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DISTRICT and DR. JAMES CORBETT

8 UNITED STATES DISTRICT COURT
9 CENTRAL DISTRICT OF CALIFORNIA

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.

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

22 Union Intervenors/Defendants.

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

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

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4
5 By: 

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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)

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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.”])

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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

