

**NO. 10-11188-CC  
UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT**

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**MINOR I DOE THROUGH PARENT I DOE, AND  
MINOR II DOE THROUGH PARENT II DOE,  
PLAINTIFFS-APPELLEES,**

**V.**

**SCHOOL BOARD FOR SANTA ROSA COUNTY, FLORIDA,  
JOHN ROGERS, IN HIS OFFICIAL CAPACITY AS SUPERINTENDENT  
OF THE SCHOOL DISTRICT OF SANTA ROSA COUNTY, FLORIDA,  
AND H. FRANK LAY, IN HIS OFFICIAL CAPACITY AS PRINCIPAL OF  
PACE HIGH SCHOOL,  
DEFENDANTS-APPELLEES,**

**V.**

**CHRISTIAN EDUCATORS ASSOCIATION INTERNATIONAL,  
PROPOSED INTERVENOR DEFENDANT-APPELLANT.**

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**Appeal from the United States District Court for the Northern District of  
Florida, Pensacola Division, Honorable M. Casey Rodgers, Judge  
Case No. 3:08-cv-00361-MCR-EMT**

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**OPENING BRIEF OF  
PROPOSED INTERVENOR DEFENDANT-APPELLANT  
CHRISTIAN EDUCATORS ASSOCIATION INTERNATIONAL**

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**Mathew D. Staver  
Anita L. Staver  
Horatio G. Mihet  
LIBERTY COUNSEL  
1055 Maitland Center Commons  
Second Floor  
Maitland, FL 32751  
(800) 671-1776 Telephone  
(407) 875-0770 Facsimile**

**Stephen M. Crampton  
Mary E. McAlister  
David M. Corry  
LIBERTY COUNSEL  
PO Box 11108  
Lynchburg, VA 24506  
(434) 592-7000 Telephone  
(434) 592-7700 Facsimile**

**CERTIFICATE OF INTERESTED PERSONS  
AND CORPORATE DISCLOSURE STATEMENT**

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rules 26.1 and 28-1(b), the following individuals/entities are known to Appellant Christian Educators Association International to have an interest in the outcome of this appeal. To the best of Appellant's knowledge, none of the following individuals/entities is a corporation that issues shares to the public:

ACLU Foundation of Florida, counsel for Plaintiffs-Appellees

ACLU of Florida, counsel for Plaintiffs-Appellees

ACLU Program on Freedom of Religion and Belief, counsel for Plaintiffs-Appellees

Barkas, Christopher, counsel for Office of Principal of Pace High School, Defendant-Appellee

Carr Allison, counsel for Office of Principal of Pace High School, Defendant-Appellee

Christian Educators Association International ("CEAI"), Proposed Intervenor Defendant-Appellant

Corry, David M., counsel for Proposed Intervenor Defendant-Appellant CEAI

Crampton, Stephen M., counsel for Proposed Intervenor Defendant-Appellant CEAI

Doe, Minor I, Plaintiff-Appellee

Doe, Minor II, Plaintiff-Appellee

Green, Paul R., counsel for School Board for Santa Rosa County Florida, and  
Office of Superintendent of the School District of Santa Rosa County,  
Florida, Defendants-Appellees

Harmon, Terry Joseph, counsel for School Board for Santa Rosa County Florida,  
and Office of Superintendent of the School District of Santa Rosa County,  
Florida, Defendants-Appellees

Johnson Green & Miller, P.A., counsel for School Board for Santa Rosa County  
Florida, and Office of Superintendent of the School District of Santa Rosa  
County, Florida, Defendants-Appellees

Katon, Glenn Michael, counsel for Plaintiffs-Appellees

Kayanan, Maria, counsel for Plaintiffs-Appellees

Bryan Stephen Shell, in his official capacity as Principal of Pace High School,  
Defendant-Appellee

Liberty Counsel, counsel for Proposed Intervenor Defendant-Appellant CEAI

Liebenhaut, Matthew, counsel for Office of Principal of Pace High School,  
Defendant-Appellee

Mach, Daniel, counsel for Plaintiffs-Appellees

Marshall, Randall C., counsel for Plaintiffs-Appellees

McAlister, Mary E., counsel for Proposed Intervenor Defendant-Appellant CEAI

Mihet, Horatio G., counsel for Proposed Intervenor Defendant-Appellant CEAI

Rodgers, Honorable M. Casey, District Court Judge

School Board for Santa Rosa County, Florida, Defendant-Appellee

Sniffen & Spellman, P.A, counsel for School Board for Santa Rosa County

Florida, and Office of Superintendent of the School District of Santa Rosa  
County, Florida, Defendants-Appellees

Sniffen, Robert, counsel for School Board for Santa Rosa County Florida, and

Office of Superintendent of the School District of Santa Rosa County,  
Florida, Defendants-Appellees

Staver, Anita L., counsel for Proposed Intervenor Defendant-Appellant CEAI

Staver, Mathew D., counsel for Proposed Intervenor Defendant-Appellant CEAI

Stevenson, Benjamin James, counsel for Plaintiffs-Appellees

Weaver, Heather, counsel for Plaintiffs-Appellees

Wyrosdick, Tim, in his official capacity as Superintendent of the School District of

Santa Rosa County, Florida, Defendant-Appellee

## **STATEMENT REGARDING ORAL ARGUMENT**

Appellant Christian Educators Association International believes that oral argument will assist the Court in analyzing, understanding and determining the issues in this case. This appeal involves important issues regarding First Amendment rights and the jurisdiction of federal courts. Therefore, Appellant respectfully requests oral argument.

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## STATEMENT OF JURISDICTION

Appellant Christian Educators Association International (“CEAI”) seeks review of: (1) the district court’s wrongful exercise of subject matter jurisdiction to continue to enforce a Consent Decree that awarded injunctive relief to high school students even after the students graduated; and (2) the district court’s denial of CEAI’s motion to intervene in this action to challenge the constitutionality of that Consent Decree, on its face and as applied to its member educators.

The district court initially had jurisdiction over the underlying §1983 non-class action pursuant to 28 U.S.C. §1331 and 28 U.S.C. §1343(a)(3), but the court irretrievably lost subject matter jurisdiction over the enforcement of the Consent Decree on May 30, 2009, when, **prior to the Consent Decree becoming final and unappealable**, the only two plaintiffs in this action graduated from high school. *See e.g., Adler v. Duval County Sch. Bd.*, 112 F.3d 1475, 1477-78 (11th Cir. 1997)(“When the threat of future harm dissipates, the plaintiff’s claims for equitable relief become moot because the plaintiff no longer needs protection from future injury”).

This Court has limited jurisdiction to require the district court to vacate the Consent Decree and dismiss the action. *Coalition for the Abolition of Marijuana Prohibition v. City of Atlanta*, 219 F.3d 1301 (11th Cir. 2000)(“When a case has become moot, we do not consider the merits presented, but instead vacate the

judgments below with directions to dismiss **even if a controversy did exist at the time the district court rendered its decision**”(emphasis added); *Adler*, 112 F.3d at 1478.

Alternatively, if this Court finds that the district court has continuing jurisdiction in the underlying action even after all plaintiffs graduated, this Court has provisional jurisdiction to review the district court’s denial of CEAI’s motion to intervene. *Fox v. Tyson Foods, Inc.*, 519 F.3d 1298, 1301 (11th Cir. 2008)(“under the ‘anomalous rule’ we have provisional jurisdiction to determine whether the district court erroneously concluded that the appellants were not entitled to intervene”)(quoting *Stallworth v. Monsanto Co.*, 558 F.2d 257, 263 (5th Cir.1977)).

The district court’s order denying intervention was entered on February 19, 2010. (Doc. 238). This appeal timely followed on March 12, 2010. (Doc. 244).

## STATEMENT OF THE ISSUES

1. Whether a district court may exercise continuing jurisdiction over a Consent Decree that granted perpetual injunctive relief to former students against their former school, when the former students: (a) did not bring a class action, (b) graduated prior to the Consent Decree becoming final and unappealable, (c) can no longer be harmed by their former school, and (d) have no further legal interest in that Consent Decree.

2. Whether a district court may conduct an *ex parte* jurisdictional inquiry, accept jurisdictional briefs from parties under seal, deny a putative intervenor the right to submit a jurisdictional brief, and deny that intervenor access to its opponents' submissions, even when the intervenor: (a) is the only litigant that raised the jurisdictional argument, (b) relies on that argument to defend against a bill of costs and prosecute its appeal, and (c) agrees to accept any potentially sensitive information subject to an existing confidentiality order.

3. Whether an intervenor has “piggyback” standing to challenge the constitutionality of a Consent Decree, when, at the time the intervention motion is filed, the existing parties are seeking judicial resolution of disputes about the enforcement of that Consent Decree.

4. Whether educators have standing to challenge a Consent Decree that interferes with their religious expression during non-instructional time and

provides, *inter alia*, that educators can never attend a school function, such as a son's evening athletic competition, a granddaughter's weekend school play, or their own lunch period, in their private, non-official capacities.

5. Whether an association has standing to seek injunctive and declaratory relief on behalf of its members, when the constitutional injury alleged broadly impacts all members and the equitable relief sought would inure equally to all members.

6. Whether a motion to intervene to challenge the constitutionality of a Consent Decree is timely when filed 40 days after the Consent Decree was presented to the intervenor's members, 51 days after the entry of Judgment and 56 days after the Consent Decree was entered.

## STATEMENT OF THE CASE

CEAI asks this Court to vacate a Consent Decree that grants perpetual injunctive relief to two former students, on the ground that the former students have graduated and no longer have a legally protectable interest in any injunctive relief against their former school. Alternatively, CEAI seeks reversal of the district court's order denying CEAI's motion to intervene, so that CEAI can establish that the Consent Decree violates the constitutional rights of CEAI's educator members.

### I. PROCEDURAL BACKGROUND.

On July 1, 2009, CEAI filed a motion to intervene as defendant on behalf of its educator members (docs. 127-128), to challenge the constitutionality of a Consent Decree entered by the district court on May 6, 2009. (Doc. 94). Following oral argument (doc. 168), the court allowed discovery on CEAI's standing and the timeliness of its motion. (Doc.169). An evidentiary hearing spanning three days was held (docs. 219-221), and on February 19, 2010 the court denied CEAI's motion, concluding that CEAI lacked standing and its intervention was untimely. (Doc. 238).

Before any evidentiary hearing, the district court *sua sponte* struck CEAI's mootness-based affirmative defense, which brought Plaintiffs' graduation to the court's attention, concluding that CEAI "lacks standing to vacate the entire Consent Decree." (Doc. 190-pg.4). After it denied intervention, the court

conducted an *ex parte* jurisdictional inquiry from which it excluded CEAI. (Doc. 255-pg.2,fn.1)(docs. 261;264;276-78;287). The court then concluded that it has continuing jurisdiction over the Consent Decree, and that Plaintiffs are entitled to injunctive relief in perpetuity, even though they graduated. (Doc. 288).

## **II. STATEMENT OF FACTS.**

### **A. The Litigation Brought by Two High School Seniors.**

On August 27, 2008, two seniors at Pace High School brought this §1983 lawsuit against their School Board, Superintendent and Principal (collectively the “District” or “Defendants”), alleging that Defendants unconstitutionally promoted religion. (Doc. 1). Plaintiffs were minors and sued through their parents. (*Id.*, ¶¶9, 14). Plaintiffs’ parents did not assert any direct claims; they acted only as passive conduits for their children, pursuant to Fed.R.Civ.P. 17(c). (*Id.*). Plaintiffs brought the suit under pseudonyms. (*Id.*, ¶¶8, 13).

Even though Plaintiffs were expecting to graduate in May 2009, they brought only individual claims. (Doc. 1). Plaintiffs did not bring their suit in a representative capacity, as a class action or otherwise. (*Id.*). There are no class allegations in the Complaint. (*Id.*). No motion for class certification was filed. (Dkt. Sheet). No class action notices were provided. (*Id.*). Neither Plaintiffs nor the court treated this action as a class action. (*Id.*).

## **B. Defendants' Admission of Liability and the Temporary Injunction.**

Three months after the complaint, Defendants filed a Notice of Admission of Liability, in which they “acknowledge[d] that Plaintiffs are entitled to certain relief.” (Doc. 44-pg.3). The court entered a “temporary injunction” on January 9, 2009, effective “for a period of **ninety (90) days** or until further notice by the court.” (Doc. 48-pg.2)(emphasis in original). The “temporary injunction” prohibited Defendants from: “promoting ... religious prayers or devotionals during school-sponsored events”; “sponsoring religious baccalaureate services”; “holding school-sponsored events at religious venues when alternative venues are reasonably available”; “permitting school officials to promote their personal religious beliefs and proselytize students in class or during school-sponsored events”; and “otherwise unconstitutionally endorsing or coercing religion.” (*Id.*).

Three CEAI members testified at the evidentiary hearing that they received (or were read) the temporary injunction, but: (1) they did not fully understand it; (2) they did not feel threatened by it because it did not prohibit any conduct they were engaged in; (3) they believed that the “temporary injunction” was temporary; and (4) they had no idea, prior to May 22, 2009, that the “temporary injunction” would be replaced by a much broader permanent Consent Decree that would infringe upon their First Amendment rights. (Doc. 297-pgs.70-73;171-173)(Doc. 300-pgs.47-49).

**C. The Educators' Reliance on Defendants to Protect the Educators' Legal Interests.**

CEAI's members also were not alarmed by the temporary injunction because they believed that Defendants—their employers—would protect their constitutional rights. (Doc. 297-pgs.74-75;173-174;195)(Doc. 300-pg.47). Superintendent Wyrosdick—who was substituted for his predecessor defendant, John Rogers—testified that it was his responsibility to defend the employees' rights (doc. 300-pg.133), and **he advised employees that he was representing their interests in the litigation.** (Doc. 300-pg.135)(*See also*, doc. 238-pg.9)(Wyrosdick “**assured the teachers that the School Board was representing their interests**”)(emphasis added). Prior to May 22, 2009, the District never advised employees that it would not protect them, or that employees must individually intervene to protect their rights. (Doc. 300-pg.134). Indeed, the **Superintendent admitted that he never did or said anything that would even suggest to his employees that he was no longer defending their interests.** (Doc. 300-pgs.299-300).

**D. The Consent Decree.**

Only on May 22, 2009, nine months after suit was filed, did District employees, including CEAI's members, learn that their reliance on the Superintendent and the School Board was misplaced. Each employee received the Consent Decree (Doc. 94), accompanied by a memorandum from Superintendent

Wyrosdick which directed each employee “to make yourself informed regarding what is allowed or not allowed under the order.” (CEAI Ex.2).<sup>1</sup> The memorandum warned that employees who violate the Consent Decree, intentionally **or unintentionally**: (a) would be disciplined “up to and including dismissal,” (b) would not be defended by the District, (c) would be reported by the Superintendent to the court, and (d) would be “subject to contempt charges,” “fines, penalties and sanctions.” (*Id.*).

The twelve-page Consent Decree contains broad injunctive relief far beyond the scope of the temporary injunction. (Doc. 94). Among myriad things, the Consent Decree:

➤ prohibits “School Officials” from offering or participating in “Prayer” at “School Events,” (Doc. 94-¶5(a));

➤ requires “School Officials” to prohibit “non-student third-parties” (such as parents or the President) from “offering a Prayer ... or other religious remarks during or in conjunction with a School Event” (*id.* at ¶5(b));

➤ requires “School Officials” to cleanse “Prayer” from any “student’s or any other person’s planned address during ... a School Event” (*id.* at ¶5(e));

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<sup>1</sup> Exhibit references are to exhibits offered at the evidentiary hearing on CEAI’s Motion to Intervene, made part of the record by the Clerk. (Doc. 305).

- prohibits “School Officials” from sitting together or dressing alike at religious baccalaureate services they voluntarily attend outside of school hours, off-school grounds (*id.* at ¶6(d));
- prohibits “School Officials” from “postur[ing] in a manner that is likely to be perceived as an endorsement of Prayer, e.g. bowing their heads, kneeling, or folding their hands” at a “School Event” (*id.* at ¶7(a));
- prohibits “School Officials” from ever lecturing, praying or preaching at student religious-club meetings or events (*id.* at ¶7(b)); and
- prohibits “School Officials” from “display[ing] religious symbols ... on the classroom walls ... or attach[ing] or plac[ing] them on the District’s tangible property,” without “an articulated nonreligious pedagogical reason” (*id.* at ¶7(e)).

The breadth of the injunctive relief is expanded by even broader, open-ended definitions. “Prayer” is not only “a communication with a deity”; it “include[s] but [is] not limited to, a devotional, ... blessing, reading from a sacred text ... sermon, or otherwise calling upon a deity to offer guidance, assistance, or a blessing.” (*Id.* at ¶3(b)). CEAI offered evidence that the District reasonably interprets this definition to include even the mere words “God Bless”—commonly used by Presidents and ordinary citizens alike—and has banned that phrase and similar phrases from educator emails and student speeches. (CEAI Ex. 18)(Doc. 300-

pgs.113-115); (CEAI Ex. 15)(Doc. 297-pgs.43-46;123-124); (CEAI Ex.16)(Doc. 297-pgs.158-159).

Similarly, “School Events” are not only classroom activities or extra-curricular events where students are a captive audience. (Doc. 94-¶3(g)). Instead, they “include but [are] not limited to,” “any happening sponsored, approved, or supervised by a School Official.” (*Id.*). They specifically include **private** events sponsored by **private** organizations and held in **privately-rented** school facilities **outside of school hours**, if the “principal attendees” are students, **thereby extending the prayer prohibitions to Boy Scout meetings, private after-school religious clubs for students, and private religious baccalaureate ceremonies sponsored by churches for students in rented high-school auditoriums.** (*Id.*).

CEAI presented testimony that educators reasonably understand the broad definition of “School Events” to cover all “happenings” that are “approved” by “School Officials,” whether or not students are present, such as their planning and lunch periods, time in the faculty lounge or copy room, and time on campus before or after school. (Doc. 297-pgs.49-50;147-149)(doc. 300-pgs.25-26). The educators also testified that they reasonably understand “happenings approved by School Officials” to include events they voluntarily attend on their own time, outside of school hours, on- or off-campus, such as a dinner to celebrate a colleague’s retirement with other “School Officials” (colleagues) who planned the event;

school athletic competitions where their grandchildren compete; or community prayer events held on school grounds outside of school hours, such as “See You at the Pole,” which they attend as parents or grandparents. (Doc. 297-pgs.51-60)(Doc. 300-pgs.26-28).

Finally, the definition of “School Official” provides that **school employees can never attend a “School Event” in their personal, non-official capacities**, as private citizens:

**If [school employees] are present at a School Event, then they are present in their official capacity.**

(Doc. 94-¶3(h))(emphasis added). CEAI’s members testified that this provision precludes them from praying, and forces them to stop other “non-student third parties” from praying, at events they attend voluntarily, on their own time, as grandparents or community members. (Doc. 297-pgs.50-60). Mrs. Kirsch testified that when she voluntarily attends an evening athletic competition at her grandson’s school and she sits in the stands with other parents, the Consent Decree dictates that she is there “in her official capacity” and thus she cannot pray for her grandson or other student-athletes when they compete or get injured, and must affirmatively stop all other “non-student third parties” (such as parents) from praying. (*Id.*).

The injunctive relief in the Consent Decree lasts in perpetuity, subject to review after five years. (Doc. 94-¶18). Following entry of the Consent Decree, Judgment was entered on May 11, 2009. (Doc. 96).

**E. Plaintiffs’ Graduation, the Mootness of the Consent Decree and the *Ex Parte* Jurisdictional Inquiry.**

On May 30, 2009—three weeks after the Consent Decree was entered **but before it became final and unappealable**—both Plaintiffs graduated from Pace High School. (Doc. 264-pg.1). Plaintiffs’ principal confirmed Plaintiffs’ graduation and that Plaintiffs had “no continuing contacts [with] Pace High School and/or the School District.” (*Id.*).<sup>2</sup>

At the time of Plaintiffs’ graduation, the deadline to appeal the Judgment had not expired, and several live issues remained in contention between the parties, including: (1) Plaintiffs’ attempt to obtain contempt sanctions **against Defendants** for Defendants’ alleged failure to ensure their employees’ compliance with the temporary injunction and the Consent Decree (docs. 86, 104); (2) Plaintiffs’ Bill of Costs (doc. 100); and (3) Plaintiffs’ pursuit of attorney’s fees. (Doc. 106). **These disputes were not resolved even when CEAI intervened.**<sup>3</sup> In the Consent

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<sup>2</sup> The principal filed this confirmation in the open record (doc. 264), and Plaintiffs’ graduation was extensively reported upon by the local media. (Docs. 271, 283-pg.2-3). Citing concerns about their continued anonymity, Plaintiffs subsequently prevailed upon the principal to move the court to seal this confirmation, even though the principal was “unaware of any requirement to file the [confirmation] under seal.” (Doc. 265). CEAI opposed the motion because the information about Plaintiffs’ graduation could not reasonably identify Plaintiffs, since 400 other students graduated from the same high school at the same time, and because Plaintiffs’ graduation had already become public. (Doc. 283-pg.2-3). Nevertheless, the court retroactively sealed the principal’s confirmation and most other submissions on mootness. (Docs. 276, 287).

<sup>3</sup> Defendants’ liability to Plaintiffs for contempt was not resolved until July 20, 2009, when the court concluded that Defendants were not vicariously liable for the acts of their employees. (Doc. 142). Defendants’ liability for fees and costs was not resolved until September 28, 2009, when Plaintiffs and Defendants advised the court that they reached agreement. (Doc. 181).

Decree, the court retained jurisdiction to determine the amount of costs and fees Plaintiffs were entitled to collect from Defendants, and to enforce the decree. (Doc. 94-pgs.8-9).

CEAI continually brought Plaintiffs' graduation and the loss of jurisdiction to the attention of the court. (Docs. 180-pgs.13-14; 185-pg.4; 243-pg.2; 252-pgs.17-23; 253-pgs.2-5; 259-pgs.2-5; 260-pgs.2-3). Without an evidentiary hearing, the court *sua sponte* struck CEAI's mootness defense, concluding that CEAI "lacks standing to vacate the entire Consent Decree." (Doc. 190-pg.4). Five months later, after it denied CEAI's motion to intervene, the court finally ordered Plaintiffs and Defendants to submit briefs on Plaintiffs' graduation status and mootness. (Doc. 255). The court *sua sponte* prohibited CEAI from submitting a brief (*id.* at pg.2, fn.1), and denied CEAI's motion for reconsideration. (Docs. 261;288). The court then sealed Plaintiffs' and Defendants' briefs and denied CEAI's motion for access to the *ex parte* filings. (Docs. 264;276-78;287). **CEAI was never served with Plaintiffs' and Defendants' jurisdictional memoranda even though CEAI: (a) was the only party to suggest mootness, (b) was relying heavily upon its mootness defense to defeat Plaintiffs' motion for attorneys' fees and bill of costs, and (c) agreed to be bound by reasonable confidentiality restrictions to protect Plaintiffs' anonymity. (Docs. 271;283). Presently, CEAI still does not know what its opponents argued.**

After reviewing Plaintiffs’ and Defendants’ *ex parte* submissions, the court concluded that it has continuing jurisdiction over the Consent Decree, and that the graduated Plaintiffs can retain their injunctive relief indefinitely. (Doc. 288).

**F. CEAI’s Intervention.**

CEAI is a national professional association for educators, whose goal is “to help its members understand and exercise their First Amendment rights while at school.” (Doc. 238-pg.5).<sup>4</sup> On July 1, 2009, CEAI filed a motion to intervene, to challenge the constitutionality of the Consent Decree on behalf of its members employed by the District. (Docs. 127-128).

At the evidentiary hearing, three CEAI members—Vicki Kirsch, Denise Gibson and Michelle Winkler—testified that the Consent Decree has forced them to forgo many forms of protected expression because they do not want to be disciplined or become targets of contempt proceedings:

Mrs. Kirsch, a third-grade teacher, testified that the Consent Decree: (1) forced her to stop praying with her adult colleagues during her breaks and off-the-clock time, outside the presence of students (doc. 297-pgs.31-32;48-51); (2) forced her to stop praying with her adult colleagues at evening events they attend voluntarily, such as retirement parties and Christmas gatherings (*id.*, at 31-32;51-53); (3) forced her to remove her inspirational, small and unobtrusive cross from

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<sup>4</sup> The court found that “the interests [CEAI] seeks to protect are germane to its purpose.” (Doc. 238-pg.26).

her personal area in her classroom, and prohibits her from putting an angel on top of a Christmas tree (*id.*, at 31;33-39); (4) forced her to stop using certain words such as “bless you,” or “God bless you today” (*id.*, at 31;41-46); (5) forces her to censor students who want to talk about their faith in class presentations on their own initiative, even when germane to an educational objective (*id.*, at 32;60-62); (6) prohibits her from praying for her grandson or other student athletes at wrestling matches or other sporting events she voluntarily attends as a grandmother, off-the-clock, and forces her to stop others from praying (*id.*, at 33;57-60); (7) prohibits her from accompanying her student grandchildren to “See You at the Pole” community prayer events held outside school hours on school campuses other than where she works (*id.* at 32;53-57); and (8) imposes unreasonable restrictions on her when attending religious baccalaureate services in her private capacity, outside school hours (*id.*, at 33;62-65).

Mrs. Gibson, a first grade teacher at Rhodes Elementary School, testified that the Consent Decree: (1) stops her from interacting freely with her adult colleagues and the parents of her students, and places unreasonable restrictions on those interactions by requiring her to sanitize her speech from all religious remarks (doc. 297-pgs.147-150;154-159); (2) forbids her from organizing voluntary, faith-based support groups for colleagues at school, during non-instructional time (*id.*, at 147;150-154); and (3) forces her to censor students when she knows they will

discuss matters of faith, even though such discussions are student-initiated and germane to legitimate educational objectives (*id.*, at 147;162-167).

Mrs. Winkler, a clerical assistant who does not interact with students (doc. 300-pg.6), testified that the Consent Decree nevertheless: (1) forced her and her colleagues to hide inside closets to pray for each other at work, even while off-the-clock and outside the presence of students (*id.*, at 8;22-26); (2) forced her to remove from her student-free office inconspicuous religious items (“a little cross,” “a little paper angel,” a Bible and a small devotional book), even though colleagues may display secular inspirational items (*id.*, at 8;15-21); (3) forces her to reject a standing invitation to speak about matters of faith to a student-led religious club, on her own time, and outside school or work hours (*id.*, at 9-13); and (4) prohibits her from praying with colleagues at voluntary, evening, off-campus, ticketed events (*id.*, at 26-29).

The court denied CEAI’s motion to intervene, concluding that CEAI lacked standing and its motion was untimely. (Doc. 238).

### **G. The Civil and Criminal Contempt Trials.**

While CEAI’s motion to intervene was pending, the district court held civil and criminal contempt trials against three educators accused by Plaintiffs of violating the temporary injunction (prior to the entry of the Consent Decree).

Plaintiffs accused Michelle Winkler of contempt because she “prompt[ed]” her husband (not a District employee) to pray at an awards banquet, even though that event took place outside of school hours, off-school grounds, was ticketed and completely voluntary, and was sponsored by a private foundation. (Doc. 86). The court issued a show cause order to Ms. Winkler (docs. 102, 110), and held a civil contempt trial. (Doc. 160). The court found Ms. Winkler not liable for contempt because the temporary injunction—drafted by Plaintiffs’ counsel—did not provide “specific notice ... that this off-campus, after-hours, ticketed event was covered under the order.” (Doc. 171-pg.221).<sup>5</sup>

Plaintiffs also accused Frank Lay, their principal and a Defendant in this action, and his athletic director, Robert Freeman, of violating the temporary injunction by blessing the food served to adults at an athletic booster luncheon. (Doc. 86-pgs.5-7). The court charged Messrs. Lay and Freeman with **criminal** contempt, referred the matter to the U.S. Attorney’s Office for prosecution, and held a criminal contempt trial. (*In re: Lay and Freeman*, Case No.3:09-mc-00062-MCR, Doc. 5 (N.D.Fla.)). The court notified Messrs. Lay and Freeman that “the maximum sentence that can be imposed upon a finding of guilt is six months imprisonment or a fine of not more than \$5,000.” (*Id.* at doc. 6). Only after a full

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<sup>5</sup> Ms. Winkler was not a CEAI member when Plaintiffs accused her of contempt, but joined CEAI just prior to the filing of CEAI’s motion to intervene. (Doc. 300-pg.31).

bench trial did the court finally find both defendants not guilty. (*Id.* at docs. 20, 22-23).

Although the educators narrowly escaped Plaintiffs' accusations, news of their plight spread across the nation, because their trials were "widely publicized" and "received national media attention." (Doc. 238-pg.4, fn.2). CEAI members are particularly aware of those proceedings, and are concerned that their own conduct might lead to similar indictments. (Doc. 297-pgs.120;124-125;167-168;183)(Doc. 300-pgs.21-22).

### **III. STANDARD OF REVIEW.**

This Court "review[s] the denial of a motion to intervene of right *de novo*." *Fox*, 519 F.3d at 1301. "[S]ubsidiary findings of fact [are reviewed] for clear error." *Id.* Questions of constitutional law, including standing, are reviewed *de novo*." *Loyd v. Alabama Dept. of Corr.*, 176 F.3d 1336, 1339 (11th Cir. 1999); *Dillard v. Chilton County Comm'n*, 495 F.3d 1324, 1330 (11th Cir. 2007).

## SUMMARY OF ARGUMENT

The district court erred by exercising continuing jurisdiction over this action and the Consent Decree entered in favor of two former students, because the students' graduation mooted the injunctive relief and permanently deprived the lower court, and this Court, of subject-matter jurisdiction. The former students can never again be harmed by their former school, and thus have no cognizable legal interest in the injunctive relief they obtained while students. Neither the finality of the Consent Decree, nor the failure of any party to appeal it, save it from being vacated. Final unappealable injunctions are not immune to mootness and do not vest courts with perpetual enforcement authority. A final judgment must be vacated as moot even if the event triggering mootness occurs after its entry, and even if the standing of the challenging party is doubtful, because federal courts have an independent duty to police and enforce their jurisdiction. The Consent Decree must be vacated as moot and the action dismissed for want of jurisdiction.

The district court erred when it *sua sponte* struck CEAI's mootness defense, because it had an independent duty to vacate the Consent Decree and dismiss the action as moot. The court further erred when it excluded CEAI from its jurisdictional inquiry, conducted that inquiry *ex parte*, accepted jurisdictional briefs from CEAI's opponents under seal, and denied CEAI the right to know its opponents' arguments.

CEAI has “piggyback” standing to intervene. The district court erred when it concluded that Plaintiffs and Defendants were no longer adverse when CEAI attempted to intervene. The record demonstrates that, when CEAI intervened, Plaintiffs and Defendants were seeking judicial resolution for a contentious dispute regarding enforcement of the Consent Decree and the religious expression of Defendants’ employees.

The district court erred in finding that CEAI lacks Article III standing to challenge the Consent Decree. The court’s conclusion that CEAI’s members’ self-censorship is objectively unreasonable ignores the evidence that Defendants—who are charged with enforcing the decree and reporting violations—interpreted (and actually applied) the Consent Decree in the same way as CEAI. The self-censorship of CEAI’s members is objectively reasonable in light of the plain language of the decree, Defendants’ actual application of the decree, Defendants’ warnings about intentional and unintentional violations, Plaintiffs’ persistent push for aggressive enforcement, and the unfolding of criminal and civil contempt trials showcasing the court’s contempt power.

The district court erred when it found that the relief requested by CEAI—declaratory and injunctive but not monetary—requires the participation of each individual member and deprives CEAI of associational standing. Associations have standing to seek declaratory or injunctive relief on behalf of their members, even if

the testimony of some members is required, where, as here, the participation of each and every member is not necessary.

Finally, the district court erred in finding that CEAI's intervention was untimely. CEAI sought to intervene within forty days after its members received the Consent Decree. CEAI's members could not reasonably anticipate that an ordinary, two-page temporary injunction protecting the constitutional rights of students would result in a twelve-page permanent decree that grants injunctive relief to non-students at the expense of the educators' constitutional rights. The court erred in failing to consider when two of the three CEAI members knew that their rights were no longer being adequately represented by their employer. Those members reasonably relied on their employer's express undertaking to represent them, and timely intervened after they learned that their employer agreed to permanent injunctive relief at the expense of their rights.

## LEGAL ARGUMENT

### I. THE DISTRICT COURT ERRED IN EXERCISING JURISDICTION OVER THE CONSENT DECREE AFTER PLAINTIFFS' GRADUATION.

#### A. The District Court Irretrievably Lost Jurisdiction to Enforce the Consent Decree When Plaintiffs Graduated Before the Decree Became Final and Unappealable.

It is well-settled that graduation moots the interest of former students in declaratory or injunctive relief against their former schools. *See e.g., Adler*, 112 F.3d at 1477-78 (dismissing action as moot and vacating judgment because, although court once had jurisdiction, that jurisdiction evaporated and action became moot upon plaintiffs' graduation); *Board of Sch. Comm'rs of Indianapolis v. Jacobs*, 420 U.S. 128 (1975)(per curiam)("all of the named plaintiffs in the action had graduated...a case or controversy no longer exists"); *Cole v. Oroville Union High Sch. Dist.*, 228 F.3d 1092, 1098 (9th Cir.2000), *cert. denied*, 532 U.S. 905 (2001)("It is well-settled that once a student graduates, he no longer has a live case or controversy justifying declaratory and injunctive relief against a school's action or policy").

It is now undisputed that both Plaintiffs graduated on May 30, 2009, and have "no continuing contacts [with] Pace High School and/or the School District." (Doc. 264-pg.1). For most of this litigation, Plaintiffs concealed their non-student status from CEAI, the court and the public by: (1) filing suit under pseudonyms

and not disclosing their status as high school seniors in the Complaint, (doc. 1); (2) serving their responses to Defendants’ discovery requests only to Defendants and only under seal, (doc. 264-Ex.A-B); (3) not informing the court of their graduation for almost one year, (doc. 255-pg.1, fn.1); and (4) inserting a provision in the Consent Decree that conceals their identities (including non-student status) for five years. (Doc. 94-¶17). When it ultimately decided to investigate Plaintiffs’ status in March 2010, after persistent requests by CEAI, the court concluded that Plaintiffs (and Defendants) “should have advised the court of factual matters affecting this court’s continuing jurisdiction.” (Doc. 255-pg.1, fn. 1). *See also, Arizonans for Official English v. Arizona*, 520 U.S. 43, 68, fn.23 (1997)(“It is the duty of counsel to bring to the federal tribunal's attention, **without delay**, facts that may raise a question of mootness”)(emphasis in original).<sup>6</sup>

Having graduated, Plaintiffs are no longer “threatened with harm from possible prayers in [the] future,” and they have no “legally cognizable need for

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<sup>6</sup> Plaintiffs disclosed in their Complaint that they were students at Pace High School. (Doc. 1-¶¶3, 7, 12). There was no reason for Plaintiffs not to disclose their status as seniors, or not to meet their duty of candor toward the court after graduating, notwithstanding any alleged concerns they had about maintaining anonymity. Plaintiffs were not the only two students enrolled as seniors at Pace High School in 2009—there were approximately 400 of them. (Doc. 271-pg.5).

[continued injunctive] relief. *Adler*, 112 F.3d at 1477. Plaintiffs' claims are moot, as is the injunctive relief they obtained against their former school. *Id.*<sup>7</sup>

**B. The District Court Failed in its Obligation to Investigate and Enforce its Jurisdiction, and Erred in *Sua Sponte* Striking CEAI's Mootness Defense.**

When the district court *sua sponte* struck CEAI's proposed defense of mootness (doc. 190-pg.4), it did exactly the opposite of what was required. Upon receiving CEAI's first notice that both Plaintiffs had graduated and had no standing to resist CEAI's intervention or defend the Consent Decree (doc. 180-pgs.13-14), the court had an independent duty to investigate its own jurisdiction and *sua sponte* dismiss the case as moot. *United States v. Hays*, 515 U.S. 737, 742 (1995) ("federal courts are under an independent obligation to examine their own jurisdiction"); *Ebrahimi v. City of Huntsville Bd. of Ed.*, 114 F.3d 162, 165 (11<sup>th</sup> Cir. 1997) ("Federal courts have an independent obligation to police the constitutional and statutory limits on our jurisdiction").<sup>8</sup>

Instead the court *sua sponte* struck CEAI's defense, because it concluded **without any evidentiary hearing** that CEAI lacked "standing to vacate the entire Consent Decree." (Doc. 190-pg.4). Thus, the court confused CEAI's obligation to establish its standing to challenge the Consent Decree *in toto*, with the court's own,

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<sup>7</sup> The "capable of repetition, yet evading review" doctrine is not applicable in the high school graduation context. *Adler*, 112 F.3d at 1477-78.

<sup>8</sup> The duty to investigate potential mootness and loss of subject-matter jurisdiction extends to this Court. *See id.*

independent duty to determine whether it could retain jurisdiction over the Consent Decree. **That duty was unaffected by any doubts the court had over CEAI's standing.** *Arizonans for Official English*, 520 U.S. at 66-67 (unanimous Supreme Court vacated declaratory relief as moot after plaintiff resigned from employment upon which standing was based, even though the Court had “grave doubts” whether intervenors who raised mootness challenge had standing). For the same reason, this Court can and should order that the Consent Decree be vacated as moot, irrespective of the Court's decision regarding CEAI's standing. *Id.* (“We may resolve the question whether there remains a live case or controversy with respect to [plaintiff's] claim **without first determining whether [intervenor] has standing to appeal** because the former question, like the latter, goes to the Article III jurisdiction of this Court and the courts below, not to the merits of the case”)(emphasis added).

Additionally, neither the district court's nor this Court's independent duty to investigate jurisdiction and vacate the Consent Decree is mitigated by Plaintiffs' and Defendants' willingness to concede enforcement jurisdiction. *Hays*, 515 U.S. at 742 (“the question of standing is not subject to waiver”); *Arizonans for Official English*, 520 U.S. at 73 (lower and appellate federal courts have a “special obligation” to satisfy themselves of their own jurisdiction “even though the parties are prepared to concede it”); *D'Lil v. Best Western Encina Lodge & Suites*, 538

F.3d 1031, 1035 (9<sup>th</sup> Cir. 2008)(“Whether or not the parties raise the issue, federal courts are **required** *sua sponte* to examine jurisdictional issues such as standing”)(emphasis in original).

**C. The District Court Erred in Conducting an *Ex-Parte* Jurisdictional Inquiry.**

CEAI is the only litigant who raised the issue of mootness and lack of subject-matter jurisdiction. Plaintiffs and Defendants were willing to concede, and apparently conceal, jurisdictional facts. Yet, when the district court decided to investigate Plaintiffs’ graduation and its own jurisdiction—six months after CEAI first raised the issue—the Court *sua sponte* excluded CEAI from that process, and prohibited it from filing a brief along with Plaintiffs and Defendants, because CEAI was not “a party.” (Doc. 255-pg.2, fn.1). Compounding this error, the court accepted Plaintiffs’ and Defendants’ briefs *ex parte* and under seal, and denied CEAI’s motion for access to those filings. (Docs. 264, 276-78, 287). **To this day, CEAI does not know what its opponents argued in favor of continued jurisdiction**, arguments which the court accepted.

Even though the court had denied CEAI’s motion to intervene, CEAI had sufficient interest in participating in the mootness inquiry, or at least knowing its opponents’ arguments. First, CEAI has an obvious need to present the mootness and standing issues to this Court, which necessarily requires that CEAI know its opponents’ arguments.

Second, CEAI raised mootness as a defense to Plaintiffs' bill of costs, filed by Plaintiffs after the court denied CEAI's motion to intervene. (Docs. 239, 243). CEAI is contending that the district court cannot impose costs against CEAI because: (1) the court lacks jurisdiction to impose costs;<sup>9</sup> and (2) the costs incurred by Plaintiffs in defending the Consent Decree were not reasonably incurred, because Plaintiffs graduated and no longer have any cognizable interest in, and thus no need to defend, the decree. (Docs. 243, 253, 259, 260). The court's decision to receive Plaintiffs' and Defendants' jurisdictional briefs *ex parte* and under seal deprive CEAI of the ability to effectively present its defense.

There was no need to impose such a profound litigation handicap on CEAI. Even if the court was persuaded by Plaintiffs' and Defendants' arguments that their jurisdictional briefs could compromise Plaintiffs' anonymity, the court could easily have fashioned much narrower solutions that would not be so prejudicial to CEAI, such as permitting the redaction of certain information, or extending already existing confidentiality provisions (docs. 26, 36) to CEAI. CEAI specifically agreed to such solutions in its many requests for access to the *ex parte* briefs, but the requests were denied. (*E.g.*, doc. 271-pg.5).

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<sup>9</sup> "It is well settled that a trial court which has no jurisdiction to try the case can enter no judgment for costs." *U.S. v. Jardine*, 81 F.2d 747 (5<sup>th</sup> Cir. 1936)(citing *Smyth v. Asphalt Belt R. Co.*, 267 U.S. 326 (1925)). *See also*, *Nordvik v. C.I.R.*, 67 F.3d 1489, 1491 (9<sup>th</sup> Cir. 1995)(If a "court lacks jurisdiction over a dispute, it generally cannot award costs stemming from the dispute")(citing *Latch v. U.S.*, 842 F.2d 1031, 1033 (9<sup>th</sup> Cir. 1988)).

The district court erred in excluding CEAI from its *ex parte* jurisdiction inquiry. That error causes prejudice even today, as this brief was prepared without the benefit of arguments successfully made by both appellees below to defeat CEAI's claim of mootness.

**D. The District Court Erred in Concluding that its Subject-Matter Jurisdiction was Saved by Entry of Final Judgment Prior to Plaintiffs' Graduation.**

After reviewing Plaintiffs' and Defendants' *ex parte* jurisdictional briefs, the district court concluded that it still has jurisdiction over the Consent Decree, because the court had jurisdiction when the Consent Decree was entered. (Doc. 288-pgs.4-5). The court reasoned that "the judgment became final, with no appeal taken, prior to the alleged graduation, and, therefore, the fact of the plaintiffs' graduation would not affect the validity of the consent decree or this court's continued jurisdiction to enforce its final judgment." (*Id.*).

The district court's determination is erroneous for at least three reasons:

**1. The Court Miscalculated the Time, and the Consent Decree Was Not Final and Unappealable When Plaintiffs Graduated.**

First, the court was mistaken in its determination that "the judgment became final, **with no appeal taken, prior to the alleged graduation.**" (Doc. 288-pgs.4-5)(emphasis added). The Consent Decree was entered on May 6, 2009 (doc. 94), and Judgment followed on May 11, 2009. (Doc. 96). The time for an appeal from

that Judgment did not expire until June 10, 2009. Fed.R.App.P. 4(a)(1). But the court lost jurisdiction on May 30, 2009, the day Plaintiffs graduated. On June 1, 2009, the court had an independent obligation to *sua sponte* review its jurisdiction and dismiss the action as moot. *Hays*, 515 U.S. at 742 (1995); *Ebrahimi*, 114 F.3d at 165. That duty continued on June 2, 3, 4, 5, 6, 7, 8, 9 and **at least** through June 10, 2009. *Preiser v. Newkirk*, 422 U.S. 395, 401 (1975)(holding that an actual case or controversy must exist at all stages of litigation). The fact that no party chose to file an appeal did not alter the court’s independent obligation to jealously guard and strictly police its jurisdiction in the interim, nor did it revive the court’s subject matter jurisdiction after it was irretrievably lost on May 30, 2009.

**2. The Court Retained Jurisdiction Over a Live Attorney Fee Dispute for Five Months After Judgment, which Required the Court to Vacate the Consent Decree as Moot.**

Moreover, the court’s independent obligation to *sua sponte* police its jurisdiction and vacate the Consent Decree continued well beyond June 10, 2009—the last day on which an appeal could be filed—because the parties did not resolve their attorney fee dispute prior to the entry of the Consent Decree, or prior to Plaintiffs’ graduation:

Whatever effect the parties’ agreement (and the court’s acquiescence therein) may have had on the entry of the consent decree, **our precedent makes clear that the court remains under a continuing obligation to examine its jurisdiction where, as here, the parties consent to the settlement of a case but leave for future resolution the matter of attorney’s fees.**

*D'Lil*, 538 F.3d at 1036 (emphasis added). Here, as in *D'Lil*, the Consent Decree resolved most of the constitutional issues, but expressly left for future resolution attorney's fees and costs. (Doc. 94-¶13). In fact, litigation over fees and costs remained pending between Plaintiffs and Defendants for almost **five months** after the entry of the Consent Decree, and was not ultimately resolved until September 28, 2009. (Doc. 181). Thus, notwithstanding the Judgment entered on May 11, 2009, the court had the authority, indeed the duty, to investigate Plaintiffs' status following their May 30, 2009 graduation, and to dismiss their case and vacate the Consent Decree as moot during the pendency of the attorney fee dispute in the subsequent five months. *D'Lil*, 538 F.3d at 1036.

**3. Final Declaratory or Injunctive Judgments Are Not Immune from Mootness, and Do Not Confer Perpetual Enforcement Jurisdiction.**

Most importantly, even if the Consent Decree or Judgment had been final and unappealable when Plaintiffs graduated, which they were not, the court **still** had an independent duty to examine its jurisdiction and *sua sponte* vacate the Consent Decree as moot. **A final judgment must be vacated as moot even if the event triggering mootness occurs after its entry, and even if no party to the judgment appeals, where, as here, an intervenor attempts to appear after entry of the judgment to challenge it, even if the intervenor's standing is doubtful.** *Arizonans for Official English*, 520 U.S. at 74-75.

In *Arizonans for Official English*, a state employee—in her individual capacity and not as a class representative—challenged a constitutional amendment declaring English the official language of Arizona. 520 U.S. at 48. On February 6, 1990, after trial on the merits, while plaintiff was still a state employee, the district court issued judgment declaring the amendment unconstitutional. *Id.* at 53, 55. Three things occurred within the 60 days **after** judgment: (1) plaintiff voluntarily resigned her job as state employee, *id.* at 60; (2) the sole remaining defendant decided not to appeal the judgment, *id.* at 55; and (3) three putative intervenors attempted to intervene **post-judgment** to challenge it. *Id.* at 55-56. The district court denied all three interventions, concluding that one intervenor was statutorily barred and the other two—the amendment’s sponsor and its chairman—**lacked Article III standing because they could not show injury in fact.** *Id.* at 57. On appeal, the Ninth Circuit concluded that the latter intervenors did have standing, but rejected their argument that plaintiff’s resignation rendered the declaratory judgment moot. *Id.* at 58-60. The Ninth Circuit panel, and later the *en banc* court, affirmed the declaratory judgment. *Id.* at 61-62. But a unanimous Supreme Court reversed and vacated the judgment as moot, instructing the district court to dismiss the action. *Id.* at 80. The Court had “grave doubts whether [**the intervenors**] have standing under Article III.” *Id.* at 67. Nevertheless, the Court concluded that **plaintiff** herself lacked standing to maintain the declaratory relief she had obtained

in the lower court, because she was no longer a state employee. *Id.* at 72. **The Court rejected plaintiff’s argument that the judgment should not be vacated because it was entered before the event triggering mootness.** *Id.* at 72-75. The Court reasoned that:

It would certainly be a strange doctrine that would permit a plaintiff to obtain a favorable judgment, take voluntary action that moots the dispute, **and then retain the benefit of the judgment.**

*Id.* at 75 (emphasis added).

*Arizonans for Official English* (“*AOE*”) is identical to this action in every material respect, except for the ultimate holding of a unanimous Supreme Court there and the holding of the district court here. As in *AOE*, Plaintiffs here obtained injunctive relief on May 6, 2009, and then graduated on May 30, 2009. As in *AOE*, Defendants here did not appeal the judgment. As in *AOE*, an intervenor here attempted to intervene shortly after judgment was entered to challenge its constitutionality. As in *AOE*, the intervenor’s standing here was questioned by all parties, and ultimately rejected by the court. As in *AOE*, the unsuccessful intervenor here raised the issue of mootness, the district court rejected it, and the intervenor is now pursuing that issue on appeal to a Circuit Court. As in *AOE*, even if the intervenor’s standing is ultimately rejected in this appeal, the injunctive relief obtained by Plaintiffs must still be vacated as moot.

Other controlling cases confirm that final judgments are not immune to mootness, and do not confer perpetual enforcement jurisdiction. In *Pasadena City Bd. of Ed. v. Spangler*, 427 U.S. 424, 430 (1976), the Supreme Court concluded that a judgment declaring educational policies unconstitutional was “clearly moot,” **even though final and unappealed by defendants**, because “all the original student plaintiffs have graduated.” The only thing that saved that judgment from being vacated was the intervention, prior to plaintiffs’ graduation, of the United States as plaintiff, pursuant to statutory authority in desegregation cases. *Id.* No such white knight exists here.

Similarly, in *Graves v. Walton Cty. Bd. of Ed.*, 686 F.2d 1135 (5<sup>th</sup> Cir. Unit B 1982), the Fifth Circuit (Unit B)<sup>10</sup> held that final, unappealable judgments are still subject to mootness. A group of parents attempted to intervene in a school desegregation action **eleven years** after an injunctive judgment became final and unappealable, and they “immediately filed a motion to vacate the 1968 decree and dismiss the action for mootness, asserting that the graduation, or departure, from school of the original named plaintiffs ... mooted the action.” 686 F.2d at 1136. The court agreed that “the original plaintiffs in this action no longer have a live stake in its continued litigation [and] their claims are moot.” 686 F.2d at 1137. The

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<sup>10</sup> Fifth Circuit Unit B decisions are binding in both Eleventh and Fifth Circuits. *Stein v. Reynolds Sec., Inc.*, 667 F.2d 33, 34 (11th Cir. 1982).

only thing that saved the moot judgment from being vacated was that plaintiffs had filed that case as a class action, the “case was in fact a class action and was specifically described and treated as such by the parties and the trial court.” 686 F.2d at 1140. Thus, new plaintiffs who were still students and members of the class could be added as named plaintiffs to reinvigorate the moot judgment. *Id.* at 1138-40.

No such saving grace exists here because Plaintiffs did not file this case as a class action, did not include class action allegations in their Complaint and did not even seek, much less obtain, class certification. This action was never treated as a class action by Plaintiffs or the district court. Accordingly, the moot Consent Decree cannot be saved and must be vacated. *Jacobs*, 420 U.S. at 130 (holding, after graduation of all student plaintiffs, that “because the class action was never properly certified nor the class properly identified by the District Court, the judgment of the Court of Appeals is vacated and the case is remanded to that court with instructions to order the District Court to vacate its judgment and to dismiss the complaint”); *Navarro-Ayala v. Hernandez-Colon*, 951 F.2d 1325, 1334 (1st Cir. 1991)(“In important public interest litigation like this, we do not know how the parties and the original judge could have overlooked a key step like class certification”).

This precise outcome also obtained in *Lasky v. Quinlan*, 558 F.2d 1133 (2d Cir. 1977). Five former inmates who “graduated” from a correctional institution sought to enforce against their former jail the terms of a consent decree regarding jail conditions, **which they had obtained while incarcerated two years earlier, and which had become final and unappealable.** 558 F.2d at 1135-36. The Second Circuit held that:

[s]ince the District Court denied class certification ... **there is no longer any party to this action having an interest in the enforcement of the consent decree. Thus, the case is moot and this Court is without jurisdiction.**

558 F.2d at 1136 (emphasis added). The former student Plaintiffs here can have no greater standing to enforce their Consent Decree than the former inmate plaintiffs in *Lasky*. The case must be remanded with instructions to vacate the Consent Decree and dismiss the action.

## **II. THE DISTRICT COURT ERRED IN CONCLUDING THAT CEAI LACKS STANDING TO INTERVENE.**

### **A. The District Court Erred in Concluding that CEAI Does Not Have “Piggyback” Standing.**

“A party seeking to intervene need not demonstrate that he has standing in addition to meeting the requirements of Rule 24 as long as there exists a justiciable case and controversy between the parties already in the lawsuit.” *Loyd v. Alabama Dept. of Corrections*, 176 F.3d 1336, 1339 (11<sup>th</sup> Cir. 1999)(emphasis added)(citing *Chiles v. Thornburgh*, 865 F.2d 1197, 1213 (11th Cir. 1989), and *Cox Cable*

*Communications, Inc. v. U.S.*, 992 F.2d 1178, 1181 (11th Cir. 1993)). “Because of the lessened justiciability concerns in the context of an ongoing Article III case or controversy, intervenors in this circuit may in some cases be permitted to ‘piggyback’ upon the standing of original parties to satisfy the standing requirement.” *Dillard v. Chilton Co. Comm’n*, 495 F.3d 1324, 1330 (11th Cir. 2007).

The precondition to piggyback standing is that, **at the time intervention is sought**, the original parties must be adverse as to **some** issue in the litigation. *Id.* at 1336. **Neither a settlement nor the entry of a consent decree precludes subsequent piggyback intervention, so long as, at the time the intervention motion is filed, there is still “an existing dispute between the original parties for which they seek a judicial resolution.”** *Id.* (emphasis added). “The test of whether there is an ongoing litigation claim or controversy between the original parties to a consent decree must be whether one party or the other to the decree is seeking judicial resolution of the dispute.” *Id.* at 1338.

At the time CEAI sought to intervene, the original parties were engaged in several contentious disputes for which they were seeking judicial resolution. Plaintiffs and Defendants were not only litigating attorney’s fees and costs, but, more importantly, were in the middle of a discordant battle over enforcement of the Consent Decree, and the alleged lack of adequate reporting and enforcement

mechanisms within the Consent Decree. Indeed, **Plaintiffs were seeking contempt sanctions against Defendants themselves** for the religious expression of Defendants' employees. On this point, the district court clearly erred when it concluded that the contempt proceedings "involved a nonparty and not any adversarial conflict between the parties." (Doc. 238-pg.12, fn.14). While it is true that Mrs. Winkler, **one** of the three individual targets of Plaintiffs' contempt allegations, was a "nonparty," it is also true that: (1) Plaintiffs also brought contempt allegations against Frank Lay, **one of the three Defendants in this action**, (doc. 86-pgs.5-7); and (2) Plaintiffs asked the court to impose contempt sanctions **against all three Defendants** (the School Board, the Superintendent and the Principal) for their alleged failure to police their employees' religious expression at adult gatherings. (Doc. 104). Plaintiffs also argued that "the case law ... renders **Defendants** liable for Ms. Winkler's contempt." (Doc. 104-pg.7)(emphasis added). They argued that "the **Superintendent and School Board** failed to appropriately discipline Mr. Lay or to notify others that they would not tolerate any violation of the Court's Order." (*Id.* at pg.8). Plaintiffs then "urge[d] this Court to impose sanctions, monetary, equitable or both, that adequately convey to **Defendants** the gravity of their acts." (*Id.* at pg.10)(emphasis added). And Plaintiffs asked the court "to command the **Defendants** to disclose [other] incidents of prayer at school events," because they had doubts about Defendants'

compliance with the Consent Decree and wanted to create an even more stringent enforcement mechanism. (*Id.* at pg.15)(emphasis added).

All of these issues were live controversies for which existing parties—Plaintiffs and Defendants—were seeking “judicial resolution” at the very time CEAI attempted to intervene. The court’s conclusion that no live controversy existed between Plaintiffs and Defendants, and that the contempt disputes were only between Plaintiffs and a “nonparty,” is clearly erroneous. CEAI should have been allowed to utilize the piggyback standing doctrine to intervene into the existing controversy between Plaintiffs and Defendants about the propriety of religious expression at adult gatherings and the enforcement of the Consent Decree.<sup>11</sup>

**B. The District Court Erred in Concluding that CEAI Does Not Have Article III Standing.**

An association has representational standing to intervene on behalf of its members when: (1) **one** of its members has standing to sue in her own right; (2) the interests it seeks to protect are germane to its organizational purpose; and (3) neither the claims asserted nor the relief requested requires the participation of its individual members in the lawsuit. *Hunt v. Washington State Apple Advertising*

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<sup>11</sup> It does not matter that the controversies existing between Plaintiffs and Defendants at the time CEAI sought intervention were eventually resolved. “The standing of a prospective intervenor, whether independent or piggyback, is properly measured at the time intervention is sought.” *Dillard*, 495 F.3d at 1339.

*Comm'n*, 432 U.S. 333, 343 (1977). Individual members have standing if they have suffered an injury-in-fact, fairly traceable to the challenged ordinance and judicially redressable. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

**“In First Amendment challenges, the actual injury requirement is most loosely applied in order to provide broad protection for speech.”** *Florida Family Policy Council v. Freeman*, 561 F.3d 1246, 1253 (11th Cir. 2009)(emphasis added). Courts “will not force a plaintiff to choose between intentionally violating a law to gain access to judicial review and foregoing what he or she believes to be constitutionally protected activity in order to avoid criminal prosecution.” *Pittman v. Cole*, 267 F.3d 1269, 1283 (11<sup>th</sup> Cir. 2001). Self-censorship because of reasonable fear of discipline or prosecution is injury-in-fact. *Id.*, at 1283-84; *Freeman*, 561 F.3d at 1254.

The court committed several reversible errors in concluding that the self-censorship of CEAI’s members is “based on a misunderstanding and an isolated reading of the” Consent Decree and is objectively unreasonable. (Doc. 238-pg.16).

**1. The Court Erred in its Interpretation of “Prayer,” and its Exclusion of Evidence that Proves the Reasonableness of CEAI’s Interpretation.**

The court concluded that educators’ “interpretation of ‘Prayer’ as encompassing all speech at school that touches on religion is strained beyond the import of the words used in the consent decree [which] plainly does not ban all

religious speech or discourse as prayer.” (Doc. 238-pg.16). The court reasoned that the open-ended list of activities that constitute ‘Prayer’ describes only “form[s] of calling upon or communicating with a deity,” thus “Prayer” cannot include religious discourse between mortals. (*Id.* at 17). The court clearly overlooked the inclusion of “blessing,” “devotional” and, most notably, “sermon” in the expressed examples of “Prayer,” (doc. 94-¶3(b), which is **not** communication with deity but “religious discourse,” or “a speech on conduct or duty.” *Merriam-Webster's Collegiate Dictionary, Eleventh Edition*, available at <http://www.merriam-webster.com>. Applying the court’s logic undermines its conclusion because including those terms in the open-ended list allows the interpretation that other types of religious communications **between people** are also banned. (Doc. 238-pg.17). Moreover, in some places the decree expressly prohibits “other religious remarks” in addition to broadly-defined “Prayers” (Doc. 94-¶5(b)), thereby supporting CEAI’s conclusion that “Prayers” include all manner of religious remarks.

CEAI attempted to introduce indisputable evidence that the School Board—responsible for enforcing the decree, disciplining educators and reporting violations to the court—interprets “Prayer” exactly the same way as educators. Exhibit 18 demonstrates that Defendants censored a student body president who wanted to end his address to colleagues the same way the President ends his

speeches to Americans—with “Good luck and God Bless.” Defendants concluded that **“to include God Bless would be prohibited by the Order,”** because **“para[graph] 3(b) would bring the phrase within the definition of prayer.”** (Ex.18-pg.1)(emphasis added). Defendants cleansed “God Bless” from the student’s address and forced him to say only “Good luck.” (*Id.*)

The court excluded this evidence because “[w]hat the board allowed the student to do or not do has no relevance in this case.” (Doc. 300-pg.115). But this evidence is critically relevant because: (a) it proves that Defendants interpret “Prayer” **exactly the same** as CEAI’s members, and that it is not “strained logic” to conclude that the decree indeed bans **all** religious discourse not just “communication with deity”; and (b) it proves the unfathomable reach of the Consent Decree, which, coupled with its enforcers’ interpretation, bans the President of the United States’ annual speech to school children because it ends with “God Bless You,” and bans singing “God Bless America,” one of our national anthems.<sup>12</sup>

Had the court admitted this evidence, it could never have concluded that “the School Board has not demonstrated any inclination toward applying [what the

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<sup>12</sup> The court also excluded educators’ testimony that the Consent Decree does not permit them to show students President Obama’s televised remarks to school children, because he ends those remarks the same way the student body president attempted to end his (*e.g.*, “God Bless you, and God Bless America”). (Doc. 297-pg.47). The President is a “non-student third party” subject to the decree’s ban on “Prayer.” (Doc. 94-¶5(b)).

court deemed] an unreasonable interpretation of the plain language of the consent decree.” (Doc. 238-pg.21). The court should have admitted the evidence and concluded that the educators’ interpretation of “Prayer” is reasonable, and that their self-censorship to avoid being disciplined and reported by their employer (who has the same exact interpretation), is objectively reasonable and constitutionally actionable.

**2. The Court Erred in its Interpretation of “Official Capacity” and its Conclusion that Only Official Capacity Conduct is Prohibited by the Consent Decree.**

The court committed an error of similar magnitude when it concluded that the Consent Decree bans only “official conduct attributable to the school district.” (Doc. 238-pg.18). The court reasoned that “ordinary understanding” and “common sense” dictate that educators like Mrs. Kirsch who voluntarily attend an evening athletic competition and sit in the stands to watch a grandson compete are not there in an official capacity and cannot be banned from praying. (*Id.*). CEAI wholeheartedly agrees, and would add “Supreme Court precedent” to “ordinary understanding” and “common sense.”<sup>13</sup> Plaintiffs and Defendants apparently

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<sup>13</sup> Teachers do not shed their rights at the schoolhouse gate. *Tinker v. Des Moines Indep. Sch. Dist.*, 593 U.S. 503, 511 (1969). Laws that fail to differentiate between teachers as state actors and private individuals are unconstitutional. *Board of Ed. of Westside Cmty. Sch. (Dist.66) v. Mergens*, 496 U.S. 226, 250 (1990) (“there is a crucial difference between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect”). **“Private speech occurring at school-related functions is constitutionally protected”** even when uttered by teachers. *Wigg v. Sioux Falls Sch. Dist. 4-5*, 382 F.3d 807, 815 (8th Cir. 2004)(emphasis added).

recognized this principle as well, because the Consent Decree refers consistently to “official capacity” conduct.

The problem, which the court failed to recognize, is the Consent Decree’s definition of “official capacity.” It plainly and unequivocally states that:

**If [school employees] are present at a School Event, then they are present in their official capacity.**

(Doc. 94, ¶3(h))(emphasis added). The Consent Decree thus attempts to do that which the Supreme Court forecloses. It leaves no room for Mrs. Kirsch to attend her grandson’s athletic competition—unquestionably a “School Event”—in anything other than her “official capacity.” (*Id.*).

It is of no moment that “all provisions [of the Consent Decree] refer explicitly to official-capacity conduct, not private conduct,” as the court noted (doc. 238-pg.15), when the decree expressly defines “official capacity” conduct to also include clearly **private** conduct. The Consent Decree could have defined “official capacity” conduct to include only “conduct that is reasonably attributable to the District.” But it does not. **CEAI’s members do not have the luxury of substituting their “ordinary understanding” and “common sense” in place of an unmistakably contrarian definition, backed by the court’s contempt power so powerfully displayed against three of their colleagues.**

### 3. The Court Erred in Interpreting Several Other Provisions of the Consent Decree.

The court's erroneous reading of the Consent Decree extends to many other provisions. The court concluded that the decree does not ban educators from "hav[ing] small personal religious items in their personal area," (doc. 238-pg.22), yet the decree expressly states that "School Officials shall not display religious symbols...on the classroom walls...or attach or place them on the District's tangible property." (Doc. 94-¶8(e)). A small Bible, devotional book and cross are unquestionably "religious symbols," the wall behind a teacher's desk visible primarily to her is unquestionably "the classroom wall," and a teacher's desk or the credenza in her personal area are unquestionably "the District's tangible property." The court erred in concluding that Mrs. Kirsch and Mrs. Winkler (whose clerical office is not even accessible to students) were unreasonable in removing those protected items to avoid becoming the targets of contempt proceedings.

The court also concluded that "nothing in the language of the consent decree requires a teacher to stop a parent attending a school event from praying in his or her personal capacity, as Kirsch testified." (Doc. 238-pg.19). But the decree plainly states:

School Officials shall prohibit **non-student third-parties** (including clergy or other religious leaders) from offering a Prayer...**or other religious remarks** during...a School Event.

(Doc. 94-¶5(b))(emphasis added). Parents, other family members and the President are unquestionably “non-student third-parties.” The decree could have restricted this prohibition to “religious leaders,” and to vocal prayers before a captive audience sanctioned by the District, but it extended it to anyone who is not a student or a party to the decree, and to all public or private prayers, as well as “religious remarks.” (*Id.*). **There is no exception for prayers by these persons in their “personal capacity.”** (*Id.*). The effect is to cleanse sideline chatter at a football game or one-on-one parent-teacher meetings from even private “Prayers” and “religious remarks,” which is exactly what the educators testified the decree compels.

The court also concluded that “School Events” do **not** encompass **all** “happening[s] sponsored, approved or supervised by a School Official,” as the decree plainly states (doc. 94-¶3(g))(emphasis added), but only a subset of school activities “similar in kind” to those examples provided in the decree’s open-ended list. (Doc. 238-p.20). Besides infidelity to the decree’s language, this conclusion disregards the enormous overbreadth of activities listed in the decree as “School Events.” The list encompasses not only events sponsored by the District, but also **private** events, sponsored by **private** organizations, principally attended by students after school in **privately**-rented school facilities, **such as Boy Scout meetings and Good News bible clubs**. The prohibition on “Prayer” at such events

is flatly unconstitutional. *Good News Club v. Milford Central Sch.*, 533 U.S. 98, 112 (2001). The inclusion of such events in the definition of “School Events,” and the court’s conclusion that the open-ended list allows for inclusion of other “similar in kind” events, demonstrate that the educators’ self-censorship of protected religious expression during lunch breaks, evening retirement parties and planning periods is reasonable and actionable.

Finally, the court concluded that nothing in the decree requires educators to censor “students’ voluntary references to religion in a classroom assignment,” because that restriction applies only to a “planned address during a School Event.” (Doc. 238-pg.19). Mrs. Kirsch and Mrs. Gibson testified that their students routinely and voluntarily bring up matters of faith in **oral reports** to their classmates, as part of non-religious assignments. (Doc. 297-pgs.32;60-62;147;162-167). The oral reports are “planned addresses,” and the activities are “School Events,” which is why the educators reasonably feel compelled to censor them notwithstanding the students’ constitutional right to express religious views germane to an assignment. (*Id.*).

#### **4. The Court Erred in Concluding that CEAI Lacks Standing to Facially Challenge the Consent Decree.**

The court erred in concluding that CEAI lacks standing to bring a facial challenge to the Consent Decree, because that conclusion is based solely on the court’s erroneous finding that “CEAI’s members have not demonstrated an

objectively reasonable imminent injury.” (Doc. 238-pg.25). Moreover, the standing hurdle is even more easily overcome in First Amendment **facial** challenges because “the facts of the challenging party's case are irrelevant.” *Sentinel Communications Co. v. Watts*, 936 F.2d 1189, 1197 (11th Cir. 1991)(emphasis added). “Facial challenges to overly broad statutes are allowed not primarily for the benefit of the litigant, but for the benefit of society—to prevent the statute from chilling the First Amendment rights of other parties not before the court.” *Secretary of State of Md. v. Joseph H. Munson Co., Inc.*, 467 U.S. 947, 956-958 (1984). The Eleventh Circuit has held that

In the First Amendment context, plaintiffs can challenge the constitutionality of a **statute that has not been unconstitutionally applied to them**. That is, plaintiffs can challenge a statute as overbroad **even if their particular conduct is not constitutionally protected**.

*Bischoff v. Osceola County*, 222 F.3d 874, 883 (11th Cir. 2000)(emphasis added) (citing *National Council for Improved Health v. Shalala*, 122 F.3d 878, 882-83 (10th Cir. 1997); and *Bordell v. General Electric Co.*, 922 F.2d 1057, 1060-61 (2d Cir. 1991)).

CEAI has standing to bring a facial challenge to the entire Consent Decree, as overbroad, vague and an unlawful prior restraint, even if every provisions has not as of yet been unconstitutionally applied to each of its members.

## 5. The Court Erred in Deciding the Merits of CEAI's Claims Prematurely.

While it purported to deny CEAI's intervention on the basis of standing, the court actually decided the merits of CEAI's claims. The court concluded that educators have no standing to complain about a Consent Decree that clearly affects their rights because their complaints are without merit. The court denied standing because it disagreed with the educators' reasonable interpretation of the Consent Decree, or because it concluded that the First Amendment rights which CEAI would advance in the litigation do not exist. Indeed, many of the authorities upon which the Court relied to deny intervention did not involve standing determinations, but denials of constitutional claims on the merits. (*E.g.*, doc. 238-pgs.23-24).

This was error. The Supreme has rejected attempts to decide merits of First Amendment challenges with standing:

the Secretary urges that Munson should not have standing to challenge the statute as overbroad...**The Secretary's concern, however, is one that is more properly reserved for the determination of Munson's First Amendment challenge on the merits....**We therefore move on to the merits of Munson's First Amendment claim.

*Joseph H. Munson Co.*, 467 U.S. at 958-59 (emphasis added); *see also*, *Virginia v. Hicks*, 539 U.S. 113, 120 (2003)(determinations of whether a statute is substantially overbroad and facially invalid “**involve not standing, but the**

**determination of a First Amendment challenge on the merits”**)(emphasis added).

The court’s error prejudiced CEAI because it improperly denied party status, which would have entitled CEAI to discovery on the District’s unconstitutional interpretation and application of the Consent Decree, as well as full participation in the mootness inquiry. The district court should have granted intervention even if it thought it could not be persuaded on the merits of CEAI’s claims, so that CEAI could come to this Court with full party status appealing an adverse merits decision on a full record, rather than a putative intervenor presenting a limited appeal of limited issues on a limited record under limited jurisdiction.

**6. The Court Erred in Concluding that Educators’ Fears of Penalty Are Unreasonable.**

The court committed two other significant errors on the way to its decision that the self-censorship of CEAI’s members is objectively unreasonable. First, the Court erroneously concluded that “the prior contempt proceedings...do not support CEAI’s members’ assertions of fear,” because they involved allegations of “prayer as an official part of a school-sponsored event.” (Doc. 238-pg.21, fn.25). But that is precisely what CEAI’s members fear: that they will be hauled into court to answer **criminal** or civil contempt charges for “Prayer” at “School Events,” as those terms are broadly defined in the Consent Decree. The educators watched (along with the entire nation) as their colleagues (and Ms. Winkler herself) stood

on trial for their freedoms and fortunes, and were but a whisker away from **federal prison**, because of alleged violations of the court's orders regarding "Prayer." The court has signaled to educators that it means business. The educators do not wish to test the limits of the court's leniency, and would rather forego protected conduct to avoid even being accused of contempt. (Doc. 297-pgs.120;124-125;167-168;183)(Doc. 300-pgs.21-22). That is eminently reasonable self-censorship.

Second the court placed unjustified significance on the District's professed "common sense," its supposed "lack of any inclination toward applying an unreasonable interpretation of the plain language of the consent decree," and the lack of any disciplinary actions in the forty days before CEAI's intervention. (Doc. 238-pg.21). Besides improperly excluding the evidence refuting the District's so-called "reasonable" and "common sense" application of the Consent Decree (*i.e.*, banning "God Bless"), and ignoring the Superintendent's ominous warning that "intentional and unintentional" violations would be reported and punished, the court lost sight of the fact that:

It will not do to say that a prosecutor's sense of fairness and the Constitution would prevent a successful ... prosecution for some of the activities seemingly embraced within the sweeping statutory definitions. **The hazard of being prosecuted ... nevertheless remains. Well-intentioned prosecutors and judicial safeguards do not neutralize the vice of a vague law.**

*Baggett v. Bullit*, 377 U.S. 360, 373 (1964) (emphasis added).

Moreover, however well-intentioned and reasonable **Defendants** claim they will be, **Plaintiffs** have shown no inclination to follow suit. It was **Plaintiffs'** accusations that led to Ms. Winkler's contempt trial for a prayer said by her husband (a non-District employee) at a voluntary, ticketed, evening banquet for adults sponsored by a private foundation. And it was **Plaintiffs'** accusations that led to the criminal indictment of Frank Lay and Robert Freeman for a blessing said before eating a meal with other adults at a booster luncheon.<sup>14</sup> Plaintiffs have continually pushed for more reporting of violations and more stringent enforcement of the Consent Decree. Although Plaintiffs have long since graduated, they continue to have Santa Rosa educators in their cross-hairs, thereby depriving educators of the luxury of relying on the District's "reasonableness" and "common sense."

At bottom, the educators' concerns about the Consent Decree are not fanciful conjectures and "out of context," "strained" interpretations. They are reasonable constructions based upon the plain language of the decree, its actual interpretation and application by those charged with enforcement, and the ominous threat of criminal and civil contempt penalties already showcased in Santa Rosa County. If the educators' self-censorship in **this** context is not sufficiently reasonable to confer standing for access to the courts, it is impossible to imagine

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<sup>14</sup> The District did not defend its employees in the contempt proceedings even though they were exculpated.

what sort of chill would ever suffice. CEAI's members have Article III standing to intervene, and so does CEAI.

**C. The District Court Erred in Concluding that CEAI's Intervention Would Require the Participation of Individual CEAI Members.**

The court erred when it concluded that CEAI's constitutional challenge to the Consent Decree would require the participation of its individual members, in violation of *Hunt*'s third prong for associational standing. (Doc. 238-pgs.26-27). The court concluded that “**any claim** that the consent decree in fact chills First Amendment free speech rights is highly dependent on a showing of individual and particularized factual circumstances that are not common to all of CEAI's members or shared in equal degree among them.” (*Id.* at 27)(emphasis added).

This Court strongly disagrees: in a facial challenge “**the facts of the challenging party's case are irrelevant.**” *Sentinel Communications Co.*, 936 F.2d at 1197 (emphasis added). The district court erred because it did not consider the possibility that CEAI's facial challenge would not require the type of fact-intensive analysis the court envisioned for as-applied challenges.

The court also erred when it concluded that CEAI's as-applied challenge would require jurisdiction-defeating particularized facts from each CEAI member. CEAI is only seeking general, injunctive relief—invalidation of the Consent Decree. CEAI is not seeking individualized relief, such as money damages.

In *Automobile Workers v. Brock*, 477 U.S. 274, 287-88 (1986), the Supreme Court reversed the lower court's finding that individualized proof was required in a union benefits case. The Court held that individual member participation was not required because the union members, just like CEAI's members, were not seeking money damages. *Id.* Conversely, in *Warth v. Seldin*, 422 U.S. 490, 501 (1975), an association sought **money damages** for lost profits of its individual members. For that reason, the Supreme Court concluded that individual proof **was** necessary and associational representation was improper. 422 U.S. at 515. However:

If in a proper case the association seeks a declaration, injunction or some other form of prospective relief, it can reasonably be supposed that the remedy, if granted, will inure to the benefit of those members of the association actually injured.

*Id.* CEAI seeks only prospective, non-monetary relief—relief that will inure to the benefit of all CEAI members—such that the participation of all members is not required.

Moreover, the Supreme Court has made it clear that associational standing under *Hunt* is not defeated merely because participation by **some** individual members may be required:

so long as the nature of the claim and the relief sought does not make individual participation of **each** injured party indispensable...the association may be an appropriate representative of its members, entitled to invoke the court's jurisdiction.

*Warth*, 422 U.S. at 511 (emphasis added). “Accordingly...an association may assert a claim that requires participation by **some** members.” *Retired Chicago Police Ass’n v. City of Chicago*, 7 F.3d 584, 601 (7th Cir. 1993)(emphasis in original)(citing *Warth*, 422 U.S. at 511; *Hospital Council of Western Pennsylvania v. City of Pittsburgh*, 949 F.2d 83 (3d Cir.1991)). Associational standing exists even where the testimony of **some** individual members is required to show the manner in which **some** members were treated, so long as the participation of “**each** member” is not be required. *Retired Chicago Police Ass’n*, 7 F.3d at 601-03 (associations standing exists even where “evidentiary submissions of some of the members” were required, because “each [member]’s presence as a party would not be required”); *Hospital Council*, 949 F.2d at 89-90 (hospital association had standing to bring “a challenge to alleged practices that would probably have to be proven by evidence regarding the manner in which defendants treated individual member hospitals...since participation by each allegedly injured party would not be necessary”).

As aptly put by the Seventh Circuit:

We can discern no indication in *Warth*, *Hunt*, or *Brock* that the Supreme Court intended to limit representational standing to cases in which it would not be necessary to take any evidence from individual members of an association. Such a stringent limitation on representational standing cannot be squared with the Court’s assessment in *Brock* of the efficiencies for both the litigant and the judicial system from the use of representational standing.

*Retired Chicago Police Ass'n*, 7 F.3d at 602-03. Applying the same *Warth-Hunt-Brock* analysis and rationale, the Third Circuit reiterated that the nature of the relief requested is dispositive of the analysis:

The Supreme Court has repeatedly held that **requests by an association for declaratory and injunctive relief do not require participation by individual association members**. The Court has distinguished such requests from requests for individualized damages for association members.

*Hospital Council*, 949 F.2d at 89 (emphasis added).

Here, the district court did not and could not find that the relief sought by CEAI—solely declaratory and injunctive—requires the participation of **each** of the dozens of members CEAI has in Santa Rosa County. The testimony of a handful of those members is (and was) sufficient to document the unconstitutional application of the Consent Decree, and to fashion injunctive relief that “inures to the benefit” of all CEAI members. The court erred.

### **III. THE DISTRICT COURT ERRED IN CONCLUDING THAT CEAI’S INTERVENION WAS NOT TIMELY.**

CEAI did not unreasonably delay its attempt to intervene in this action. CEAI intervened on July 1, 2009, only 40 days after its members received the Consent Decree, only 51 days after the entry of Judgment, and only 56 days after the Consent Decree was entered. In *Stallworth v. Monsanto Co.*, 558 F.2d 257, 264-267 (5th Cir. 1977), the Court adopted a four-part test for intervention

timeliness, and found that intervention within one month of a consent decree was timely.

**A. The District Court Erred in Failing to Consider When Mrs. Kirsch and Mrs. Gibson Knew that Their Interests Were No Longer Being Represented by the School Board and the Superintendent.**

In applying the *Stallworth* four-part timeliness test, the court erred by failing to consider whether and when two of the three CEAI members knew that their interests were no longer being defended and adequately represented by the School Board and Superintendent. **The timeliness clock starts to run only when the intervenor knows that her legal interests are no longer adequately represented by the existing parties.** *Midwest Realty Mngmt. Co. v. City of Beavercreek*, 93 Fed. Appx. 782, \*5 (6th Cir. 2004)(reversing for abuse of discretion finding of untimeliness). In *Midwest Realty*, the Sixth Circuit held that,

The proposed intervenors undoubtedly knew that this litigation could affect their legal interests from the beginning. **However, it was not until there was reason to believe their interests were not being adequately represented by the City that they would have been alerted to the need to seek intervention.**

93 Fed. Appx. 782, \*5 (emphasis added). Similarly, in *Jansen v. City of Cincinnati*, 904 F.2d 336, 341 (6<sup>th</sup> Cir. 1990), the Court concluded that,

From the outset of the litigation, the proposed intervenors knew their interest would be affected. **They were not aware, however, that their interest was inadequately represented by the City until the City responded to the plaintiffs' summary judgment motion.**

904 F.2d at 341 (emphasis added)(reversing finding of untimeliness, where “the proposed intervenors proceeded with haste from the time that they became aware that the City's interest differed from their interest”).

The district court was aware of this factor and applied it to **one** of three CEAI members, finding that Michelle Winkler knew or should have known that Defendants “might not be adequately representing [her] interest at the time of the temporary injunction in January 2009.” (Doc. 238-pg.30). But the court premised this finding **solely** on the dispute between Ms. Winkler and the School Board in February 2009, before she became a CEAI member, regarding her husband’s prayer at an evening banquet, and on testimony about that dispute that Ms. Winkler gave at her civil contempt trial **in August 2009**. (*Id.* at 31-32).

The court did not even consider, much less find, when the other two CEAI members—Mrs. Kirsch and Mrs. Gibson—knew that their interests were no longer being adequately represented by Defendants. (*Id.*). Their un rebutted testimony was that they believed their employer was protecting them until they received the May 22, 2009 memorandum from the Superintendent. (Doc. 297-pgs.74-75;173-174;195) The Superintendent admitted that he advised employees that he was representing their interests in the litigation. (Doc. 300-pg.135). The court itself found that the Superintendent “**assured the teachers that the School Board was representing their interests.**” (Doc. 238-pg.9)(emphasis added). The

**Superintendent also admitted that, after he publicly undertook to represent and defend the constitutional rights of District employees in the litigation, he never did or said anything that would even suggest to his employees that he was no longer defending their interests,** until he sent them the May 22, 2009 memorandum advising them that they were on their own. (Doc. 300-pgs.299-300).

Moreover, there was no basis for the court to impute any earlier knowledge that Mrs. Winkler might have had to Mrs. Kirsch, Mrs. Gibson or CEAI. Plaintiffs' accusations against Mrs. Winkler did not surface until May 5, 2009, the day before the Consent Decree was entered. (Doc. 86). There was no evidence that Mrs. Kirsch and Mrs. Gibson even knew Mrs. Winkler—who worked at a separate administration facility—much less know of Mrs. Winkler's dispute with the School Board before it became public. Mrs. Winkler did not join CEAI until June 2009, a few days before CEAI's motion to intervene was filed. (Doc. 300-pg.31). And Mrs. Winkler's very public contempt trial did not take place until late August 2009, almost two months after CEAI filed its motion to intervene. The court impermissibly imputed to CEAI the supposed knowledge of a non-member to defeat its intervention, while ignoring the lack of knowledge of its longstanding members.

If the court had considered this critical issue, it could only have concluded that Mrs. Gibson and Mrs. Kirsch reasonably relied on Defendants to protect their

interests, and did not know until May 22, 2009 that they needed to intervene to protect themselves, thereby making their intervention—40 days later—timely.

**B. The District Court Erred in Concluding that CEAI’s Members Should Have Foreseen the Unconstitutional Provisions of the Consent Decree.**

The court also erred when it concluded that the two-page temporary injunction issued in January 2009 should have put CEAI’s members on notice of the twelve-page permanent injunction that followed in May. The court concluded that the Consent Decree “mirrors the temporary injunction but provides more detail,” and is “consistent with the temporary injunction.” (Doc. 238-pg.4).

However, the temporary injunction was very short and very general, prohibiting such things as “promoting, advancing, aiding, facilitating, endorsing, or causing religious prayers or devotionals during school-sponsored events,” and “otherwise unconstitutionally endorsing or coercing religion.” (Doc. 48). The temporary injunction did not define “school-sponsored events,” so there was no way to anticipate the overreaching, unconstitutional definition of “School Events” that Plaintiffs and Defendants eventually negotiated amongst themselves.

The temporary injunction did not include or define the “official capacity” terminology later included in the Consent Decree, so there was no way to anticipate that Plaintiffs and Defendants would agree that no school employee could **ever** attend in a private capacity an event “approved” by school officials,

such as a grandson’s athletic competition, a granddaughter’s flagpole prayer event before school, or simply lunch with colleagues in the faculty lounge. The temporary injunction also did not define “Prayer” to include an open-ended list of activities, including a “blessing” or religious discourse. The temporary injunction certainly did not define “Prayer” in a manner that reasonably could allow Defendants to conclude—as they did with the Consent Decree—that “God Bless You,” “God Bless America” or simply “God Bless” is a “Prayer” and therefore banned.

The temporary injunction did not prohibit educators from sitting together or wearing similar attire at private religious baccalaureate services that they attend voluntarily, outside of school hours, in houses of worship, as does the Consent Decree. (Doc. 94-¶6(d)). The temporary injunction did not prohibit educators from having a “religious symbol” (*e.g.*, a Bible or an angel) “on the District’s tangible property” (*e.g.*, a desk or Christmas Tree), as does the Consent Decree. (Doc. 94-¶8(e)). And the temporary injunction did not extend the prohibition on “Prayer” to private events sponsored by private organizations which are attended principally by students after school hours in privately-rented District facilities (*e.g.*, Good News Clubs or the Boy Scouts), as does the Consent Decree. (Doc. 94-¶3(g)).

Simply put, CEAI’s members could not anticipate that the consenting parties would take a plain vanilla temporary injunction that protects students by

prohibiting “unconstitutionally endorsing religion,” and transform it into the sweeping Consent Decree that affirmatively infringes on the members’ constitutional rights. It was not reasonable for CEAI’s members to conclude, from the fact that Plaintiffs requested, and the temporary injunction forecasted, unspecified and general permanent relief, that such relief would be fashioned at the expense of their own constitutional rights.

The Eleventh Circuit has rejected contrary arguments, particularly in the institutional litigation context. *Howard v. McLucas*, 782 F.2d 956, 959 (11<sup>th</sup> Cir. 1986). Starting with the well-established premise that “a court cannot impute knowledge that a person’s interests are at stake from mere knowledge that an action is pending,” (782 F.2d at 959), the *Howard* court explained:

It is especially unrealistic to say that the whites should have known from the outset that any relief might be at their expense... **The essence of institutional litigation is that the remedy cannot be deduced from the defendant’s liability;** the remedy embodies discretionary policy choices about the future operation of an institution. **The variety of remedial possibilities in any given case makes it difficult to foresee which remedies the court or the parties will actually select. Potential intervenors cannot very well judge whether their interests are in serious jeopardy until they know what particular remedies are being contemplated.**

*Id.* (emphasis added). Thus, the Court reversed a finding of untimeliness where the intervention motion was filed **six weeks** after the consent decree was announced.

*Id.* at 960. Coupled with the decision in *Stallworth*, where intervention within one month of the consent decree was found timely, the authorities firmly establish that

CEAI's intervention—within 40 days after the Consent Decree was delivered and just 56 days after it was entered—was timely.

**C. The District Court Erred in Concluding that CEAI's Intervention Would Unduly Prejudice Plaintiffs and Defendants.**

Finally, the court also erred in concluding CEAI's intervention would unduly prejudice the parties. CEAI's intervention could not possibly prejudice Plaintiffs, because they graduated and no longer have any cognizable interest in this litigation or the Consent Decree. As to Defendants, the court had no factual basis to conclude that they incurred great expense to negotiate the terms of the Consent Decree.

Defendants (and Plaintiffs for that matter) did not present any specific evidence of prejudice they would suffer if intervention were granted. The Superintendent testified that the District has spent approximately one-half million dollars **on this entire litigation** since its inception in August 2008, has answered many questions about the litigation, and has trained District employees on how to comply with the Consent Decree. (Doc. 300-pgs.291-292). But **no evidence** was offered about how much time was spent by Plaintiffs or Defendants in drafting and negotiating **the Consent Decree**, and how much time or money was spent to answer questions and train employees **about the Consent Decree in the 40 days**

**of its existence (many of which were over summer break) between its dissemination and CEAI's intervention. (*Id.*)<sup>15</sup>**

Even if the court could assume that the value was substantial, Plaintiffs and Defendants have no legitimate interest in preserving an unconstitutional agreement. The fruit of their labor unconstitutionally chills speech and violates in wholesale the constitutional rights of educators, because it fails to recognize the difference between their official and private capacities. Any prejudice to Plaintiffs or Defendants pales in comparison to the prejudice visited by the Consent Decree upon CEAI's members.

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<sup>15</sup> CEAI can hardly be blamed for training and compliance costs incurred by Defendants **after** the motion to intervene was filed, because Defendants would have avoided those costs if CEAI's motion had been promptly granted.

## CONCLUSION

For these reasons, CEAI respectfully requests that this Court remand this action to the district court, with instructions to vacate the Consent Decree for lack of jurisdiction and dismiss the action as moot. Alternatively, CEAI requests that the Court reverse the denial of CEAI's motion to intervene and remand the action to the district court for a merits determination of CEAI's claims in intervention.

Dated: September 20, 2010.

/s/ Horatio G. Mihet  
Mathew D. Staver  
Anita L. Staver  
Horatio G. Mihet  
LIBERTY COUNSEL  
1055 Maitland Center Commons  
Second Floor  
Maitland, FL 32751  
(800) 671-1776 Telephone  
(407) 875-0770 Facsimile

Stephen M. Crampton  
Mary E. McAlister  
David M. Corry  
LIBERTY COUNSEL  
PO Box 11108  
Lynchburg, VA 24506  
(434) 592-7000 Telephone  
(434) 592-7700 Facsimile  
  
Attorneys for Proposed Intervenor  
Defendant-Appellee Christian Educators  
Association International

## CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), the undersigned certifies this Brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B).

1. Exclusive of the sections exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and 11<sup>th</sup> Cir. R. 32-4, the Brief contains 13,989 words according to the word count feature of the software (Microsoft Word 2010) used to prepare the Brief.

2. The Brief has been prepared in proportionately spaced typeface using Times New Roman 14 point.

/s/ Horatio G. Mihet  
Horatio G. Mihet  
Attorney for Appellant

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, pursuant to the parties' written stipulation, a true and correct electronic copy of the foregoing has been furnished by overnight express courier on the 20th day of September, 2010, to the following:

Benjamin James Stevenson  
Attorney for Plaintiffs-Appellees  
ACLU Foundation of Florida  
Northwest Region  
Post Office Box 12723  
Pensacola, FL 32591-2723

Robert Sniffen, Esq.  
Attorney for School Board and Superintendent Defendants-Appellees  
Sniffen & Spellman, P.A  
211 East Call Street  
Tallahassee, FL 32301

Christopher Barkas, Esq.  
Attorney for Office of Principal Defendant-Appellee  
Carr Allison  
305 South Garden Street  
Tallahassee, FL 32301

/s/ Horatio G. Mihet  
Horatio G. Mihet  
Attorney for Appellant