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11 UNITED STATES DISTRICT COURT
12 CENTRAL DISTRICT OF CALIFORNIA

13 **ASSOCIATION OF CHRISTIAN SCHOOLS**
14 **INTERNATIONAL, et al.,**
15 **Plaintiffs,**
16 **v.**
17 **ROMAN STEARNS, et al.,**
18 **Defendants.**

CIVIL ACTION NO.
CV 05-06242 SJO (RZx)

**PLAINTIFFS’
OPPOSITION TO
MOTION TO DISMISS**

Judge: Hon. S. James Otero
Date: December 12, 2005
Time: 10:00 a.m.
Room: 1600

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21 * All emphasis in quotations in this brief is added unless indicated by (emphasis in original).

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1 **I. INTRODUCTION**

2 This case involves defendants’ major step, after 70 years of simply requiring that
3 nonpublic schools teach minimum years of “a-g” subject areas including a list of topics, to
4 rejecting courses because of their viewpoint or perspective even if they otherwise qualify in
5 nearly all major subject areas (science, religion/ethics, history, literature, social studies, and
6 electives). The viewpoint rejected in this case is a conservative Christian viewpoint (which
7 is why the nation’s largest organization of Christian schools brought the suit as plaintiff).
8 The same principle would allow Defendants to reject courses because of a different
9 religious, ethnic, or socio-political viewpoint. This viewpoint discrimination causes
10 students, who choose courses that add a Christian perspective to standard course materials,
11 to be discriminatorily excluded from the near-dozen University of California institutions
12 (“UC”), and the two dozen California State (“CSU”) institutions, unless this Court protects
13 their First Amendment rights. Yet these nonpublic schools’ instructional approach enables
14 students to outscore public schools, and UC has no evidence of their underperformance.

15 The Christian schools do not object to “a-g” subject areas, or to unbiased review of
16 courses for sufficient coverage of standard material, but do object to rejection of courses
17 and texts because they add a Christian viewpoint to standard course material.

18 Defendants are technically right about several things (*see* Br. p.1), but they still amount to
19 discrimination. “Defendants are not stopping Plaintiffs from teaching or studying anything,”
20 but biased rejection, while not making courses illegal, still disqualifies them. “[T]here are
21 other avenues to eligibility for admission to the University,” but only for students in the upper
22 2-4%, while students in the upper 12.5-15% would otherwise be admitted, and only for a few
23 courses. Plaintiffs are not required to violate religious sacraments, but they are discriminated
24 against if they choose certain courses because of their religious perspective, and ultimately if
25 they choose to associate in Christian schools having disqualified courses. It is ludicrous to
26 allege that “this lawsuit is really an attempt by Plaintiffs to control the Regents’ educational
27 choices,” except as those choices involve First Amendment violations that need to stop.

28 A. Freedoms of speech, religion, and association can be violated by content regulation,

1 viewpoint discrimination, prescribing orthodoxy, and chilling rights, as much as by flat
2 prohibitions. To say “nothing prevents schools from teaching or students from taking
3 whatever classes they wish” (Br. p.2) ignores regulating and disqualifying classes with a
4 Christian perspective, potentially excluding students from UC, and these other violations.

5 UC would not dare claim that there was no constitutional violation if it rejected courses
6 because of their African-American, or Latino heritage, or feminist or environmentalist
7 perspective. But UC engages in equally objectionable content regulation and viewpoint
8 discrimination toward a religious perspective, and exercises equally unchecked discretion.

9 B. The Regents corporation lacks sovereign immunity in this case, for three reasons: it
10 is an officer subject to an *Ex parte Young* injunctive action, it exercises both arm-of-the-
11 state functions and other functions as recognized by the Ninth Circuit, and it does not meet
12 the five-factor test of the Ninth Circuit in doing content regulation of nonpublic schools.

13 C. The state law claims, which parallel the federal law ones, do not come under *Pennhurst*.

14 D. The individual capacity claims are appropriate because the *Ex parte Young* and §
15 1983 claims can properly be individual capacity claims, and because declaratory and
16 injunctive claims against individual capacities are allowed under many cases.

17 E. The individual capacity claims against Mr. Galligani still apply, and the official
18 capacity claims will automatically apply to his successor without any need to dismiss him.

19 **II. BACKGROUND FACTS**

20 **A. The Complaint’s Allegations about Defendants’ Discrimination in Other** 21 **Approaches to Admission at the Universities**

22 Defendants begin their “Background” section by totally ignoring the allegations of the
23 complaint, and painting an incomplete picture of alternative methods for admission to UC
24 other than through the main door of approved a-g courses. Those alternatives are very
25 narrow back doors to the bus, and involve clear discrimination against schools and students.

26 The main approach to admission, two narrow alternatives, and a narrow exception, are
27 described in Complaint ¶¶ 26-29 (quotations, from UC publications, are in the complaint):

28 **1. “Eligibility in the Statewide Context” (Approved “a-g” Courses)**

92.5% of students are admitted to UC through this main approach (¶26), which requires

1 taking approved “a-g” courses in sufficient quantity.

2 The “a-g” course requirements (§23) essentially involve 15 full-year courses in high
3 school (UC strongly recommends 18) out of the 25 full-year courses that constitute a
4 normal high school load. Christian schools such as plaintiff Calvary require 4 years of
5 religion courses, in addition, so only 3-6 course slots remain available for the total of
6 nonapproved courses, physical education, health, and nonqualifying electives. This main
7 approach to admission is being closed for Christian schools by viewpoint discrimination.

8 For Plaintiff Calvary Chapel Christian School, Defendants’ policy of disapproving all
9 biology and physics courses that use texts from the two leading Christian publishers means
10 students will soon be unable to meet the (d) science requirement. Defendants’ policy of
11 disapproving religion and ethics courses that favor a particular religion or encourage spiritual
12 development means Calvary’s 4 years of religion courses are unable to meet the (g) elective
13 requirement. Defendants’ rejection of new history, literature, and social studies courses
14 means students selecting those courses (because of their Christian perspectives added to
15 standard course material) cannot count them for (a) history/social science, (b) English, or (g)
16 elective requirements. (§§30-50.)

17 Defendants now argue that disapproved courses can be replaced by examinations. This
18 does not appear in Defendants’ outline of the “three ways for students to meet the University’s
19 minimum admission requirements” or the outline of a-g requirements (D.Ex.A, J), nor do
20 examinations figure into the sliding scale of grades and scores for eligibility (D.Ex.B). This is
21 instead buried at the end of Exhibit C, and even that only says unspecified “portions of the ‘a-g’
22 requirements” may be met by examination. (D.Ex.C at 15.) The very need to take special
23 examinations because of disqualified courses is discriminatory, and resulting admission of
24 students using special examinations to lower-ranked UC or CSU institutions is discriminatory
25 (if admitted at all), since a-g courses are the first and third factors in admissions. ([www.univer-](http://www.universityofcalifornia.edu/admissions)
26 [sityofcalifornia.edu/admissions](http://www.universityofcalifornia.edu/admissions)) The unspecified “portions” involve unchecked discretion.
27 Further, examinations do not help with the next three alternatives or exceptions (D.Ex.E-G).

28 **2. “Eligibility in the Local Context” (Top 4% in Schools with Approved a-g Courses)**

Only the top 4% of students are eligible for this alternative, and they are only eligible if

1 their school is eligible by having approved “a-g” courses, and if they take 11 approved “a-
2 g” courses by the end of their junior year. (¶27.) If the main approach is not available
3 because of disapproved courses, this alternative is not available either. (¶26A; *see* D.Ex.E.)

4 This and the next alternative discriminate against Christian schools and students: only a
5 student in the top 2-4% is eligible for admission under these alternatives, while a student in
6 the top 12.5-15% is eligible under the main alternative (approved a-g courses). (¶¶27, 28.)

7 **3. “Eligibility by Examination Alone” (Top 2% on Standardized Examinations)**

8 Only 1.3% of students are eligible through this alternative, and the required
9 examination scores are effectively the top 2% (¶28(b)), and some UC institutions “typically
10 do[] not select students for admission by the examination-alone criteria [sic]” at all. (¶28.)

11 **4. “Eligibility by Exception” (2% for Athletes, Artists, Etc.)**

12 Only 2% of students can in the best case be eligible through exception, and “[m]ost
13 campuses admit fewer than 2% this way,” and nearly all those are athletes, artists, “adults,
14 veterans, students with special talents, and. . .other special circumstances.” (¶29.) This is so
15 narrow that it is not even listed as one of the “paths to eligibility” in UC publications. (*Id.*)

16 **B. The Complaint’s Allegations about Defendants’ Viewpoint Discrimination,
Content Regulation, and Other Discrimination**

17 Defendants’ viewpoint discrimination has resulted in course rejections in all a-g
18 subjects except mathematics. In science, they have “standard language” “re Christian
19 biology texts” that automatically rejects biology courses using them, and issued a “Position
20 Statement” on “High School Science Courses Taught from Textbooks from Selected
21 Christian Publishers,” rejecting them. (¶¶31-32.) In religion and ethics, Defendants
22 disqualify courses with otherwise acceptable content if they “include among [their] primary
23 goals the personal religious growth of the student.” (¶36.) In history, Defendants rejected
24 “Christianity’s Influence on American History” (emphasizing the colonists who sought
25 religious freedom), even though it used a standard text used at a CSU institution in addition
26 to the Christian text, because the “content. . . is not consistent with the empirical historical
27 knowledge generally accepted in the collegiate community.” (¶¶39-39.) In literature,
28 Defendants rejected the course “Christianity and Morality in American Literature” (with
selections from almost all major American authors before 1900) because it “does not offer a

1 non-biased approach to the subject matter.” (¶¶45-47.) In social studies, “Special
2 Providence: American Government” was rejected on grounds similar to the history course.
3 (¶¶48-49.) Yet Defendants admit they do not have any student performance data showing
4 that Christian school graduates underperform, and standardized test scores show them to
5 outperform public schools. (¶¶34,59, 63, 64, 74.)

6 **C. The Complaint’s Allegations about the Violation of Schools’ and Students’**
7 **Freedoms of Speech and from Viewpoint Discrimination, Freedoms of Religion**
8 **and Association, Freedom from Arbitrary Discretion, and Other Freedoms**

9 Freedom of speech is violated, first, by science courses being disqualified by
10 Defendants, and students being disqualified from UC who otherwise would be admitted,
11 and by other courses being rejected by Defendants and not taught. (¶¶56-64.) Second, the
12 rejections result from viewpoint discrimination by Defendants against the Christian
13 viewpoint added to standard course material. (¶¶65-74.) Defendants’ objection to science,
14 history, and social studies courses was to its content, viewpoints, and nonmajoritarian view:

14 The *content* of the course outlines submitted for approval is not consistent with the
15 *viewpoints* and knowledge *generally accepted* in the scientific community. [¶¶67.]

16 The *content* of the course outline submitted for approval is not consistent with the
17 empirical historical knowledge *generally accepted* in the collegiate community.

18 [¶¶39,49.]

19 Freedom of religion and association are violated by disqualifying courses of *nonpublic*
20 schools because of religious viewpoint, when that is the very reason for existence of those
21 schools and for selection by students and parents, and when standard material is also taught.
22 (¶¶75-79.) This penalizes and chills choice of Christian schools, and Christian courses.

23 The First and Fourteenth Amendments are also violated by unchecked state discretion.

24 All of this results in discrimination, self-censorship, and the message that Christian
25 schools and students are second-class citizens and their beliefs are toxic to standard studies.

26 **III. ARGUMENT**

27 This motion to dismiss does not, and cannot, meet the high standard for dismissing
28 claims, which is rarely met: it is far from clear that no relief could be granted under any set

1 of facts, and it is far from no doubt that the Christian schools can prove no set of facts
2 entitling them to relief, when the complaint is viewed in the light most favorable and its
3 allegations are viewed as true. *RDF Media Ltd. v. Fox Broadcasting Co.*, 372 F.Supp.2d
4 556, 560 (C.D. Cal. 2005).

5 **A. The Challenged Constitutional Causes of Action State Claims, and Do Not Fail,**
6 **and Defendants’ Snippets that Take an Extremely Narrow View of First**
7 **Amendment Freedom Contradict the Supreme Court’s Body of Decisions on Point**

8 A First Amendment violation can occur without a total prohibition (prior restraint) of
9 speech, religious exercise, or association, contrary to Defendants’ repeated argument that
10 they do not forbid offering or taking disqualified courses for extra credit as a heavy load.
11 In fact, there are few First Amendment decisions since the 1920s that involve total
12 prohibitions. “[T]he Constitution’s protection is not limited to direct interference with
13 fundamental rights.” *Healy v. James*, 408 U.S. 169, 183, 92 S.Ct. 2338, 33 L.Ed.2d 266
14 (1972). All the following cases instead involve First Amendment violations, without
15 prohibitions, by content regulation, viewpoint discrimination, other discrimination, chilling,
16 even unchecked discretion that has not been exercised adversely, and conditions on rights.

16 **1. Rejection of Courses Based on Content Regulation, Viewpoint Discrimination,**
17 **Official Orthodoxy, Discriminatory Admissions Based on Beliefs and**
18 **Teaching, and Chilling Speech Do State a First Amendment Speech Claim**

18 According to the complaint, “Defendants have rejected textbooks and courses based on a
19 viewpoint of religious faith.” (¶30.) Defendants’ policies reject science and religion/ethics
20 courses that add a Christian perspective to standard material. (¶¶30-37.) They have also
21 rejected Plaintiffs’ history, literature, and social studies course submissions for the same reason.
22 (¶¶38-50.) This violates freedom of speech, by content regulation and viewpoint
23 discrimination, and by prescribing orthodoxy and chilling rights, and certainly states a claim.

24 First, content-based regulation violates the First Amendment, under many decisions such
25 as *Police Dep’t v. Mosley*, 408 U.S. 92, 95-96, 92 S.Ct. 2286, 33 L.Ed.2d (1972):

26 But above all else, the First Amendment means that government has no power to
27 restrict expression because of its message, its ideas, its subject matter, or its content.
28 [Citations omitted.] . . . The essence of this forbidden censorship is content control.
Any restriction on expressive activity because of its content would completely

1 undercut the ‘profound national commitment to the principle that debate on public
2 issues should be uninhibited, robust, and wide-open.’ *New York Times v. Sullivan*...

3 A restriction “may not be based upon either the content or subject matter of [the] speech.”
4 *Heffron v. International Society*, 452 U.S.640,648, 101 S.Ct.2559, 69 L.Ed.2d 298 (1981). “It
5 is axiomatic that the government may not regulate speech based on its substantive content or
6 the message it conveys.... Discrimination against speech because of its message is presumed
7 to be unconstitutional.” *Rosenberger v. Rector and Visitors of University of Virginia*, 515
8 U.S. 819, 828, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995). That includes religious content.

9 The restriction of religious content in qualifying a-g courses strikes at the heart of this
10 prohibition. (Complaint ¶¶56-64.) If “prohibit[ing] the use of University buildings or grounds
11 ‘for purposes of religious worship or religious teaching’” violates freedom of speech as
12 content-based regulation, then prohibiting qualification of nonpublic schools’ a-g courses
13 because of “religious worship” in religion courses or “religious teaching” in other courses,
14 added to standard course material, certainly violates freedom of speech as content-based.
15 Such “content-based exclusion of religious speech ... violates the fundamental principle that a
16 state regulation of speech should be content-neutral.” *Widmar v. Vincent*, 454 U.S. 263, 265,
17 277, 102 S.Ct. 269, 70 L.Ed.2d 440 (1981). If “Son of Sam” laws that regulate royalties
18 only from convicted criminals’ books violate freedom of speech as content-based
19 regulation, then regulation of the Christian content of nonpublic school courses do so.
20 “‘Regulations which permit the Government to discriminate on the basis of the content of
21 the message cannot be tolerated under the First Amendment.’ *Regan v. Time, Inc.* 468 U.S.
22 641, 648-649, 104 S.Ct. 3262, 82 L.Ed.2d 487 (1984).” *Simon & Schuster, Inc. v. Members of*
23 *N.Y. State Crime Victims Board*, 502 U.S. 105, 116, 112 S.Ct. 501, 116 L.Ed.2d 476 (1991).

24 Second, viewpoint discrimination is even more a violation of freedom of speech than
25 content regulation. (Complaint ¶¶65-74.) Here, other viewpoints may be and are added to
26 standard course material, but not a conservative Christian viewpoint. Moreover, religion
27 and ethics courses receive a-g credit, but not those that “include among [their] primary
28 goals the personal religious growth of the student.” (¶36.) Yet the Supreme Court found

1 viewpoint discrimination in denying equal funding to “publications that ‘primarily
2 promot[e] or manifes[t] a particular belief in or about a deity.” *Rosenberger*, 515 U.S. at 836.

3 Viewpoint discrimination is thus an egregious form of content discrimination. . . .

4

5 The Court [in *Lamb’s Chapel*] relied on no such distinction in holding that
6 discriminating against religious speech was discriminating on the basis of viewpoint.

7 *Rosenberger*, 515 U.S. at 829, 832. Excluding a student newspaper that “offers a Christian
8 perspective,” *id.* at 826,830, from student newspaper funding was viewpoint discrimination.

9 In the cited decision, *Lamb’s Chapel*, the Court found that “discriminat[ing] on the basis
10 of viewpoint,” by permitting “presentation of all views about family issues and child rearing
11 except those dealing with the subject matter from a religious standpoint,” violates freedom of
12 speech. “The principle that has emerged from our cases ‘is that the First Amendment forbids
13 the government to regulate speech in ways that favor some viewpoints or ideas at the expense
14 of others.’” *Lamb’s Chapel v. Center Moriches Union Free School District*, 508 U.S. 384,
15 393, 394, 113 S.Ct. 2141, 124 L.Ed.2d 352 (1993). “Clearly, the prohibition of expression of
16 one particular opinion...is not constitutionally permissible.” *Tinker v. Des Moines Indep.*
17 *Community School Dist.*, 393 U.S. 503, 511, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969).

18 Defendants try to justify discrimination by citing UC’s freedom to say “who may be
19 admitted.” (Br. 8.) That is limited by prohibitions on invidious discrimination, *see Regents v.*
20 *Bakke*, 438 U.S. 265, 312, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978), including on religious
21 discrimination, *Widmar*, 454 U.S. at 277. (What *is* relevant from their quotation is the Christian
22 schools’ academic freedom to determine “what may be taught, how it shall be taught.”) Thus,

23 For the University, by regulation, to cast disapproval on particular viewpoints of its
24 students risks the suppression of free speech and creative inquiry

25 *Rosenberger*, 515 U.S. at 836.

26 Defendants also try to justify viewpoint discrimination by applying *Hazelwood*, which
27 allows public schools to limit “the style and content of student speech in school-sponsored
28 expressive activities” *in public schools*. *Hazelwood*, 484 U.S. at 273. It has nothing to do

1 with regulating *nonpublic* schools or *discriminating* against some viewpoints there.

2 Third, the First Amendment flatly prohibits setting an orthodoxy that must be taught:

3 If there is any fixed star in our constitutional constellation, it is that *no official, high*
4 *or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or*
5 *other matters of opinion ...* If there are any circumstances which permit an
6 exception, they do not now occur to us.

7 *West Virginia State Board of Educ. v. Barnette*, 319 U.S. 624, 642, 63 S.Ct. 1178, 87 L.Ed.
8 1628 (1943). “[S]tudents may not be regarded as closed-circuit recipients of only that
9 which the State chooses to communicate,” which is “officially approved.” *Tinker*, 393 U.S.
10 at 511. These cases restrict Defendants toward public schools, and the point applies even
11 more toward private schools. There is no “power of the state to standardize its children by
12 forcing them to accept instruction from public teachers only,” or to make the instruction the
13 same. *Pierce v. Society of Sisters*, 268 U.S. 510, 535, 45 S.Ct. 571, 69 L.Ed.1070 (1925).

14 Fourth, chilling speech also violates the First Amendment. For example, “chilling of
15 individual thought and expression” is a “danger...to speech.” Free speech is chilled if “state
16 officials and courts scan the publication to ferret out views that principally manifest a belief
17 in a divine being.” *Rosenberger*, 515 U.S. at 835, 844. Chilling can be shown by cessation
18 of the First Amendment activity, as occurred here when the disqualified courses were not
19 offered. *Culinary Workers Union v. Del Papa*, 200 F.3d 614, 618 (9th Cir. 1999).

20 Any content-based or viewpoint-based regulation is unconstitutional unless it can be
21 justified by a compelling interest served by the least burdensome means. Defendants may
22 “not dictate the content of speech absent compelling necessity, and then, only by means
23 precisely tailored.” *Riley v. National Fed’n of the Blind*, 487 U.S. 781, 800, 108 S.Ct. 2667,
24 101 L.Ed.2d 669 (1988). *Accord, Boos v. Barry*, 485 U.S. 312, 321, 108 S.Ct. 1157, 99
25 L.Ed.2d 333 (1988) (“Content-based restrictions on speech must be narrowly tailored to
26 achieve a compelling government interest.”); *Board of Airport Commissioners v. Jews for*
27 *Jesus, Inc.*, 482 U.S. 569, 573, 107 S.Ct. 2568, 96 L.Ed.2d 500 (1987) (holding that “[f]or
28 the State to enforce a content-based exclusion it must show that its regulation is necessary

1 to serve a compelling state interest and that it is narrowly drawn to achieve that end”)
2 (quoting *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45, 103 S.Ct.
3 948, 74 L.Ed.2d 794 (1983)); *Sable Comm. v. FCC*, 495 U.S. 115, 126, 109 S.Ct. 2829, 106
4 L.Ed.2d 93 (1989) (“Content-based restrictions on speech must be narrowly tailored to
5 achieve a compelling government interest.”); *Widmar*, 454 U.S. at 269-70 (“content-based
6 exclusions” use that test).

7 **2. Penalization of Christian Schools for Offering a Religious Perspective, and of** 8 **Students for Attending Them, Does State a Free Exercise and Speech Claim**

9 Defendants have rejected courses with religious viewpoints added to standard material,
10 while widely approving courses with other viewpoints, such as feminism, African-
11 American or Latino viewpoints, political or multicultural viewpoints, etc. (¶68).
12 “[G]overnment, in pursuit of legitimate interests, cannot in a selective manner impose
13 burdens only on conduct motivated by religious belief.” *Church of Lukumi Babalu Aye v.*
14 *City of Hialeah*, 508 U.S. 520, 543, 113 S.Ct. 2217, 124 L.Ed.2d 472 (1993). Their
15 policies and rejections have expressly targeted “Christian biology texts” and “High School
16 Science Courses Taught from Textbooks from Selected Christian Publishers” (¶¶31-32), as
17 well as courses with conservative Christian perspectives added to standard course material
18 (¶¶39,45,47,48). “A law targeting religious beliefs as such is never permissible. [Citations
19 omitted.]” *Id.* at 533. Defendants’ action is as much so as the City of Hialeah’s. *Id.* at 542.

20 First, discrimination against a religion is a clear violation of freedom of religion. *E.g.*,
21 *id.* at 532, 542, 546 (“At a minimum, the protections of the Free Exercise Clause pertain if
22 the law at issue discriminates against some or all religious beliefs or regulates or prohibits
23 conduct because it is undertaken for religious reasons.”...“The Free Exercise Clause
24 ‘protect[s] religious observers against unequal treatment.’”...“A law that targets religious
25 conduct for distinctive treatment or advances legitimate governmental interests only against
26 conduct with a religious motivation will survive strict scrutiny only in rare cases.”);
27 *Employment Division v. Smith*, 494 U.S. 872, 877, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990)
28 (“The government may not. . .punish the expression of religious doctrines. . ., impose
special disabilities on the basis of religious views or religious status,...”); *Widmar*, 454 U.S.

1 at 277 (“content-based exclusion of religious speech”).

2 Second, burdening free exercise of religion, in conjunction with infringement of
3 freedom of association or speech (Complaint ¶76), is equally unconstitutional. That
4 “involve[s] not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction
5 with other constitutional protections, such as freedom of speech and of the press, *see*
6 *Cantwell v. Connecticut . . .*” *Employment Division v. Smith*, 494 U.S. at 881.

7 Any abridgment by discrimination, or any abridgment by burdening free exercise of
8 religion coupled with other rights such as freedom of association, is unconstitutional unless
9 it can be justified by a compelling interest served by the least burdensome means:

10 A law burdening religious practice that is not neutral or not of general application
11 must undergo the most rigorous of scrutiny. To satisfy the commands of the First
12 Amendment, a law restrictive of religious practice must advance ““interests of the
13 highest order”” and must be narrowly tailored in pursuit of those interests.

14 *City of Hialeah*, 508 U.S. at 546. *Accord, Employment Div. v. Smith*, 494 U.S. at 881, 886 n.3
15 (strict scrutiny for conjunctive rights, and “we strictly scrutinize governmental classifications
16 based on religion”). The complaint does not raise the free exercise claim under the “general
17 proposition” of neutral state action, but under the exceptions for discriminatory state action
18 and free exercise in conjunction with other First Amendment rights. (¶76.)

19 **3. Discriminating against Students Who Associate in Christian Schools, and the
20 Schools Themselves, Does State a Freedom of Association Claim**

21 The Plaintiff students would otherwise qualify for admission to UC—their standardized
22 scores are in the top 15%—except for the school they chose and the shared viewpoints
23 there—which means that they are ineligible for admission to UC unless they are in the top
24 2-4% under the alternatives, if they choose disqualified courses with a Christian perspective
25 or if Defendants implement their new approach to disqualify most of the other courses.
(¶¶76, 51.) This violates freedom of association, and certainly states a claim.

26 An individual’s freedom to speak, to worship, and to petition the government for the
27 redress of grievances could not be vigorously protected from interference by the
28 State unless a correlative freedom to engage in group effort toward those ends were

1 not also guaranteed. [Citations omitted.] According protection...is especially
2 important in preserving political and cultural diversity and in shielding dissident
3 expression from suppression by the majority. [Citations omitted.]...

4 *Roberts v. United States Jaycees*, 468 U.S. 609, 622, 104 S.Ct. 3244, 82 L.Ed.2d 462
5 (1984). *E.g.*, *Boy Scouts v. Dale*, 530 U.S. 640, 655, 120 S.Ct. 2446, 147 L.Ed.2d 554
6 (2000); *Healy*, 408 U.S. at 181.

7 Again, the compelling interest test applies. *E.g.*, *Roberts*, 468 U.S. at 623.

8 **4. Unchecked Discretion To Regulate Content and Viewpoints, Which Also**
9 **Violates the First and Fourteenth Amendments, Infringes Liberty Interests in**
10 **Free Speech, Religion, Association, and Equal Treatment**

11 Defendants have not questioned the fourth cause of action, that “unbridled discretion in
12 the hands of a government official or agency constitutes a prior restraint” on freedom of
13 expression. *Lakewood v. Plain Dealer Publishing Co.*, 486 U.S.750, 757, 772 (1988). *E.g.*,
14 *Broadrick v. Oklahoma*, 413 U.S. 601, 611-13, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973).

15 They instead have argued that “Plaintiffs have not identified any liberty or property
16 interest that is entitled to due process protection.” But the complaint clearly identifies the
17 liberty interest as freedom of speech and academic freedom (§§81,84), including viewpoint
18 discrimination and content regulation (§§82-85), and other discrimination and violation of
19 equal protection (§§84-89), such as discrimination in course approval and in admission to
20 UC (§§90, 87-88), which are threatened by unchecked discretion. This states a claim.

21 For 70 years, the “liberty embodied in [the Fourteenth] Amendment embraces the
22 liberties guaranteed by the First Amendment.” *Cantwell v. Connecticut*, 310 U.S. 296, 303
23 (1940). *E.g.*, *Troxel v. Granville*, 530 U.S. 57, 66, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000).

24 The right to be nondiscriminatorily considered, once California established universities,
25 is a property interest. *Goss v. Lopez*, 419 U.S. 565, 574, 95 S.Ct.729, 42 L.Ed.2d 725 (1975).

26 **5. Requiring Students To Avoid Courses Giving Christian Perspectives in**
27 **Science, Religion, History, Literature, and Social Studies as a Condition to**
28 **Equal Admission to UC, and To Avoid Christian Schools Offering Too Many**
of Those Courses, Is an Unconstitutional Condition

We do not argue that the a-g requirements themselves are an unconstitutional condition.

The recent changes to require not just subject areas, but approved and nondisqualified

1 viewpoints and content regulation, do create an unconstitutional condition. Religious
2 schools, students, parents, and teachers must choose between their First Amendment right
3 to offer and study a Christian perspective added to standard course material, and their equal
4 right to receive a-g credit and to be eligible for UC admission. UC “may not deny a benefit
5 to a person on a basis that infringes his constitutionally protected interests—especially his
6 interest in freedom of speech.” *Perry v. Sindermann*, 408 U.S. 593, 597, 92 S.Ct. 2694, 33
7 L.Ed.2d 570 (1972) (citing 16 cases). *Accord, Keyishian*, 385 U.S. at 605-06.

8 **6. Excluding Qualified Students, and Penalizing Outperforming Christian**
9 **Schools, Is Far from the Least Burdensome Means To Achieve Any**
10 **Compelling State Interest the State May Have**

11 The compelling interest/least burdensome means test applies, as discussed in 1-2 *supra*.

12 Far less burdensome means are available to ensure that UC admits qualified students.
13 Standardized tests show whether students have learned what they should (Complaint ¶63),
14 but Defendants ignore them here because the Christian schools *outscore* the public schools
15 (¶¶59,63), even though Defendants find the tests sufficient for out-of-state students who do
16 not have approved a-g courses (¶¶28,63). Studies of university performance show whether
17 students’ foundation is adequate (¶63), but Defendants have made no effort to determine if
18 there is a problem with Christian school graduates (¶¶34,59). Remedial courses are the
19 normal method to deal with any deficiency (¶63), and Defendants use them widely for
20 others, but do not even offer them as an alternative for Christian school graduates.

21 No compelling interest is threatened at all, or requires any viewpoint discrimination or
22 content regulation (¶64). No such interest is involved in requiring approved a-g courses at
23 all, because Defendants do not require them for out-of-state applicants or for applicants
24 under some narrow exceptions it cites (*id.*). No compelling interest is involved in requiring
25 approved viewpoints, because 49 states do not find that necessary, and because the First
26 Amendment protects the viewpoints and content of nonpublic schools (*id.*). “Where
27 government restricts only conduct protected by the First Amendment and fails to enact
28 feasible measures to restrict other conduct producing substantial harm or alleged harm of
the same sort, the interest given in justification of the restriction is not compelling.” *City of*
Hialeah, 508 U.S. at 546-47.

1 **B. The Regents and Others Are Subject to Suit**

2 The intrusion into the viewpoints that nonpublic schools may and may not teach
3 (beyond the subject areas that they must teach) is being accomplished by the Regents, their
4 unit known as Office of the President, and the Board of Admissions and Relations with
5 Schools (BOARS), as well as by their officials, and the President of University of
6 California, and the Chair of BOARS, who also are defendants and who are not sought to be
7 dismissed. (Complaint ¶¶10, 12, 13, 18-20, 23, 25, 31, 32, 36, 39, 45-47, 48-49, 51-53 *passim*.)

8 The Regents corporation is not immune from suit for three separate reasons:

9 **1. The Regents Does Not Have Sovereign Immunity from Injunctive and
10 Declaratory Actions Because It Is an “Officer,” under *Ex Parte Young***

11 Defendants do not question that official capacity claims for injunctive relief can be, and
12 were, properly brought against state officers under *Ex parte Young*, 209 U.S. 123, 160, 28
13 S.Ct. 441, 454, 52 L.Ed.2d 714 (1908). (This is discussed in D below.)

14 The Regents is a state officer, according to the California Supreme Court. *Regents v.*
15 *Superior Court*, 3 Cal.3d 529, 539, 91 Cal.Rptr.57 (1970) (“That entity is itself, in the
16 absence of a designated administrator, an ‘officer.’”).

17 Thus, an *Ex parte Young* suit for injunctive relief can be brought against Regents.

18 **2. The Regents Does Not Have Sovereign Immunity in All Functions, Such as This**

19 There indeed are cases saying that Regents has Eleventh Amendment immunity, and
20 acts as an arm of the state, in at least many of its functions. But under the Ninth Circuit’s
21 test for whether an entity is acting as an arm of the state, Regents is not acting as an arm of
22 the state, and does not enjoy Eleventh Amendment immunity for its functions intruding into
23 the First Amendment liberties of Christian schools and other nonpublic schools.

24 The Supreme Court has recognized that entities that “exercise a ‘slice of state power’”
25 are not thereby arms of the state with Eleventh Amendment immunity. *Lake Country*
26 *Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391, 401, 99 S.Ct. 1171, 1177,
27 59 L.Ed.2d 401 (1979). The Ninth Circuit has noted that “not all state-created or state-
28 managed entities are immune”; an entity “may be organized or managed in such a way that
it does not qualify as an arm of the state.” *Durning v. Citibank*, 950 F.2d 1419, 1423 (9th

1 Cir. 1991).

2 That concept led the Ninth Circuit to hold that, even though “the University [of
3 California] has been granted Eleventh Amendment immunity in a number of cases,”

4 The University is an enormous entity which functions in various capacities and
5 which is not entitled to Eleventh Amendment immunity for all of its functions. . . .

6 *Doe v. Lawrence Livermore National Laboratory*, 65 F.3d 771, 775 (9th Cir. 1995), *rev'd on*
7 *other grounds sub nom. Regents of the University of California v. Doe*, 519 U.S. 425, 117 S.Ct.
8 900, 137 L.Ed.2d 55 (1997). The Supreme Court quoted that language, then said “[n]or is it
9 necessary to decide whether there may be some state instrumentalities that qualify as ‘arms
10 of the State’ for some purposes but not others.” 519 U.S. at 428 n.2, 117 S.Ct. 903.¹ The
11 reversal was on the other ground that indemnification of damages by a third party meant the
12 state would not be liable; that alone did not divest the university of immunity.

13 The U.S. Supreme Court has allowed a number of declaratory and injunctive suits
14 against other states’ equivalents of the Regents, without sovereign immunity discussion.
15 *E.g.*, *Gratz v. Bollinger*, 539 U.S. 244, 252 & n.2, 123 S.Ct. 2411, 156 L.Ed.2d 257 (2003);
16 *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. at 827; *Keyishian v. Board of*
17 *Regents of N.Y.*, 385 U.S. 589, 592, 87 S.Ct. 675, 17 L.Ed.2d 629 (1967). Some but not all
18 other circuits’ decisions treat state universities or colleges and their boards of regents as not
19 arms of the state, and as not immune.²

20 Thus, the Northern District recently allowed an injunctive suit against California’s Regents:

21 While a *damages* action cannot lie against the Board [of Regents] or Johnson in his

23 ¹ The Ninth Circuit has continued to recognize that a state agency can be an arm of the state for some
24 purposes but not other purposes. For example, the Los Angeles County Sheriff’s Department “is not acting
25 as an arm of the state when administering the local county jails.” *Streit v. County of Los Angeles*, 236 F.3d
26 552, 566 (9th Cir. 2001). The California Supreme Court has recognized that the same is true of the Regents
or the University. *E.g.*, *Regents v. Superior Court*, 17 Cal.3d 533, 537, 131 Cal.Rptr.228, 230 (1976) (the
University (and its Regents) “is entitled to no sovereign immunity in its lending decisions,” in its function of
investing its portfolio.); *Regents v. Superior Court of Los Angeles County*, 3 Cal.3d 529, 539 n.12, 91
Cal.Rptr.57 (1970) (Regents can “be considered a ‘public entity’ as to some matters and as a ‘public officer’
for the purposes of venue.”).

27 ² *E.g.*, *Hopkins v. Clemson Agricultural College*, 221 U.S. 636, 648, 31 S.Ct. 654, 658, 55 L.Ed.890
28 (1911); *Kovats v. Rutgers, the State University*, 822 F.2d 1303 (3d Cir. 1987); *Goss v. San Jacinto Junior*
College, 588 F.2d 96 (5th Cir. 1979); *Samuel v. University of Pittsburgh*, 538 F.2d 991 (3d Cir. 1976);
Hander v. San Jacinto Junior College, 522 F.2d 204, 205 (5th Cir. 1975).

1 official capacity, the Eleventh Amendment does “not bar a federal court action
2 seeking prospective *injunctive* relief under federal law, even if the action [is] brought
3 against the state or its officials acting in their official capacity.” *Pena*, 976 F.2d at
4 473 n.5. . . .

5 *McVey v. Board of Regents of the University of California*, 165 F.Supp.2d 1052, 1057
6 (N.D.Cal. 2001). The court did not apply the five-factor test for whether a function
7 amounted to an arm of the state; it simply applied *Ex parte Young* (discussed in D).

8 **3. The Regents Does Not Have Sovereign Immunity from Injunctive Actions over
Regulating Nonpublic Schools, under the Ninth Circuit’s Five Factor Test**

9 The same result comes from applying the Ninth Circuit’s five-factor test to the function
10 of Regents that regulates course content or approved viewpoints of nonpublic schools. The
11 Ninth Circuit analyzed each factor in the unreversed part of *Doe v. Lawrence Livermore
12 National Laboratory*, 65 F.3d at 774-75, which we will not repeat for reasons of space. It
13 held “that the University, acting in a managerial capacity for the Laboratory, has not satis-
14 fied the burden of proving that it is entitled to Eleventh Amendment immunity.” *Id.* at 776.

15 This is supported by the California Supreme Court’s holding that ““the University is
16 intended to operate as independently of the state as possible,”” showing that Regents is not
17 always an arm of the state. *San Francisco Labor Council v. Regents*, 26 Cal.3d 785, 789,
18 163 Cal.Rptr.460, 461 (1980) (quoting *Regents v. Superior Court*). That quoted decision
19 held that the University (and its Regents) “is entitled to no sovereign immunity in its
20 lending decisions,” in its function of investing its portfolio. *Regents v. Superior Court*, 17
21 Cal.3d 533, 537, 131 Cal.Rptr.228, 230 (1976).

22 **4. BOARS and Office of the President**

23 BOARS and the Office of the President act as officers or entities, in creating policies
24 (Complaint ¶¶31-32,36, Ex.1-2), issuing all letters turning down courses (*id.* Ex.4,6,7,9),
25 having letterhead (*id.*), being the body that “oversees all matters relating to the admissions
26 of undergraduate students” and “regulates the policies and practices used in the admissions
27 process” (¶12), and “maintain[ing] the standard of preparation required of students who
28 enter the University” and “review[ing] those courses annually” for compliance with a-g

1 requirements (§12). However, we have not found clear authority that they are entities.

2 **C. Federal Jurisdiction Exists over State Law Claims against State Officials in Their**
3 **Personal Capacities, though Not in Their Official Capacities**

4 **1. State Law in Official Capacities Cannot Be Decided**

5 Defendants argue that *Pennhurst* holds that “the Eleventh Amendment prohibits federal
6 courts from granting injunctive relief against state officials for violations of state law.” Br.
7 at 18. This is accurate for claims in their official capacities, as their two Ninth Circuit
8 citations say, but not for claims in their personal capacities.

9 **2. State Law Claims in Personal Capacities Can Be Decided**

10 *Pennhurst* stated its “conclusion” as follows: “a federal suit against state officials on the
11 basis of state law contravenes the Eleventh Amendment *when—as here—the relief sought*
12 *and ordered has an impact directly on the State itself.*” 465 U.S. at 117. The Ninth
13 Circuit’s first decision to discuss *Pennhurst* held that *Pennhurst* addressed only official
14 capacity claims, and not personal capacity claims under state law, in *Demery v.*
15 *Kupperman*, 735 F.2d 1139, 1150-51 (9th Cir. 1984):

16 Neither *Edelman* nor *Pennhurst II* changes the well-settled rule that the eleventh
17 amendment does not bar suits seeking damages for violation of federal law from
18 state officials personally.⁹

19 As we noted above, this suit is . . . in their individual capacities. The *Pennhurst*
20 language is therefore inapposite.

21 ⁹We of course need not consider what effect, if any, *Pennhurst* has on the
22 availability of a federal forum for suits seeking damages for violation of state
23 law from state officials personally. . . .

24 The Ninth Circuit later discussed the issue squarely, and held that *Pennhurst* did not
25 address, and does not apply to, personal capacity claims under state law, in *Pena v.*
26 *Gardner*, 976 F.2d 469, 473-74 (9th Cir. 1992):

27 2. Pendent State Claims . . .

28 The defendants . . . argue that *Pennhurst II* stands for the proposition that individual
capacity claims against officials who are alleged to have violated state law are barred

1 by the eleventh amendment. *We disagree.* In *Pennhurst II*, the Supreme Court held
2 that the eleventh amendment bars suits in federal court, for both retrospective and
3 prospective relief, brought against state officials acting in their *official* capacities
4 alleging a violation of state law. *Id.* at 106. *The court distinguished the situation*
5 *where a plaintiff brings suit against a state official acting in his individual capacity.*
6 *Id.* at 111 n.21.

7 . . . See also . . . Paul M. Bator et al., *Hart and Wechsler's The Federal Courts*
8 *and The Federal System* 1203 (3d ed. 1988) (*Pennhurst II* appears to permit a suit
9 under state law against a state official for damages to be paid by the officer
10 personally rather than by the state).

11 *We conclude that the eleventh amendment will not bar pendent state claims by*
12 *Pena against state officials acting in their individual capacities.*

13 Similarly, the Eleventh Amendment does not bar state claims against personal capacities here.

14 **D. The Individual Capacity Claims Are Proper, Widely Supported by Precedent, and**
15 **Not Barred by Defendants' Citations**

16 Defendants do not question that **official capacity** claims can be, and were, properly
17 brought against the defendant officials under *Ex parte Young*, 209 U.S. 123, 160, 28 S.Ct.
18 441, 454, 52 L.Ed.2d 714 (1908).

19 Defendants are mistaken that **personal capacity** suits cannot be brought for injunctive
20 or declaratory relief, or that “individual-capacity suits against government officials are
21 appropriate only where plaintiffs seek damages to be paid out of the official’s personal
22 assets or action by the individual personally.” (Br. 19.) The quotation from *Kentucky v.*
23 *Graham* does not say that, and the Supreme Court’s interpretation of that decision in *Hafer*
24 *v. Melo* says the opposite. 502 U.S.21, 25, 30, 112 S.Ct.358, 361, 364, 116 L.Ed.2d 301 (1991).
25 A short footnote in *Wolfe v. Strankman* indeed says that judges “were also sued in their personal
26 capacities, but the declaratory and injunctive relief *Wolfe seeks* is only available in an official
27 capacity suit.” 392 F.3d 358, 360 n.2 (9th Cir. 2004) (no citations). However, that does not
28 state a general rule, but a special rule when judges are sued: “‘a court should not enjoin judges
from applying statutes when complete relief can be afforded’ by enjoining other parties,

1 because ‘it is ordinarily presumed that judges will comply with a declaration of a statute’s
2 unconstitutionality without further compulsion’” (quoting then Judge Breyer). 392 F.3d at 366.

3 **1. *Ex parte Young* Suits and § 1983 Suits Are Personal Capacity Suits, and Are Permitted**

4 “[S]ince *Ex parte Young*, . . . it has been settled that the Eleventh Amendment provides
5 no shield for a state official confronted by a claim that he had deprived another of a federal
6 right under color of state law. *Ex parte Young* teaches that when a state officer acts under a
7 state law in a manner violative of the Federal Constitution, he ‘. . . is in that case stripped of
8 his official or representative character and is subjected in his person to the consequences of
9 his individual conduct.’” *Scheuer v. Rhodes*, 416 U.S. 232, 237, 94 S.Ct. 1683, 1687, 40
10 L.Ed.2d 90 (1974), quoting *Ex parte Young*, 209 U.S. at 160, 28 S.Ct. at 454.³

11 An *Ex parte Young* suit is treated as a personal capacity suit: “Under the doctrine of *Ex*
12 *parte Young*, courts treat a suit against a state officer to enjoin a violation of federal law as
13 an individual-capacity suit” *Moore’s Federal Practice* § 123.40[3][b] (2005).

14 Similarly, a Section 1983 suit, which the Eleventh Amendment permits, is normally a
15 personal capacity suit: “Because Hafer acted under color of state law, respondents could
16 maintain a § 1983 individual-capacity suit against her.” *Hafer v. Melo*, 502 U.S. at 24, 112
17 S.Ct. at 361. “[T]he Eleventh Amendment does not erect a barrier against suits to impose
18 ‘individual and personal liability’ on state officials under § 1983.” *Hafer*, 502 U.S. at 30-
19 31, quoting *Scheuer*, 416 U.S. at 238. Such a Section 1983 suit can seek declaratory or
20 injunctive relief, instead of damages. (We do not seek damages.) *E.g.*, *Wolfe*, 392 F.3d at 365.

21 **2. Declaratory Relief, and Injunctive Relief, Are Permitted in Personal Capacity Suits**

22 Numerous cases allow declaratory judgment claims in defendants’ personal capacities,
23 against ongoing violations of federal constitutional rights. *E.g.*, *Quern v. Jordan*, 440 U.S.
24 332, 99 S.Ct. 1139, 59 L.Ed.2d 358 (1979) (affirming declaratory judgment and notice).⁴

25 ³ *Accord, Pena v. Gardner*, 976 F.2d 469, 473 n.5 (9th Cir. 1992) (“The eleventh amendment would
26 not bar a federal court action seeking prospective injunctive relief under federal law, *even if* the action were
brought against the state or its officials acting in their official capacities.”).

27 ⁴ *Accord, National Audubon Society v. Davis*, 307 F.3d 835 (9th Cir. 2002) (“as long as the relief is
28 truly prospective in nature, as it is here, the *Ex Parte Young* exception to Eleventh Amendment immunity
applies to declaratory relief against state officials”); *Culinary Workers Union, Local 226 v. Del Papa*, 200
F.3d 614, 619 (9th Cir. 1999)(“the Eleventh Amendment would generally present no barrier to the union’s
request for declaratory and injunctive relief”); *see Calderon v. Ashmus*, 523 U.S. 740, 744, 118 S.Ct. 1694,
19

1 These can also “seek[] a declaration of the past,” when there is no damages claim. *Verizon*
2 *v. PSC*, 535 U.S. 635, 646, 122 S.Ct. 1753, 152 L.Ed.2d 871 (2002).

3 Numerous cases allow injunctive claims in defendants’ personal capacities, such as
4 *Young*. *E.g., Edelman v. Jordan*, 415 U.S. 651, 653, 94 S.Ct. 1347, 1351, 39 L.Ed.2d 662
5 (1974) (injunction entered and not overturned).⁵

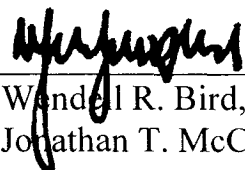
6 **E. The Claim for Declaratory Relief against Dennis J. Galligani in His Official and**
7 **Personal Capacity Should Not Be Dismissed, and the Claim for an Injunction in**
8 **His Official Capacity Should Simply Have the New Officeholder Substituted**
9 **under Fed. R. Civ. P. 25(d)(1)**

10 Mr. Galligani left office shortly before the complaint was filed (though that was not
11 disclosed on the California web site until after the complaint was filed). For the official
12 capacity claim in an injunction and declaratory judgment, Mr. Galligani’s successor should
13 be substituted when he or she takes office. Defendants admit that (Br. 19): “if any of the
14 specific named defendants ceases to hold the same job, the new occupant of that office will
15 automatically be substituted as a defendant so that the suit and/or any injunction obtained
16 will continue to be effective against the holder of the office Fed. R. Civ. P. 25(d)(1).”

17 For the individual capacity claim, there is no more need for an injunction against Mr.
18 Galligani. However, he violated the plaintiff schools’ constitutional rights while in office.
19 (Complaint ¶¶8, 54-55 et seq.) A declaratory judgment that he did so is appropriate.
20 *Edelman* involved declaratory relief against “two former directors,” which was granted and
21 not overturned. 415 U.S. at 653, 94 S.Ct. at 1351. We do not seek damages.

22 Dated November ___, 2005, and respectfully submitted,

23 BIRD & LOECHL, LLC

24 By: 
25 Wendell R. Bird, P.C.
Jonathan T. McCants

26 1697, 140 L.Ed.2d 970 (1998) (Ninth Circuit in declaratory judgment case “concluded that the case falls
27 within the *Ex parte Young* exception to Eleventh Amendment immunity, . . .because respondent sufficiently
alleged a continuing violation of federal law,” though the suit failed on justiciability grounds).

28 ⁵ *Moore’s Federal Practice* § 123.40[3][a][i] (2005) (“Suits against state officials to enjoin them
from continuing to enforce allegedly unconstitutional state laws are not deemed to be suits against the state. .
. . As such, they may be sued personally . . .”) (citing cases).

ADVOCATES FOR FAITH & FREEDOM

By: Robert H Tyler

Robert H. Tyler

Attorneys for Plaintiffs

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PROOF OF SERVICE

I am employed in County of Fulton, State of Georgia; I am over the age of 18 years and not a party to the within action; my business address is 1150 Monarch Plaza, 3414 Peachtree Road, N.E., Atlanta, Georgia 30326.

On November 21, 2005, I served the foregoing **Plaintiffs' Opposition to Motion to Dismiss** in the above referenced action on the interested parties by Federal Express and facsimile at the addresses that follow and :

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A previous copy of said Opposition was faxed to the interested parties and sent via Federal Express on November 11, 2005.

I declare that I am employed in the office of an attorney admitted *pro hac vice* before this Court, at whose direction the service was made.

Executed on November 21, 2005, at Atlanta, Georgia.


Jonathan T. McCants