Farnan is Entitled to an Award of**
3 **Attorney's Fees, they should be Reduced to Reflect the Level of**
4 **Farnan's Success on the Merits of this Case**

5 Should this Court determine that Farnan is entitled to an award of attorney's
6 fees, Farnan's request for attorney's fees under section 1988 should be reduced to
7 reflect the level of success, i.e., the fact that Farnan prevailed on only one claimed
8 violation and lost on the 21 other claims he made.

9 42 U.S.C. section 1988(b) provides in part, "In any action or proceeding to
10 enforce a provision of sections . . . 1983 . . . the court, in its discretion, may allow the
11 prevailing party, other than the United States, a reasonable attorney's fee as part of the
12 costs. . . ." (Emphasis added)

13 Farnan relies on Buckhannon Bd. And Care Home, Inc. v. W. Va. Dep't of
14 Health & Human Res., 532 U.S. 598, 604, 121 S.Ct. 1835, 149 L.Ed.2d 855 (2001) to
15 support his claim that he is the prevailing party, and thus, entitled to attorney's fees
16 because he received a court-ordered change in the legal relationship between himself
17 and Dr. Corbett. The Buckhannon case cites to the decision in Farrar v. Hobby, 506
18 U.S. 103, 113 S.Ct. 566, 121 L.Ed.2d 494 (1992) (a case also relied on by Farnan).

19 In Farrar v. Hobby, the court addressed the issue of whether a civil rights
20 plaintiff who receives a nominal damages award is a "prevailing party" eligible to
21 receive attorney's fees under 42 U.S.C. section 1988. There, although the Court
22 determined that even though the plaintiff was the "prevailing party," the plaintiff was
23 *not* entitled to an award of attorney's fees. (Farrar v. Hobby, *supra*, 506 U.S. at 115-
24 116)

25 The Farrar court held that in determining the amount of attorney's fees that a
26 prevailing party may recover under section 1988, the district court must consider "the
27 degree of the plaintiff's overall success." (*Id.* at 113) Once civil rights litigation
28 materially alters the legal relationship between the parties, "the degree of the

1 plaintiff's overall success goes to the reasonableness" of a fee award. Indeed, "the
2 *most critical factor*" in determining the reasonableness of a fee award "is the *degree of*
3 *success* obtained." (*Id.* at 114; emphasis added) As the Farrar court noted, "if 'a
4 plaintiff has achieved only partial or limited success, the product of hours reasonably
5 expended on the litigation as a whole times a reasonable hourly rate may be an
6 excessive amount.'" (*Ibid.*)

7 Denial of attorney's fees is appropriate where "the plaintiff's success is purely
8 technical or de minimis." (Mendez v. County of San Bernardino, 540 F.3d 1109, 1126
9 (9th Cir. 2008))

10 Here, Farnan has acknowledged that he only seeks nominal damages, i.e.,
11 \$1.00, from Dr. Corbett. Farnan was not successful in obtaining a finding that Dr.
12 Corbett leveled a constant barrage of anti-religious statements at his student. Instead,
13 the Court has found that a single comment -- out of 22 comments asserted -- violated
14 the Establishment Clause. Farnan did not receive a judgment against CUSD. This
15 Court found that Farnan failed to establish either that CUSD violated the
16 Establishment Clause itself, or that CUSD was liable under some "vicarious" liability
17 theory. Thus, CUSD received a ruling in its favor. Finally, Farnan has been unable to
18 articulate a workable, enforceable permanent injunction against Dr. Corbett. Farnan is
19 not legally entitled to the injunction he seeks.

20 Farnan's success on this case is, at best, purely technical or de minimus.
21 Therefore, Farnan is not entitled to an award of attorney's fees. Should this Court
22 determine that Farnan is entitled to attorney's fees, then any such fees should be
23 reduced to reflect the level of success that Farnan achieved in this litigation.

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1 **4. DR. CORBETT IS ENTITLED TO A DETERMINATION OF**
2 **QUALIFIED IMMUNITY IN HIS FAVOR AND SHOULD BE**
3 **PERMITTED TO AMEND HIS ANSWER TO REFLECT THIS**
4 **DEFENSE**

5 Farnan's sole argument against permitting Dr. Corbett to amend his answer and
6 against this Court making a determination of the qualified immunity defense is based
7 on Farnan's contention that the request is untimely.⁴ Farnan does not address the
8 factual issue that the posture of this case changed drastically when this Court made its
9 May 1 ruling. From the beginning of this litigation up until this Court's May 1, 2009
10 ruling on Farnan's motion for summary judgment the posture of this case was that Dr.
11 Corbett constantly and repeatedly made comments that were hostile to religion, that
12 there was a "barrage" of any-religious comments, and that the case was *not* about a
13 few, isolated comments made by Dr. Corbett. Farnan does not address whether or not
14 the law was clearly established in 2007 that a teacher could violate the Establishment
15 Clause by making a single statement during a year-long course.

16 By its ruling this Court determined that the first prong of the qualified immunity
17 inquiry. Now, Dr. Corbett is entitled to a determination of the second prong of the
18 inquiry, i.e., was the right deemed to have been violated clearly established in 2007.
19 Farnan has not and cannot establish that the rights he claims were violated were
20 "clearly established" under existing case law in 2007. At that time it was not clearly
21 established that a teacher could violate the Establishment Clause by making a single
22 statement in one lecture given during a year-long course. Cases that have discussed or
23 held that schools have violated the Establishment Clause have looked at the
24 *curriculum* or *theme* or ongoing conduct being challenged. Although the parties have
25 had ample opportunity to brief this particular issue, to date no case has been presented

26
27 ⁴ Defendants incorporate by this reference the law and argument included in their
28 motions for leave to file an amended answer and motion for a determination of
qualified immunity in Dr. Corbett's favor, which were filed with this Court on June 8,
2009.

1 where a school teacher was held to have violated the Establishment Clause by making
2 a single statement during a year-long course. Accordingly, the right cannot be said to
3 be clearly established and Dr. Corbett is entitled to a determination of qualified
4 immunity in his favor.

5 Further, the evidence and case law shows that the qualified immunity defense
6 was not available to Defendants until the court's ruling on May 1, 2009, when this
7 Court determined that Dr. Corbett violated the Establishment Clause when Dr. Corbett
8 stated "religious, superstitious nonsense" during a discussion about the lawsuit filed
9 against CUSD, Dr. Corbett and others by former biology teacher John Pelozza. Mr.
10 Pelozza refused to teach the state mandated curriculum (the theory of evolution) but
11 instead taught creationism in the classroom. This ruling, as more fully explained in
12 Defendants' moving papers, rendered the qualified immunity defense available to
13 Defendants for the first time in this litigation. As such, Defendants' request to file an
14 amended answer and for this Court to determine the qualified immunity is timely and
15 this Court should determine the issue of qualified immunity in Dr. Corbett's favor.

16 **5. CONCLUSION**

17 In light of the above, it is requested that this Court deny Farnan's request for an
18 injunction. The injunction requested by Farnan is unwarranted, unenforceable and
19 overbroad. It also is requested that this Court determine that CUSD is a prevailing
20 party entitled to recover costs and attorney's fees and that Farnan is not entitled to
21 recover his attorney's fees. Finally, it is requested that this Court permit Defendants to
22 amend their answer to raise the qualified immunity defense on Dr. Corbett's behalf
23 and decide that defense in Dr. Corbett's favor.

24 DATED: June 15, 2009

WOODRUFF, SPRADLIN & SMART, APC

25 By: 

26 DANIEL K. SPRADLIN
27 ROBERTA A. KRAUS
28 Attorneys for Defendants CAPISTRANO
UNIFIED SCHOOL DISTRICT and DR.
JAMES CORBETT

1 **PROOF OF SERVICE**

2 **STATE OF CALIFORNIA, COUNTY OF ORANGE**

3 I am over the age of 18 and not a party to the within action; I am employed by WOODRUFF,
4 SPRADLIN & SMART in the County of Orange at 555 Anton Boulevard, Suite 1200, Costa Mesa,
CA 92626-7670.

5 On June 15, 2009, I served the foregoing document(s) described as **DEFENDANTS'**
6 **OPPOSITION TO PLAINTIFF'S SUPPLEMENTAL BRIEFING PURSUANT TO ORDER**
7 **DATED JUNE 1, 2009; MEMORANDUM OF POINTS AND AUTHORITIES;**
8 **DECLARATION OF DANIEL K. SPRADLIN**

- 9 by placing the true copies thereof enclosed in sealed envelopes addressed as stated on the
10 attached mailing list;
11 by causing the foregoing document(s) to be electronically filed using the Court's Electronic
12 Filing System which constitutes service of the filed document(s) on the individual(s) listed
13 on the attached mailing list:

14 **(BY MAIL)** I placed said envelope(s) for collection and mailing, following ordinary
15 business practices, at the business offices of WOODRUFF, SPRADLIN & SMART, and
16 addressed as shown on the attached service list, for deposit in the United States Postal
17 Service. I am readily familiar with the practice of WOODRUFF, SPRADLIN & SMART for
18 collection and processing correspondence for mailing with the United States Postal Service,
19 and said envelope(s) will be deposited with the United States Postal Service on said date in
20 the ordinary course of business.

21 **(BY OVERNIGHT DELIVERY)** I placed said documents in envelope(s) for collection
22 following ordinary business practices, at the business offices of WOODRUFF, SPRADLIN
23 & SMART, and addressed as shown on the attached service list, for collection and delivery
24 to a courier authorized by _____ to receive said documents, with
25 delivery fees provided for. I am readily familiar with the practices of WOODRUFF,
26 SPRADLIN & SMART for collection and processing of documents for overnight delivery,
27 and said envelope(s) will be deposited for receipt by _____ on said
28 date in the ordinary course of business.

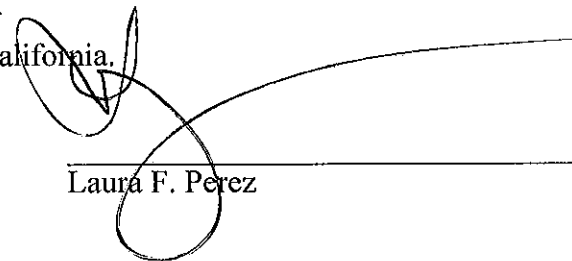
(BY FACSIMILE) I caused the above-referenced document to be transmitted to the
interested parties via facsimile transmission to the fax number(s) as stated on the attached
service list.

(BY PERSONAL SERVICE) I delivered such envelope(s) by hand to the offices of the
addressee(s).

(State) I declare under penalty of perjury under the laws of the State of California that the
above is true and correct.

(Federal) I declare that I am employed in the office of a member of the bar of this court at
whose direction the service was made. I declare under penalty of perjury that the
above is true and correct.

Executed on June 15, 2009 at Costa Mesa, California.



Laura F. Perez

1 CHAD FARNAN et al. v. CAPISTRANO UNIFIED SCHOOL DISTRICT

2 USDC CASE NO. SACV07-1434-JVS (ANx))
3 ASSIGNED TO: HON. JAMES V. SELNA

4 ATTACHED SERVICE LIST

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UNIFIED EDUCATION
ASSOCIATION**

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