UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

ASSOCIATION OF CHRISTIAN SCHOOLS INTERNATIONAL, *et al.*, Plaintiffs, v. ROMAN STEARNS, SPECIAL ASSISTANT TO THE PRESIDENT, *et al.*, Defendants.	NO. CV 05-06242 SJO (RZx) **ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION TO DISMISS PURSUANT TO FED. R. CIV. P. 12(b)(1) & 12(b)(6)**

On October 28, 2005, Defendants Regents of the University of California ("UC Regents") and various officials and offices of the University of California ("UC") filed a Motion to Dismiss Pursuant to Federal Rule of Civil Procedure 12(b)(1) and 12(b)(6). On November 21, 2005, Plaintiffs Association of Christian Schools International, Calvary Chapel Christian School ("Calvary Christian School"), and five Calvary Christian School students by and through their parents filed an Opposition to the Motion, to which Defendants replied. On June 27, 2006, this Court heard argument on Defendants' Motion. For the reasons discussed below, the Court GRANTS the Motion in part and DENIES it in part.

I. BACKGROUND

Plaintiffs Association of Christian Schools International, Calvary Christian School, and five Calvary Christian School students by and through their parents have brought suit against Defendants UC Regents and various officials and offices of the UC for violating their constitutional rights. Plaintiffs allege that through the implementation and practice of discriminatory admissions practices, Defendants have discriminated against Plaintiffs, infringing on Plaintiffs' freedom of speech, freedom from viewpoint discrimination, freedom of religion and association, freedom from arbitrary governmental discretion, equal protection of the laws, and freedom from hostility toward religion. *Id*.

According to Plaintiffs' Complaint, there are several methods by which a high school student may be eligible to gain admission to the University of California institutions. (Compl. ¶ 26.) The most prevalent method for students attending private schools in California is known as "Eligibility in the Statewide Context," by which 92.5% of students achieving eligibility in 2003 did so. *Id.* Under this method, students may be eligible to gain admission to the University of California institutions with a high enough combination of standardized test scores and grades in a required number of courses, known as "a-g" course requirements.[1] *Id*. These a-g course

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[1] **General requirements by subject area:**
The following sequence of high school courses is required by the University of California of (sic) high school students to be minimally eligible for admission. It also illustrates the minimum level of academic preparation students ought to achieve in high school to undertake university level work.
The a-g requirements can be summarized as follows:
(a) History/Social Science – Two years required, including one year of world history, cultures, and geography and one year of U.S. history or one-half year of U.S. history and one-half year of civics or American government.
(b) English – Four years of college preparatory English that include frequent and regular writing, and reading of classic and modern literature.
(c) Mathematics – Three years of college preparatory mathematics that include the topics covered in elementary and advanced algebra and two- and three-dimensional geometry.
(d) Laboratory Science – Two years of laboratory science providing fundamental knowledge in at least two of these three disciplines: biology, chemistry, and physics.
(e) Language Other Than English – Two years of the same language other than English.
(f) Visual & Performing Arts – One year, including dance, drama/theater, music,

requirements are met when students at their respective schools take courses that have been approved by Defendants for a particular subject area. *Id*. ¶ 23.

There are two less favored (*i.e.*, more difficult) methods for achieving eligibility for admission to the University of California.[2] One such method is known as "Eligibility in the Local Context." Under this method, students ranking in the top 4% at each participating California high school is eligible for admission.[3] *Id*. ¶ 26. Students may also attain eligibility for admission through a method known as "Eligibility by Examination Alone." Only students with exceptionally high scores on standardized tests may qualify for admission by this method. *Id*.

Calvary Christian School avers that it sought to comply with the requirements of offering approved courses satisfying a-g course requirements. Specifically, Calvary Christian School avers that it submitted applications for approval of courses to qualify under the science (d), college preparatory elective (g), history/social science (a), and English (b) categories as described above. *Id*. ¶¶ 31-50. In each instance, Defendants allegedly rejected Calvary Christian School's application for approval. *Id*.

> or visual art.
> **(g) College Preparatory Elective** – In addition to those courses required in "a-f" above, one year (two semesters) of college preparatory electives are required, chosen from advanced visual and performing arts, history, social science, English, advanced mathematics, laboratory science, and language other than English.
> (Compl. ¶ 23 (emphasis in original).)

[2] Another method, not counted as being one to achieve eligibility for admission but outright admission, is known as "Admission by Exception." A student may gain admission to a particular University of California school at the discretion of the campus admissions director. Students admitted through this method are generally those exhibiting exceptional qualifications (*e.g.*, athletes, artists, veterans, etc.) (Compl. ¶ 29.)

[3] A participating high school is a school that offers sufficient approved a-g required courses that would enable its students to achieve Eligibility in the Statewide Context. Hence, at a school that does not offer sufficient approved a-g requirement courses for students to achieve Eligibility in the Statewide Context, these students, accordingly, also would not be able to achieve Eligibility in the Local Context. (Compl. ¶ 26A.)

In rejecting Calvary Christian School's applications, Plaintiffs aver that Defendants made several statements. In response to a biology course application, Defendant Stearns allegedly wrote:

> The content of the course outlines submitted for approval is not consistent with the viewpoints and knowledge generally accepted in the scientific community. As such, students who take these courses may not be well prepared for success if/when they enter science courses/programs at UC.

Id. ¶ 31. Also, Defendants allegedly have stated generally that biology and physics courses relying on science textbooks containing a Christian viewpoint from two particular publishers would not be approved to meet the lab science requirement. *Id*. Furthermore, rejection of courses relying on the particular textbooks was said by Defendants to be based on "'the way in which these texts address the topics of evolution and creationism' and 'their general approach to science' in relation to the Bible." *Id*. ¶ 32. It is based on these and other alleged statements made by Defendants that Plaintiffs bring this action for discrimination.

II. LEGAL STANDARD

A. Motion to Dismiss

Rule 12(b)(6) must be read in conjunction with Rule 8(a) which requires "a short and plain statement of the claim showing that the pleader is entitled to relief." 5A Charles A. Wright & Arthur Miller, Federal Practice and Procedure §1356 (1990). A Rule 12(b)(6) dismissal is proper only where there is either a "lack of a cognizable legal theory" or "the absence of sufficient facts alleged under a cognizable legal theory." *Balistreri v. Pacifica Police Dept.*, 901 F.2d 696, 699 (9th Cir. 1988). A complaint should not be dismissed under Rule 12(b)(6) "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Id.* The court must accept all material allegations in the complaint as true and construe them in the light most favorable to the plaintiff. *See NL Indus., Inc. v. Kaplan*, 792 F.2d 896, 898 (9th Cir. 1986); *see also*, *Russell v. Landrieu*, 621 F.2d 1037, 1039 (9th Cir. 1980).

Unless a court converts a Rule 12(b)(6) motion into a motion for summary judgment, a court cannot consider material outside of the complaint (*e.g.*, facts presented in briefs, affidavits, or discovery materials). *Levine v. Diamanthuset, Inc.*, 950 F.2d 1478, 1483 (9th Cir. 1991). A court

may, however, consider exhibits submitted with the complaint and matters that may be judicially noticed pursuant to Federal Rule of Evidence 201. *Hal Studios, Inc. v. Richard Feiner & Co.*, 896 F.2d 1542, 1555 n.19 (9th Cir. 1989).

For all these reasons, "[d]ismissal is warranted only if it appears to a certainty that [plaintiff] would be entitled to no relief under any state of facts that could be proved." *NL Indus.*, 792 F.2d at 898. However, a court need not accept as true unreasonable inferences or conclusory legal allegations. *See W. Min. Council v. Watt*, 643 F.2d 618, 624 (9th Cir.), *cert. denied*, 454 U.S. 1031 (1981).

B. Subject Matter Jurisdiction

It is a fundamental legal principle that federal courts are courts of limited jurisdiction. "A federal court is presumed to lack jurisdiction in a particular case unless the contrary affirmatively appears." *Stock West, Inc. v. Confederated Tribes,* 873 F.2d 1221, 1225 (9th Cir. 1989) (citation omitted). Lack of subject matter jurisdiction may be raised by any party at any time, and it is never waived. "[W]henever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action." Fed. R. Civ. P. 12(h)(3); *Hernandez v. McClanahan,* 996 F. Supp. 975, 977 (N.D. Cal. 1998).

III. DISCUSSION

A. Federal Constitutional Claims

1. First Amendment Speech Claim

In their Motion, Defendants contend that Plaintiffs fail to state a First Amendment speech claim "because Defendants are not stopping Plaintiffs from saying whatever they choose and because the University has its own First Amendment right to establish rigorous admission standards." (Defs.' Mot. 5.) Furthermore, Defendants argue in their Reply that the cases cited by Plaintiffs are inapposite. (Defs.' Reply 3.) In contrast, Plaintiffs contend that it is not necessary for Defendants to issue a total prohibition on speech for a freedom of speech violation to occur. (Pls.' Opp'n 6.) Instead, Plaintiffs argue that Defendants' actions, rejecting Plaintiffs' applications for a-g course approval because of Plaintiffs' incorporation of Christian material to the proposed courses, amount to First Amendment violations in the form of content regulation, viewpoint

discrimination, prescription of orthodoxy, and chilling of rights. *Id*. Whether or not Plaintiffs have stated a First Amendment freedom of speech claim by so contending is the issue at hand.

a. Restriction of Plaintiffs' Speech

According to the Supreme Court, "the Constitution's protection is not limited to direct interference with fundamental rights." *Healy v. James*, 408 U.S. 169, 183 (1972). Hence, contrary to Defendants' assertion that Plaintiffs have failed to state a speech violation claim simply because "Defendants are not stopping Plaintiffs from saying whatever they choose" (Pls.' Mot. 5), outright prohibition of particular activities is not required for a First Amendment speech violation. Instead, the Supreme Court has found in a number of cases (*i.e.*, many of those cases cited by Plaintiffs) that the freedom of speech is violated where government actions had the same effect of impeding the freedom of speech even without explicitly curtailing what was said.[4]

Fundamentally, the government is forbidden from engaging in regulation of speech based on its substantive content or its message. *Police Dep't v. Mosley*, 408 U.S. 92, 96 (1972). The bar against content-based regulation is high: "[d]iscrimination against speech because of its message is presumed to be unconstitutional." *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995).

[4] The Defendants' efforts to convince this Court that prior Supreme Court First Amendment decisions are inapposite to the matter at hand are unavailing. In *Healy*, where a school administration denied official recognition to a student group, the Supreme Court purposely chose to disagree with the lower courts' characterization of the consequences of nonrecognition. Justice Powell stated, "[I]n this case, the group's possible ability to exist outside the campus community does not ameliorate significantly the disabilities imposed by the President's actions. We are not free to disregard the practical realities." He then went on to quote Justice Stewart: "'Freedom such as these are protected not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference.'" *Healy*, 408 U.S. at 183 (citations omitted). Accordingly, this Court is not free to disregard the practical realities of Defendants' actions with respect to Plaintiffs' First Amendment rights. As in *Healy* and in the other cases cited by Plaintiffs, Plaintiffs aver that the practical reality of Defendants' actions is that it has become more difficult for Plaintiffs to exercise their First Amendment rights. If Plaintiffs' averment proves to be true, whether or not such effect is justified within the bounds of the law is the primary inquiry of this action.

The practice of viewpoint discrimination is related to that of content-based regulation. "Viewpoint discrimination is . . . an egregious form of content discrimination." *Id*. Viewpoint discrimination occurs when the government takes issue with particular views held by a speaker on a subject, rather than with the subject matter itself. *R.A.V. v. St. Paul*, 505 U.S. 377, 391 (1992). Government regulation of a speaker's viewpoint simply is not allowed. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983).

Here, Plaintiffs have alleged in their Complaint that it is the inclusion of religious material, and more specifically, that of a Christian viewpoint, to standard subject matter presentation in the course applications that prompted Defendants' rejection of Plaintiffs' applications for a-g course approval. The Complaint clearly states that "Defendants have rejected textbooks and courses based on a viewpoint of religious faith." (Compl. ¶ 30.) Further, the Complaint states that Defendants explicitly acknowledged that rejection of proposed science courses was based on the use of textbooks containing a Christian viewpoint. In fact, Plaintiffs have alleged that Defendants have a policy of rejecting applications from Christian schools that use particular textbooks containing a Christian viewpoint. Such applications generate a standardized response: "The content of the course outlines submitted for approval is not consistent with the viewpoints and knowledge generally accepted in the scientific community." *Id*. ¶ 31. The Complaint makes clear that no other reasons have been given for rejecting the applications. *Id*. ¶ 33. In addition, the Complaint contains information on Defendants' "*University of California Position Statement: 'A-G' Course Approval for High School Science Courses Taught from Textbooks from Selected Christian Publishers*." *Id*. ¶ 32. The Position Statement, directed at Christian schools and discussing the requirements for approved science courses, instructs Christian schools to "develop and submit for UC approval a *secular* science curriculum with a text and course outline that addresses course content/knowledge *generally accepted* in the scientific community." *Id*. (emphasis in original).

Evidently, Plaintiffs' references to Defendants' alleged acts of content-based regulation and viewpoint discrimination in their Complaint are numerous and specific. The Complaint contains detailed accounts of the responses Plaintiffs received from Defendants after submitting applications for approval in various subject areas (*e.g.*, history ¶¶ 39-44; English and literature ¶¶

45-47; social science ¶¶ 48-50). The Complaint also contains specific allegations as to the roles of the individual Defendants in commission of the alleged First Amendment violations, ¶¶ 54-55. Suffice it to say, the Complaint clearly indicates that Plaintiffs have alleged sufficient facts to allow this claim to go forward.

b. Defendants' First Amendment Rights

Defendants assert that Plaintiffs' claim of free speech violation under its content-based/viewpoint discrimination theories fails because "the University's right to set its own admissions standards is protected by the First Amendment." (Defs.' Mot. 7.) Defendants argue that the evaluation and approval or disapproval of the content and viewpoints of academic expression is required to enforce academic standards. *Id*. at 8.

Certainly, members of the Supreme Court have articulated on various occasions that a university's decisions regarding its admissions policies deserve a measure of sanctity. Justice Powell, in another matter involving the University of California Regents, stated, "The freedom of a university to make its own judgments as to education includes the selection of its student body." *Univ. of Cal. Regents v. Bakke*, 438 U.S. 265, 312 (1978) (Powell, J., concurring). Justice Frankfurter described admissions policies as being among the "four essential freedoms" of a university, along with the freedoms of "who may teach, what may be taught, [and] how it shall be taught." *Sweezy v. N.H.*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring).

However, as Plaintiffs point out, the freedom that a university enjoys to determine its own admissions policies is not without limit. Justice Powell in *Bakke* recognized, "Although a university must have wide discretion in making the sensitive judgments as to who should be admitted, constitutional limitations protecting individual rights may not be disregarded." 438 U.S. at 314. Essentially, *Bakke* supports the proposition that a university's freedom to determine who is to be admitted does not extend so far as to allow invidious discrimination in admissions policies. Along with race discrimination, the issue in *Bakke*, bias against a person because of her religion has been characterized by the Supreme Court as an invidious discrimination. *Cameron v. Johnson*, 381 U.S. 741, 751 (1965). By extension, it is difficult to imagine how discrimination because of a particular manifested religious viewpoint could itself be anything less than invidious.

In the matter at hand, at issue is Defendants' rejection of Plaintiffs' applications for a-g course approval. If in fact such rejection is based on Defendants' discrimination of Plaintiffs' applications solely because of the religious viewpoints expressed in the applications, such action would run afoul of the limits of Defendants' freedom to determine its admissions policies. Hence, Defendants' assertion of their First Amendment right to set their own admissions standards does not shield Defendants from the prohibition of engaging in content-based regulation or viewpoint discrimination.

In addition, Defendants contend that the regulation of content and viewpoints of academic speech is permissible as long as it is "reasonably related to legitimate pedagogical concerns." (Defs.' Mot. 10.) This standard, articulated in *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988), concerned a public high school principal's decision to censor certain articles written by students in a journalism class for a newspaper created by that class. Defendants cite a number of appellate level decisions to support their position that their rejection of Plaintiffs' applications for a-g course approval, even if based on the content and viewpoints contained within the course applications, does not violate the First Amendment. These cases, however, along with *Hazelwood*, are inapposite to the issue at hand. In *Hazelwood*, *Brown v. Li*, 308 F.3d 939 (9th Cir. 2002), *Settle v. Dickson County Sch. Bd.*, 53 F.3d 152 (6th Cir. 1995), and *Axson-Flynn v. Johnson*, 356 F.3d 1277 (10th Cir. 2004), the speech at issue was that of students attending the schools that were regulating the speech. Here, the speech at issue is that of independent entities (*i.e.*, Christian schools) and is not necessarily student speech. Granted, students are included among the Plaintiffs, but the applications put forth for a-g course approval were ostensibly prepared and submitted by the school and thus arguably may be considered to primarily be the school's speech. Hence, the issue has less to do with a school censoring its own students' speech, and more to do with a school (*i.e.*, Defendants) censoring a separate entity's (*i.e.*, Plaintiffs) speech. This crucial distinction in the relationship of the parties makes it difficult to rationalize why the standard in *Hazelwood* should apply here.

Neither is *Fleming v. Jefferson County Sch. Dist. R-1*, 298 F.3d 918 (10th Cir. 2002), another case cited by Defendants, particularly instructive. The court in *Fleming* was concerned

with speech "that might reasonably be perceived to bear the imprimatur of the school and that involve pedagogical concerns." 298 F.3d at 924. The facts in *Fleming* may be better analogized to those in the matter at hand, as the speech there was that of community members and not limited to students, as in the instant matter. However, here, unlike for the speech at issue in *Fleming*, it simply would not be reasonable for all courses that receive a-g course approval to be perceived as bearing Defendants' imprimatur. A-g approved courses are clearly taught by many different high schools across the state of California, entities separate and independent from Defendants. In addition, the number and range of course topics make it unlikely for the courses to be perceived as being anything but courses taught by the respective high schools. Hence, even if Defendants' actions in rejecting Plaintiffs' course applications are reasonably related to legitimate pedagogical concerns, this outcome does not necessarily shield Defendants from First Amendment liability, in the event of content-based or viewpoint discrimination of Plaintiffs' speech.

A complaint should not be dismissed under Rule 12(b)(6) "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Balistreri*, 901 F.2d at 699. Based on the information contained in the Complaint, it is evident that Plaintiffs have alleged sufficient facts to state a claim for violation of the freedom of speech in the forms of content-based regulation and viewpoint discrimination. Defendants' arguments of their own First Amendment rights permitting potential infringement upon the rights of Plaintiffs are unavailing. As such, it is not necessary for the Court to explore at this time the Plaintiffs' other freedom of speech violation charges of prescription of orthodoxy and chilling of speech. Defendants' Motion to Dismiss Plaintiffs' freedom of speech claim is DENIED.

2. Free Exercise of Religion Claim

Defendants also take issue with Plaintiffs' claim that Defendants' actions violate Plaintiffs' free exercise of religion. In *Thomas v. Review Bd. of Ind. Employment Sec. Div.*, 450 U.S. 707 (1981), the Supreme Court established:

> Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists. While the

> compulsion may be indirect, the infringement upon free exercise is nonetheless substantial.

Thomas, 450 U.S. at 717-18. The court also observed that "[t]he determination of what is a 'religious' belief or practice is more often than not a difficult and delicate task . . . However, the resolution of that question is not to turn upon a judicial perception of the particular belief or practice in question. . . ." *Id*. at 714. As the court put it, "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection." *Id*.

The Supreme Court's decision in *Thomas* is instructive. In that case, the court held that a state's denial of unemployment benefits unlawfully burdened an employee's right to free exercise of religion. Thomas, the petitioner, held religious beliefs that forbade him from participating in the production of armaments. He was forced to leave his job when his employer transferred him to a division that fabricated turrets for tanks. Indiana subsequently denied him unemployment compensation benefits. The Supreme Court recognized that the coercive impact was indistinguishable from that in *Sherbert v. Verner*, 374 U.S. 398 (1963), in which the court held that a ruling disqualifying petitioner from benefits because of her refusal to work on Saturday in violation of her faith "force[d] [the petitioner] to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand." *Sherbert*, 374 U.S. at 404. Citing *Sherbert*, the *Thomas* court stated "[n]ot only is it apparent that appellant's declared ineligibility for benefits derives solely from the practice of [his] religion, but the pressure upon [him] to forego, (sic) that practice is unmistakable." *Thomas*, 450 U.S. at 717. The court therefore determined that Thomas had been "put to a choice between fidelity to religious belief or cessation of work." *Id*. at 717. Accordingly, the court held that Indiana's denial of unemployment compensation benefits violated Thomas' right to the free exercise of his religion.

At the June 27, 2006 hearing on this Motion, Plaintiffs' counsel stated that Plaintiffs have not pled a substantial burden on a central religious belief or core practice. Defendants' counsel, however, conceded that centrality may not be crucial to Plaintiffs' free exercise claim. In the instant case, Plaintiffs generally aver:

> The a-g course requirements effectively provide (or are interpreted to provide) that specifically Christian content and viewpoints are disapproved and, if in the disapproved category, may not be added to standard course material, even though all the standard course material is taught, if the course and text is to meet a-g course requirements. This violates the freedom of religion of plaintiffs, and bars admission to the University of California on account of religion. It also abridges the right of Christians to assemble and associate in Christian schools, and to speak freely about their Christian beliefs, and for parents to train their children in their religious faith.

(Compl. ¶ 77.) A complaint shall not be dismissed under Rule 12(b)(6) "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Balistreri*, 901 F.2d at 699. Viewing Plaintiffs' allegations in the light most favorable to Plaintiffs, as the Court must, the Court determines that Plaintiffs have stated a valid free exercise of religion claim. Plaintiffs have adequately shown that they have been put to the choice between providing and taking courses that promote a biblical moral view or complying with the UC's a-g course requirements. Because Plaintiffs have alleged that the a-g course requirements place a burden on their religion, Defendants' Motion to Dismiss Plaintiffs' free exercise claim is DENIED.

3. Freedom of Association Claim

Defendants also dispute Plaintiffs' freedom of association claim. In *Roberts v. U.S. Jaycees*, 468 U.S. 609 (1984), the Supreme Court clearly identified the two lines of decisions protecting the freedom of association. First, the freedom of private association protects "choices to enter into and maintain certain intimate human relationships . . . against undue intrusion by the State because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme." *Id.* at 617-18. Second, the freedom of expressive association is protected "for the purpose of engaging in those activities protected by the First Amendment-speech, assembly, petition for the redress of grievances, and the exercise of religion." *Id*. at 618. Government interference with one type of associational freedom will often burden the other type as well. *Bd. of Dirs. of Rotary Intern. v. Rotary Club of Duarte*, 481 U.S. 537, 544 (1987).

Here, Plaintiffs claim that the a-g course requirements effectively prevent the addition of Christian content and viewpoints to standard course material if the course is to meet a-g course requirements. (Compl. ¶ 77.) Plaintiffs further argue that the a-g course requirements "abridge[]

the right of Christians to assemble and associate in Christian schools, and to speak freely about their Christian beliefs." (Compl. ¶ 77.) Plaintiffs' Opposition to the instant Motion echoes an allegation put forth in the Complaint's section on the First Cause of Action, paragraph 61:

> The Plaintiff students would otherwise qualify for admission to UC–their standardized scores are in the top 15%–except for the school they chose and the *shared viewpoints* there–which means that they are ineligible for admission to UC unless they are in the top 2-4% under the alternatives, if they choose disqualified courses with a Christian perspective or if Defendants implement their new approach to disqualify most of the other courses.

(Pls.' Opp'n 11 (emphasis added).) Insofar as Plaintiffs' claim is based on their right to congregate to share and discuss their viewpoints, in this case Christian viewpoints, and the effect of the a-g course requirements preventing them from doing so, Plaintiffs have stated a claim for a violation of their freedom of association. Hence, Defendants' Motion to Dismiss Plaintiffs' freedom of association claim is DENIED.

4. Fourteenth Amendment Procedural Due Process Claim

Defendants also request that this Court dismiss Plaintiffs' federal procedural due process claim. Defendants are constrained from making decisions depriving Plaintiffs of "'liberty' or 'property' interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment." *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976). Some interests are "protected . . . because they are guaranteed in one of the provisions of the Bill of Rights which has been 'incorporated' into the Fourteenth Amendment." *Paul v. Davis*, 424 U.S. 693, 711 n.5 (1976). Property interests, on the other hand, "are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law . . . ." *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 577 (1972).

Defendants challenge Plaintiffs' federal procedural due process claim with two arguments. First, Defendants contend that Plaintiffs have failed to allege deprivation of a previously possessed property or liberty. (Defs.' Mot. 15.) Second, Defendants also assert that Plaintiffs "have no legal entitlement . . . to have any particular classes designated as meeting the a-g requirements, and

they do not have any legal entitlement to attend the University other than in compliance with its admissions criteria." *Id*.

Plaintiffs counter by identifying a host of First Amendment rights that are discussed in the Complaint, along with the right to be nondiscriminatorily considered for university admission as a property interest. (Pls.' Opp'n 12.) The Supreme Court has found that the application of the due process provision of the Fourteenth Amendment extends at least to the rights of speech, press, and religion under the First Amendment. *Duncan v. State of La.*, 391 U.S. 145, 147-48 (1968). Plainly, Plaintiffs have identified their deprived liberty interests as those encompassed within the First Amendment, including free speech (Compl. ¶ 81) and academic freedom, *id*. ¶ 84, thereby defeating Defendants' first challenge to Plaintiffs' procedural due process claim.

The analysis for Defendants' second challenge is more involved. Although Plaintiffs assert that they have a property interest in the "right to be nondiscriminatorily considered, once California established universities" (Pls.' Opp'n 12), Plaintiffs' citation to *Goss v. Lopez*, 419 U.S. 565, to support such an assertion is unconvincing. In *Goss*, the persons claiming a property interest in a public education did so on the basis of state laws that required both the provision and the receipt of the benefit. *Id*. at 573. Here, it is unclear what exactly is the basis for Plaintiffs' purported property interest in the "right to be nondiscriminatorily considered." Hence, Plaintiffs have failed to identify a property interest for their federal due process claim. However, because Plaintiffs have identified several First Amendment liberty interests, Defendants' Motion to Dismiss this procedural due process claim is DENIED.

5. Unconstitutional Condition

Defendants contend and Plaintiffs agree that the University's admissions criteria are not an unconstitutional condition. (Defs.' Mot. 15; Pls.' Opp'n 12.) However, Plaintiffs assert that "recent changes to require not just subject areas, but approved and nondisqualified viewpoints and content regulation, do create an unconstitutional condition." (Pls.' Opp'n 12-13.)

According to the Supreme Court, "the government may not deny a benefit to a person on a basis that infringes his constitutionally protected . . . freedom of speech even if he has no entitlement to that benefit." *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 126

S. Ct. 1297, 1307 (2006) (citations omitted). The unconstitutional conditions doctrine extends to other "constitutionally protected interests" in addition to the freedom of speech. *Perry v. Sindermann*, 408 U.S. 593, 597 (1972).

As Defendants have noted, the court's determination of the existence of an unconstitutional condition takes place in sequence. "As a prerequisite to discerning a constitutional violation for an unconstitutional condition . . . we must first examine the validity of the underlying alleged constitutional rights." *Vance v. Barrett*, 345 F.3d 1083, 1088 (9th Cir. 2003) (citations omitted). *See also*, *Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272, 286 (1998) (declining to address respondent's unconstitutional conditions argument by first finding no constitutional violation). Accordingly, Defendants' defense of its standards as not being an unconstitutional condition is premature; although this Court has found that Plaintiffs have alleged sufficient facts for Plaintiffs' constitutional rights claims against Defendants to go forward, this Court has yet to "examine the validity of the underlying alleged constitutional rights." *Vance*, 345 F.3d at 1088. Hence, the Court declines to consider either Defendants' argument of there being no unconstitutional condition or Plaintiffs' argument of the existence thereof.

B. Defendants Subject to Suit

In order for this action to move forward, the Defendants must be subject to suit. Defendants contend that as an arm of the state of California, the UC Regents (along with its operating units Board of Admissions and Relations with Schools (BOARS) and Office of the President (UCOP)) is not subject to suit under 42 U.S.C. § 1983, under which Plaintiffs bring this action.

A state and its officers sued in their official capacity are not subject to suit under 42 U.S.C. § 1983, as they are not considered "persons" within the meaning of the statute. *Cortez v. County of Los Angeles*, 294 F.3d 1186, 1188 (9th Cir. 2002). "States or governmental entities that are considered 'arms of the state' for Eleventh Amendment purposes" are excluded from the definition of "persons" in § 1983. *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 70 (1989). Because the UC Regents is considered an arm of the state under the Eleventh Amendment, it therefore is not considered a "person" subject to suit under 42 U.S.C. § 1983. *Thompson v. City*

of Los Angeles, 885 F.2d 1439, 1443 (9th Cir. 1989). Clearly, Plaintiffs may not sue the UC Regents under 42 U.S.C. § 1983 as they might any other "person."

Plaintiffs make three arguments to try to convince this Court that the UC Regents is nonetheless subject to suit. Plaintiffs' first argument, that the UC Regents is subject to suit as a state officer under *Ex parte Young*, 209 U.S. 123, 160 (1908), is unconvincing. *Ex parte Young* stands for the proposition that "a suit challenging the constitutionality of a state official's action is not one against the state." *Pennhurst State Sch. & Hosp. v. Halderman*, 405 U.S. 89, 102 (1984). Although this exception to the doctrine of sovereign immunity allows state officers to be sued, Plaintiffs' citation to *Regents v. Super. Ct. of Los Angeles County*, 3 Cal. 3d 529, 536-39, 131 Cal. Rptr. 228, 230 (1976), is hardly sufficient to overcome the plethora of cases explicitly excluding the UC Regents from suit under 42 U.S.C. § 1983. As Defendants point out in their Reply, *Regents v. Super. Ct. of Los Angeles County* held only that the UC Regents is an "officer" for specific California venue laws. Plaintiffs' expansive reading here of the California Supreme Court's holding is unmerited. In the absence of convincing authority that the UC Regents is indeed an "officer" for purposes of *Ex parte Young*, Plaintiffs' first argument fails.

Plaintiffs next argue that the UC Regents enjoys Eleventh Amendment immunity only in limited functions and not in this situation. Certainly, the UC Regents' immunity from suit is not all-encompassing of the University's many functions. In *Doe v. Lawrence Livermore Nat'l Lab.*, 65 F.3d 771 (9th Cir. 1995), *rev'd on other grounds sub nom. Regents of the Univ. of Cal. v. Doe*, 519 U.S. 425 (1997), the Ninth Circuit employed a five-factor analysis to determine if the University, "acting in a managerial capacity for the Laboratory, is an arm of the state and thus is entitled to Eleventh Amendment immunity from suit in federal court." *Lawrence Livermore Nat'l Lab*, 65 F.3d at 774. The California Supreme Court has also limited the UC Regents' sovereign immunity. *See, e.g.*, *Regents v. Super. Ct.*, 17 Cal. 3d 533, 537 (1976) (declining to extend sovereign immunity to the University's lending decisions in investment of portfolio). Plaintiffs also point to a number of suits brought against other states' equivalents of the Regents that were allowed by the U.S. Supreme Court without discussion of sovereign immunity. (Pls.' Opp'n 15.) In addition, Plaintiffs cite to a matter in the Northern District of California that allowed an injunctive relief suit against the

UC Regents to go forward, *McVey v. Bd. of Regents of the Univ. of Cal.*, 165 F. Supp. 2d 1052, 1057 (N.D. Cal. 2001). Despite Plaintiffs' apparent urging of this Court to simply rely on past instances in which the UC Regents (or other states' equivalents) has been subject to suit, without clear authority supplying this Court with a rationale for doing so, this argument necessarily fails.

Finally, Plaintiffs argue that "applying the Ninth Circuit's five-factor test to the function of Regents that regulates course content or approved viewpoints of nonpublic schools" will convince this Court that the UC Regents is subject to suit. (Pls.' Opp'n 16.) The five factors in the Ninth Circuit's test are:

> (1) whether a money judgment would be satisfied out of state funds, (2) whether the entity performs central governmental functions, (3) whether the entity may sue or be sued, (4) whether the entity has power to take property in its own name or only the name of the state, and (5) the corporate status of the entity.

ITSI TV Prods. v. Agric. Ass'ns, 3 F.3d 1289, 1292 (9th Cir. 1993). Without question, the single most important factor in the analysis is whether the state would be liable for a money judgment against the defendant. *Lawrence Livermore Nat'l Lab.*, 65 F.3d at 774; *Jackson v. Hayakawa*, 682 F.2d 1344, 1350 (1982). Here, Plaintiffs do not seek money damages; they seek only injunctive and declaratory relief. (Pls.' Opp'n 19.) In such a case it would appear that the first and most weighty factor on its face weighed in favor of finding the UC Regents as not being an arm of the state. However, past authority would support the opposite result.

First, the Supreme Court, in its reversal of the Ninth Circuit decision in *Lawrence Livermore Nat'l Lab.*, 65 F.3d 771 (finding the University in its function there to not be an arm of the state), took issue with the Ninth Circuit's characterization of the government's indemnification of the University as weighing the first factor against granting the University Eleventh Amendment immunity from suit in federal court. *Regents of the Univ. of Cal. v. Doe*, 519 U.S. 425, 431 (1997). The Court there stated "that with respect to the underlying Eleventh Amendment question, it is the entity's potential legal liability . . . that is relevant." *Id.* It is true that here there is no potential legal liability, as Plaintiffs do not seek money damages. However, the fact that Plaintiffs are not pursuing money damages does not alter the relationship between the state of California and the University. If Plaintiffs were seeking money damages, it would be the state of California to which

they would look. Hence, the first factor should weigh in favor of granting the UC Regents immunity from suit.

Second, the Ninth Circuit has addressed the situation where the appellant sought both damages and injunctive relief against an appellee that claimed Eleventh Amendment immunity. *Mitchell v. Los Angeles Cmty. Coll. Dist*., 861 F.2d 198 (9th Cir. 1988). There, after only limited discussion of the first factor in its five-factor analysis, the Ninth Circuit found that the appellee, a school district, was entitled to Eleventh Amendment immunity from the appellant's 42 U.S.C. § 1983 claim in damages *and* for injunctive relief. *Id.* at 201. There was no separate analysis of the claim due to the fact that injunctive relief was sought; that the first factor in the analysis did not apply to the plaintiff's request for injunctive relief did not matter in the court's decision to grant Eleventh Amendment immunity from the § 1983 claim for both types of relief. Here, although money damages are not being sought, it is not apparent that such absence makes any difference to the five-factor analysis as would be conducted if Plaintiffs did request damages. Hence, again, the first factor would weigh in favor of granting the UC Regents immunity from suit.

Third, the Supreme Court has stated that sovereign immunity is not limited to suits seeking money damages. "This jurisdictional bar [under the Eleventh Amendment] applies regardless of the nature of the relief sought." *Pennhurst*, 465 U.S. 89, 100. Further, the Court has equated the effect of money damages with that of injunctive relief, at least in noting what it is that qualifies a suit as being against a sovereign. "The general rule is that suit is against the sovereign if 'the judgment sought would expend itself on the public treasury or domain . . . ,' or if the effect of the judgment would be 'to restrain the Government from acting, or to compel it to act.'" *Id.* at 102 n.11 (citations omitted). Here, in this Eleventh Amendment analysis, given the Supreme Court's characterization of suits against a sovereign, it is not evident that Plaintiffs' choice not to seek money damages makes this suit any less against a sovereign entity and, thereby, entitled to sovereign immunity. Hence, the first factor does not weigh against granting the UC Regents immunity from suit.

The analysis for the other factors is similar to the analysis performed by the Ninth Circuit in *Lawrence Livermore Nat'l Lab.* and is not repeated here. Because the first and most important

factor weighs in favor of finding UC Regents immune from suit in federal court, which is not overcome by the other factors in the analysis, the Ninth Circuit five-factor test supports the proposition that the UC Regents should be found to be an arm of the state. Therefore, the UC Regents is entitled to Eleventh Amendment immunity from suit in federal court, and the claims against the UC Regents (including its operating units BOARS and UCOP)[5] are DISMISSED.

C. Federal Jurisdiction for State Law Claims

Plaintiffs and Defendants agree that claims based on violations of state law, made against state officers in their official capacity cannot be decided. (Defs.' Mot. 18; Pls.' Opp'n 17.) However, the officers here are also sued in their individual, or personal, capacity. Defendants do not disagree that federal courts may decide state law claims against state officers in their personal capacity, but only if the suit is for damages. (Defs.' Reply 5.) Plaintiffs, however, assert that the jurisdiction of federal courts are not limited to suits for damages, but generally covers claims against state officers acting in their personal capacity. (Pls.' Opp'n 18.)

The Eleventh Amendment bars suits against a state in federal court without the state's explicit consent. *In re State of N.Y.*, 256 U.S. 490, 497 (1921). This jurisdictional bar applies not only when the state is the named party, but also when it is the party in fact. *Edelman v. Jordan*, 415 U.S. 651 (1974). "The general rule is that relief sought nominally against an officer is in fact against the sovereign if the decree would operate against the latter." *Haw. v. Gordon*, 373 U.S. 57, 58 (1963) (per curiam). An exception to the Eleventh Amendment bar exists to allow suits challenging the constitutionality of a state official's action. *Ex parte Young*, 209 U.S. 123. However, this exception exists only for federal claims seeking prospective injunctive relief. *Ulaleo v. Paty*, 902 F.2d 1395, 1398 (9th Cir. 1990) (citation omitted). Further, *Ex parte Young* is "inapplicable in a suit against state officials on the basis of state law." *Pennhurst*, 465 U.S. at 106.

Defendants contend that Ninth Circuit authority "prohibits federal courts from deciding state law claims for injunctive or declaratory relief against state officials." (Defs.' Mot. 18.) Such

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[5] Plaintiffs admit that they "have not found clear authority that [BOARS and UCOP] are entities. (Pls.' Opp'n 17.)

prohibition, Defendants claim, extends to "personal-capacity claims for injunctive or declaratory relief under state law." (Defs.' Reply 5.) In support of their argument, Defendants cite three cases. Indeed, the courts in *Air Transp. Ass'n of Am. v. Pub. Utils. Comm'n of the State of Cal.*, 833 F.2d 200 (9th Cir. 1987), *Han v. U.S. Dep't of Justice*, 45 F.3d 333 (9th Cir. 1994), and *Leventhal v. Vista Unified Sch. Dist.*, 973 F. Supp. 951 (S.D. Cal. 1997), cite *Pennhurst* as standing for the proposition that federal courts are barred by the Eleventh Amendment from deciding state law claims for injunctive or declaratory relief against state officials.[6] Yet there is no discussion in these cases of the difference, if any, in the treatment of suits against state officials in their official or personal capacity.

Another Ninth Circuit case, *Ashker v. Cal. Dep't of Corr.*, 112 F.3d 392, 394 (9th Cir. 1997), sheds more light on the Supreme Court's rationale for finding some cases to be barred by the Eleventh Amendment while others are not. In *Ashker*, the Ninth Circuit described *Pennhurst* as standing for the proposition that the "Eleventh Amendment barred a federal district court from hearing a supplemental state law claim for an injunction against a state officer acting in his *official* capacity." *Ashker*, 112 F.3d at 394 (emphasis in original). The court went on to discuss the question of suit against an officer in his or her personal capacity on a state law claim for money damages, the issue of a similar suit, but such a claim for injunctive relief was not discussed. However, the Ninth Circuit did take the opportunity to note that in *Pennhurst*, 465 U.S. 89, "[t]he

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[6] In *Air Transp. Ass'n of Am. v. Pub. Utils. Comm'n of the State of Cal.*, 833 F.2d 200 (9th Cir. 1987), the plaintiffs sought declaratory relief and an injunction to enjoin the enforcement of a regulation promulgated by the California Public Utilities Commission. The Ninth Circuit cited *Pennhurst* as standing for the proposition that the Eleventh Amendment "bars claims in federal court against state officials based on state law violations." 833 F.2d at 204 (citation omitted). The court subsequently declared the plaintiffs' claim barred by the Eleventh Amendment.

In *Han v. U.S. Dep't of Justice*, 45 F.3d 333 (9th Cir. 1994), the plaintiffs sought what the court held to be a retrospective remedy and the Ninth Circuit again cited *Pennhurst* in declaring itself "barred by the Eleventh Amendment from deciding claims against state officials based solely on state law." 45 F.3d at 339 (citation omitted).

In *Leventhal v. Vista Unified Sch. Dist.*, 973 F. Supp. 951 (S.D. Cal. 1997), the plaintiffs brought suit against school board members in their official capacity, seeking injunctive and declaratory relief. The district court there cited *Pennhurst* for the proposition that the "Eleventh Amendment bars federal courts from granting injunctive relief against state officials for violations of state law." 973 F. Supp. at 956.

Supreme Court observed that 'a federal suit against state officials on the basis of state law contravenes the Eleventh Amendment when–as here–the relief sought and ordered has an impact directly on the State itself.'" *Ashker*, 112 F.3d at 394. This statement suggests that, in determining whether claims are barred by the Eleventh Amendment, the Supreme Court primarily considers whether such relief would directly impact the state itself. Hence, a state claim for injunctive relief against a state official, in either his or her official or individual capacity, would be barred in federal court, as such relief would necessarily "have an impact directly on the State itself."

In contrast, Plaintiffs cite Ninth Circuit authority to contend that *Pennhurst* is inapposite to the matter at hand. First, Plaintiffs cite *Demery v. Kupperman*, 735 F.2d 1139, 1150-51 (9th Cir. 1984), to stand for the proposition that "*Pennhurst* addressed only official capacity claims, and not personal capacity claims under state law." (Pls.' Opp'n 17.) Indeed, the Ninth Circuit in *Demery* addressed the situation where a § 1983 suit seeking money damages was brought against the defendants in their individual capacity. There, the Ninth Circuit declined to find that the Supreme Court's ruling in *Pennhurst* prevented the bringing of suit in federal court against state officials in their individual capacity for damages.[7] *Demery*, 735 F.2d at 1151.

Next, Plaintiffs assert that the Ninth Circuit addressed the issue of personal capacity claims under state law in *Pena v. Gardner*, 976 F.2d 469, 473-74 (9th Cir. 1992), holding that "*Pennhurst* did not address, and does not apply to, personal capacity claims under state law." (Pls.' Opp'n 17.) In *Pena*, the Ninth Circuit found that the Eleventh Amendment did not bar the plaintiff's pendent state claims against state officials acting in their individual capacity. *Pena*, 976 F.2d at 474. Notably, the plaintiff in *Pena* did not seek prospective injunctive relief, as Plaintiffs do here.[8]

Despite Plaintiffs' attempts to distance *Pennhurst* from the instant matter, the Court is unconvinced that the Eleventh Amendment does not bar from federal court suits containing state

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[7] The Supreme Court indirectly agreed with the Ninth Circuit's reading of *Pennhurst in Hafer v. Melo*, 502 U.S. 21 (1991) (allowing suit for monetary damages and reinstatement against state official in her individual capacity).

[8] "Pena did not request injunctive relief in his original complaint." *Pena*, 976 F.2d at 473 n.5.

claims for injunctive or declaratory relief against state officials in his or her personal capacity. Clearly, in *Pena*, the Ninth Circuit "held that the Eleventh Amendment would not bar federal or pendent state claims seeking *damages* against a state official acting personally." *Ashker*, 112 F.3d at 394-95 (citation omitted) (emphasis added). However, the Ninth Circuit in *Pena* appears to have decided on a narrower question than Plaintiffs contend that they did. In other words, the Ninth Circuit did not conclusively decide in *Pena* if the Eleventh Amendment bars state claims seeking injunctive or declaratory relief against a state official acting personally.

"A federal court is presumed to lack jurisdiction in a particular case unless the contrary affirmatively appears." *Stock West, Inc. v. Confederated Tribes,* 873 F.2d 1221, 1225 (9th Cir. 1989) (citation omitted). As such, given that Plaintiffs have failed to convince this Court that *Pennhurst* is not instructive for the issue at hand, and given the Supreme Court's observation that the Eleventh Amendment bars in federal court state law claims against state officials that seek relief that has an impact directly on the state itself, this Court declines to find that jurisdiction exists over Plaintiffs' state law claims. Hence, Defendants' Motion to Dismiss Plaintiffs' state law claims is GRANTED.

D. "Individual Capacity" Claims

Defendants request that claims against Defendants in their "individual capacity" be dismissed. Defendants assert that suits against officials in their individual capacity are "appropriate only where plaintiffs seek damages to be paid out of the official's personal assets or action by the individual personally, rather then [sic] as a government official." (Defs.' Mot. 19.) Plaintiffs counter that personal capacity suits for injunctive or declaratory relief, as here, are proper and are allowed. (Pls.' Opp'n 18.)

At the least, Defendants' reliance on the Supreme Court's discussion in *Ky. v. Graham*, 473 U.S. 159, 165-66 (1985), of the difference between personal capacity and official capacity suits, to mandate their position is misplaced. As Plaintiffs have stated in their Opposition (Pls.' Opp'n 18), the Supreme Court's discussion in *Graham*, merely gave "concrete examples of the practical and doctrinal differences between personal and official capacity actions" because "this distinction [between the two types of actions] continues to confuse lawyers and confound lower courts." 473

U.S. at 165. There is no indication in *Graham* that the Supreme Court meant to limit or delineate the capacity in which future plaintiffs should bring particular kinds of suit against state official defendants. *See Hafer v. Melo*, 502 U.S. 21, 25 (1991). Defendants' citation to *Am. Civil Liberties Union of Miss., Inc. v. Finch*, 638 F.2d 1336, 1338 (5th Cir. 1981) is similarly flawed.

In support of Plaintiffs' argument that personal capacity suits may be for injunctive or declaratory relief, Plaintiffs assert that *Ex parte Young* suits and § 1983 suits are personal capacity suits. (Pls.' Opp'n 19.) Defendants contend that *Ex parte Young* suits are, rather, official-capacity suits. (Defs.' Reply 5.) Indeed, the legal fiction that the Supreme Court created in *Ex parte Young* to bypass the Eleventh Amendment allowed for suit to be brought against the unconstitutional conduct of an official. The fiction postulates that "[the officer] is in that case stripped of his official or representative character and is subjected in his person to the consequences of his *individual* conduct." *Ex parte Young*, 209 U.S. at 160 (emphasis added). Such description of how it is that suit is allowed to be brought against what ostensibly are the actions of an official simply carrying out his or her duties, appears to indicate that the official there is subjected to suit in his or her individual capacity. However, additional Ninth Circuit and Supreme Court case law would indicate that Defendants' interpretation of *Ex parte Young* ultimately prevails.

Indeed, the Ninth Circuit has characterized *Ex parte Young* suits as where "a state official in his or her *official* capacity, when sued for injunctive relief, [is] a person under § 1983, because 'official-capacity actions for prospective relief are not treated as actions against the State.'" *Wolfe v. Strankman*, 392 F.3d 358, 365 (9th Cir. 2004) (internal citations and quotation marks omitted) (emphasis added). In making this observation, the Ninth Circuit drew upon Supreme Court case law. *Id*. Clearly, the legal fiction that the Supreme Court created in *Ex parte Young* is, at best, only a fiction, and suit brought under *Ex parte Young*, although perhaps *treated* as a personal capacity suit,[9] is *actually* brought against officials in their official capacity.

[9] "An *Ex parte Young* suit is treated as a personal capacity suit: 'Under the doctrine of *Ex parte Young*, courts treat a suit against a state officer to enjoin a violation of federal law as an individual-capacity suit . . . .' *Moore's Federal Practice* § 123.40[3][b] (2005)." (Pls.' Opp'n 19.)

Plaintiffs also argue that "a Section 1983 suit . . . is normally a personal capacity suit" and cites to *Hafer*, 502 U.S. 21, in support of this contention. (Pls.' Opp'n 19.) The Court agrees that a § 1983 suit may be brought against an official in his or her personal capacity. However, no authority has been presented that would indicate that a § 1983 suit is "normally a personal capacity suit." Without conclusive authority indicating that Plaintiffs may sue Defendants in their "individual capacity" for injunctive and declaratory relief this Court declines to allow these claims to go forward. Hence, Defendants' Motion to Dismiss claims against certain Defendants in their "individual capacity" is GRANTED.

E. Claims Against Dennis J. Galligani

Apparently, Dennis J. Galligani has retired from the position of Associate Vice President for Student Academic Services. (Defs.' Mot. 20.) Defendants request that this Court dismiss Mr. Galligani as a defendant. *Id.* Plaintiffs argue that "Mr. Galligani's successor should be substituted when he or she takes office." (Pls.' Opp'n 20.) Federal Rule of Civil Procedure 25(d)(1) specifies that substitution is the proper course to take. Defendants fail to advance any reason why this Court should deviate from such course. Hence, Defendants' Motion to Dismiss Mr. Galligani as a defendant is DENIED. Of course, in light of the Court's granting of Defendants' Motion to Dismiss claims against certain Defendants in their "individual capacity," claims against Mr. Galligani are limited to federal claims against him in his official capacity.

IV. CONCLUSION

For the foregoing reasons, the Court DENIES Defendants' Motion to Dismiss Plaintiffs' First, Second, Third and Fourth Causes of Action. In addition, this Court GRANTS Defendants' Motion to Dismiss all claims against the UC Regents, the components of Plaintiffs' First, Second, Third, Fourth, Fifth and Sixth Causes of Action that are based on California law, and all claims against any of the Defendants in their individual capacity. Moreover, this Court DENIES Defendants' Motion to Dismiss claims against Dennis J. Galligani in his official capacity.

To the extent that the Court GRANTS Defendants' Motion, Plaintiffs' claims are dismissed with prejudice. The filing of an Amended Complaint is not required. Defendants have twenty (20) days to answer the remainder of the Complaint.

IT IS SO ORDERED.

Dated this _____ day of August, 2006.

S. JAMES OTERO
UNITED STATES DISTRICT JUDGE