

ORIGINAL

FILED
CLERK, U.S. DISTRICT COURT
AUG - 8 2006
CENTRAL DISTRICT OF CALIFORNIA
DEPUTY
SCANNED

Priority
Send
Enter
Closed
JS-5/JS-6
JS-2/JS-3
Scan Only

DECREED ON CM
AUG - 9 2006
BY [Signature] 012

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.

[Handwritten Signature]

SCANNED

1 I. BACKGROUND

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

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

17
18 ¹ **General requirements by subject area:**

19 The following sequence of high school courses is required by the University of California
20 of (sic) high school students to be minimally eligible for admission. It also illustrates the
21 minimum level of academic preparation students ought to achieve in high school to
22 undertake university level work.

23 The a-g requirements can be summarized as follows:

24 **(a) History/Social Science** – Two years required, including one year of world
25 history, cultures, and geography and one year of U.S. history or one-half year of
26 U.S. history and one-half year of civics or American government.

27 **(b) English** – Four years of college preparatory English that include frequent and
28 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,

SCANNED

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

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

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

15
16
17
18
19 or visual art.

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

25 ² Another method, not counted as being one to achieve eligibility for admission but outright
26 admission, is known as “Admission by Exception.” A student may gain admission to a particular
27 University of California school at the discretion of the campus admissions director. Students
28 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.)

SCANNED

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

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

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

14 II. LEGAL STANDARD

15 A. Motion to Dismiss

16 Rule 12(b)(6) must be read in conjunction with Rule 8(a) which requires "a short and plain
17 statement of the claim showing that the pleader is entitled to relief." 5A Charles A. Wright &
18 Arthur Miller, *Federal Practice and Procedure* §1356 (1990). A Rule 12(b)(6) dismissal is proper
19 only where there is either a "lack of a cognizable legal theory" or "the absence of sufficient facts
20 alleged under a cognizable legal theory." *Balistreri v. Pacifica Police Dept.*, 901 F.2d 696, 699
21 (9th Cir. 1988). A complaint should not be dismissed under Rule 12(b)(6) "unless it appears
22 beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle
23 him to relief." *Id.* The court must accept all material allegations in the complaint as true and
24 construe them in the light most favorable to the plaintiff. *See NL Indus., Inc. v. Kaplan*, 792 F.2d
25 896, 898 (9th Cir. 1986); *see also, Russell v. Landrieu*, 621 F.2d 1037, 1039 (9th Cir. 1980).

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

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

4 For all these reasons, "[d]ismissal is warranted only if it appears to a certainty that [plaintiff]
5 would be entitled to no relief under any state of facts that could be proved." *NL Indus.*, 792 F.2d
6 at 898. However, a court need not accept as true unreasonable inferences or conclusory legal
7 allegations. See *W. Min. Council v. Watt*, 643 F.2d 618, 624 (9th Cir.), cert. denied, 454 U.S.
8 1031 (1981).

9 B. Subject Matter Jurisdiction

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

17 III. DISCUSSION

18 A. Federal Constitutional Claims

19 1. First Amendment Speech Claim

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

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

3 a. Restriction of Plaintiffs' Speech

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

12 Fundamentally, the government is forbidden from engaging in regulation of speech based
 13 on its substantive content or its message. *Police Dep't v. Mosley*, 408 U.S. 92, 96 (1972). The
 14 bar against content-based regulation is high: "[d]iscrimination against speech because of its
 15 message is presumed to be unconstitutional." *Rosenberger v. Rector and Visitors of Univ. of Va.*,
 16 515 U.S. 819, 829 (1995).

17
 18
 19
 20 ⁴ The Defendants' efforts to convince this Court that prior Supreme Court First Amendment
 21 decisions are inapposite to the matter at hand are unavailing. In *Healy*, where a school
 22 administration denied official recognition to a student group, the Supreme Court purposely chose
 23 to disagree with the lower courts' characterization of the consequences of nonrecognition. Justice
 24 Powell stated, "[I]n this case, the group's possible ability to exist outside the campus community
 25 does not ameliorate significantly the disabilities imposed by the President's actions. We are not
 26 free to disregard the practical realities." He then went on to quote Justice Stewart: "Freedom
 27 such as these are protected not only against heavy-handed frontal attack, but also from being
 28 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.

1 The practice of viewpoint discrimination is related to that of content-based regulation.
2 "Viewpoint discrimination is . . . an egregious form of content discrimination." *Id.* Viewpoint
3 discrimination occurs when the government takes issue with particular views held by a speaker
4 on a subject, rather than with the subject matter itself. *R.A.V. v. St. Paul*, 505 U.S. 377, 391
5 (1992). Government regulation of a speaker's viewpoint simply is not allowed. *Perry Educ. Ass'n*
6 *v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983).

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

26 Evidently, Plaintiffs' references to Defendants' alleged acts of content-based regulation and
27 viewpoint discrimination in their Complaint are numerous and specific. The Complaint contains
28 detailed accounts of the responses Plaintiffs received from Defendants after submitting

1 applications for approval in various subject areas (e.g., history ¶¶ 39-44; English and literature ¶¶
2 45-47; social science ¶¶ 48-50). The Complaint also contains specific allegations as to the roles
3 of the individual Defendants in commission of the alleged First Amendment violations, ¶¶ 54-55.
4 Suffice it to say, the Complaint clearly indicates that Plaintiffs have alleged sufficient facts to allow
5 this claim to go forward.

6 b. Defendants' First Amendment Rights

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

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

20 However, as Plaintiffs point out, the freedom that a university enjoys to determine its own
21 admissions policies is not without limit. Justice Powell in *Bakke* recognized, "Although a university
22 must have wide discretion in making the sensitive judgments as to who should be admitted,
23 constitutional limitations protecting individual rights may not be disregarded." 438 U.S. at 314.
24 Essentially, *Bakke* supports the proposition that a university's freedom to determine who is to be
25 admitted does not extend so far as to allow invidious discrimination in admissions policies. Along
26 with race discrimination, the issue in *Bakke*, bias against a person because of her religion has
27 been characterized by the Supreme Court as an invidious discrimination. *Cameron v. Johnson*,

28

1 381 U.S. 741, 751 (1965). By extension, it is difficult to imagine how discrimination because of
2 a particular manifested religious viewpoint could itself be anything less than invidious.

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

10 In addition, Defendants contend that the regulation of content and viewpoints of academic
11 speech is permissible as long as it is "reasonably related to legitimate pedagogical concerns."
12 (Defs.' Mot. 10.) This standard, articulated in *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260
13 (1988), concerned a public high school principal's decision to censor certain articles written by
14 students in a journalism class for a newspaper created by that class. Defendants cite a number
15 of appellate level decisions to support their position that their rejection of Plaintiffs' applications
16 for a-g course approval, even if based on the content and viewpoints contained within the course
17 applications, does not violate the First Amendment. These cases, however, along with
18 *Hazelwood*, are inapposite to the issue at hand. In *Hazelwood, Brown v. Li*, 308 F.3d 939 (9th
19 Cir. 2002), *Settle v. Dickson County Sch. Bd.*, 53 F.3d 152 (6th Cir. 1995), and *Axson-Flynn v.*
20 *Johnson*, 356 F.3d 1277 (10th Cir. 2004), the speech at issue was that of students attending the
21 schools that were regulating the speech. Here, the speech at issue is that of independent entities
22 (*i.e.*, Christian schools) and is not necessarily student speech. Granted, students are included
23 among the Plaintiffs, but the applications put forth for a-g course approval were ostensibly
24 prepared and submitted by the school and thus arguably may be considered to primarily be the
25 school's speech. Hence, the issue has less to do with a school censoring its own students'
26 speech, and more to do with a school (*i.e.*, Defendants) censoring a separate entity's (*i.e.*,
27 Plaintiffs) speech. This crucial distinction in the relationship of the parties makes it difficult to
28 rationalize why the standard in *Hazelwood* should apply here.

1 Neither is *Fleming v. Jefferson County Sch. Dist. R-1*, 298 F.3d 918 (10th Cir. 2002),
2 another case cited by Defendants, particularly instructive. The court in *Fleming* was concerned
3 with speech "that might reasonably be perceived to bear the imprimatur of the school and that
4 involve pedagogical concerns." 298 F.3d at 924. The facts in *Fleming* may be better analogized
5 to those in the matter at hand, as the speech there was that of community members and not
6 limited to students, as in the instant matter. However, here, unlike for the speech at issue in
7 *Fleming*, it simply would not be reasonable for all courses that receive a-g course approval to be
8 perceived as bearing Defendants' imprimatur. A-g approved courses are clearly taught by many
9 different high schools across the state of California, entities separate and independent from
10 Defendants. In addition, the number and range of course topics make it unlikely for the courses
11 to be perceived as being anything but courses taught by the respective high schools. Hence,
12 even if Defendants' actions in rejecting Plaintiffs' course applications are reasonably related to
13 legitimate pedagogical concerns, this outcome does not necessarily shield Defendants from First
14 Amendment liability, in the event of content-based or viewpoint discrimination of Plaintiffs' speech.

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

24 2. Free Exercise of Religion Claim

25 Defendants also take issue with Plaintiffs' claim that Defendants' actions violate Plaintiffs'
26 free exercise of religion. In *Thomas v. Review Bd. of Ind. Employment Sec. Div.*, 450 U.S. 707
27 (1981), the Supreme Court established:
28

1 Where the state conditions receipt of an important benefit upon conduct proscribed
2 by a religious faith, or where it denies such a benefit because of conduct mandated
3 by religious belief, thereby putting substantial pressure on an adherent to modify his
4 behavior and to violate his beliefs, a burden upon religion exists. While the
5 compulsion may be indirect, the infringement upon free exercise is nonetheless
6 substantial.

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

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

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

5 The a-g course requirements effectively provide (or are interpreted to provide) that
6 specifically Christian content and viewpoints are disapproved and, if in the
7 disapproved category, may not be added to standard course material, even though
8 all the standard course material is taught, if the course and text is to meet a-g
9 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.

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

18 3. Freedom of Association Claim

19 Defendants also dispute Plaintiffs' freedom of association claim. In *Roberts v. U.S.*
20 *Jaycees*, 468 U.S. 609 (1984), the Supreme Court clearly identified the two lines of decisions
21 protecting the freedom of association. First, the freedom of private association protects "choices
22 to enter into and maintain certain intimate human relationships . . . against undue intrusion by the
23 State because of the role of such relationships in safeguarding the individual freedom that is
24 central to our constitutional scheme." *Id.* at 617-18. Second, the freedom of expressive
25 association is protected "for the purpose of engaging in those activities protected by the First
26 Amendment-speech, assembly, petition for the redress of grievances, and the exercise of
27 religion." *Id.* at 618. Government interference with one type of associational freedom will often
28

SCANNED

1 burden the other type as well. *Bd. of Dirs. of Rotary Intern. v. Rotary Club of Duarte*, 481 U.S.
2 537, 544 (1987).

3 Here, Plaintiffs claim that the a-g course requirements effectively prevent the addition of
4 Christian content and viewpoints to standard course material if the course is to meet a-g course
5 requirements. (Compl. ¶ 77.) Plaintiffs further argue that the a-g course requirements “abridge[]
6 the right of Christians to assemble and associate in Christian schools, and to speak freely about
7 their Christian beliefs.” (Compl. ¶ 77.) Plaintiffs’ Opposition to the instant Motion echoes an
8 allegation put forth in the Complaint’s section on the First Cause of Action, paragraph 61:

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

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

20 4. Fourteenth Amendment Procedural Due Process Claim

21 Defendants also request that this Court dismiss Plaintiffs’ federal procedural due process
22 claim. Defendants are constrained from making decisions depriving Plaintiffs of “‘liberty’ or
23 ‘property’ interests within the meaning of the Due Process Clause of the Fifth or Fourteenth
24 Amendment.” *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976). Some interests are “protected . . .
25 because they are guaranteed in one of the provisions of the Bill of Rights which has been
26 ‘incorporated’ into the Fourteenth Amendment.” *Paul v. Davis*, 424 U.S. 693, 711 n.5 (1976).
27 Property interests, on the other hand, “are not created by the Constitution. Rather they are
28 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).

1 Defendants challenge Plaintiffs' federal procedural due process claim with two arguments.
2 First, Defendants contend that Plaintiffs have failed to allege deprivation of a previously
3 possessed property or liberty. (Defs.' Mot. 15.) Second, Defendants also assert that Plaintiffs
4 "have no legal entitlement . . . to have any particular classes designated as meeting the a-g
5 requirements, and they do not have any legal entitlement to attend the University other than in
6 compliance with its admissions criteria." *Id.*

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

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

25 5. Unconstitutional Condition

26 Defendants contend and Plaintiffs agree that the University's admissions criteria are not
27 an unconstitutional condition. (Defs.' Mot. 15; Pls.' Opp'n 12.) However, Plaintiffs assert that
28

1 "recent changes to require not just subject areas, but approved and nondisqualified viewpoints
2 and content regulation, do create an unconstitutional condition." (Pls.' Opp'n 12-13.)

3 According to the Supreme Court, "the government may not deny a benefit to a person on
4 a basis that infringes his constitutionally protected . . . freedom of speech even if he has no
5 entitlement to that benefit." *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 126
6 S. Ct. 1297, 1307 (2006) (citations omitted). The unconstitutional conditions doctrine extends to
7 other "constitutionally protected interests" in addition to the freedom of speech. *Perry v.*
8 *Sindermann*, 408 U.S. 593, 597 (1972).

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

21 B. Defendants Subject to Suit

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

27 A state and its officers sued in their official capacity are not subject to suit under 42
28 U.S.C. § 1983, as they are not considered "persons" within the meaning of the statute. *Cortez v.*

1 | *County of Los Angeles*, 294 F.3d 1186, 1188 (9th Cir. 2002). "States or governmental entities that
2 | are considered 'arms of the state' for Eleventh Amendment purposes" are excluded from the
3 | definition of "persons" in § 1983. *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 70 (1989).
4 | Because the UC Regents is considered an arm of the state under the Eleventh Amendment, it
5 | therefore is not considered a "person" subject to suit under 42 U.S.C. § 1983. *Thompson v. City*
6 | *of Los Angeles*, 885 F.2d 1439, 1443 (9th Cir. 1989). Clearly, Plaintiffs may not sue the UC
7 | Regents under 42 U.S.C. § 1983 as they might any other "person."

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

21 | Plaintiffs next argue that the UC Regents enjoys Eleventh Amendment immunity only in
22 | limited functions and not in this situation. Certainly, the UC Regents' immunity from suit is not all-
23 | encompassing of the University's many functions. In *Doe v. Lawrence Livermore Nat'l Lab.*, 65
24 | F.3d 771 (9th Cir. 1995), *rev'd on other grounds sub nom. Regents of the Univ. of Cal. v. Doe*, 519
25 | U.S. 425 (1997), the Ninth Circuit employed a five-factor analysis to determine if the University,
26 | "acting in a managerial capacity for the Laboratory, is an arm of the state and thus is entitled to
27 | Eleventh Amendment immunity from suit in federal court." *Lawrence Livermore Nat'l Lab*, 65 F.3d
28 | at 774. The California Supreme Court has also limited the UC Regents' sovereign immunity. See,

1 e.g., *Regents v. Super. Ct.*, 17 Cal. 3d 533, 537 (1976) (declining to extend sovereign immunity
2 to the University's lending decisions in investment of portfolio). Plaintiffs also point to a number
3 of suits brought against other states' equivalents of the Regents that were allowed by the U.S.
4 Supreme Court without discussion of sovereign immunity. (Pls.' Opp'n 15.) In addition, Plaintiffs
5 cite to a matter in the Northern District of California that allowed an injunctive relief suit against
6 the UC Regents to go forward, *McVey v. Bd. of Regents of the Univ. of Cal.*, 165 F. Supp. 2d
7 1052, 1057 (N.D. Cal. 2001). Despite Plaintiffs' apparent urging of this Court to simply rely on
8 past instances in which the UC Regents (or other states' equivalents) has been subject to suit,
9 without clear authority supplying this Court with a rationale for doing so, this argument necessarily
10 fails.

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

15 (1) whether a money judgment would be satisfied out of state funds, (2) whether the
16 entity performs central governmental functions, (3) whether the entity may sue or
17 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.

18 *ITSI TV Prods. v. Agric. Ass'ns*, 3 F.3d 1289, 1292 (9th Cir. 1993). Without question, the single
19 most important factor in the analysis is whether the state would be liable for a money judgment
20 against the defendant. *Lawrence Livermore Nat'l Lab.*, 65 F.3d at 774; *Jackson v. Hayakawa*,
21 682 F.2d 1344, 1350 (1982). Here, Plaintiffs do not seek money damages; they seek only
22 injunctive and declaratory relief. (Pls.' Opp'n 19.) In such a case it would appear that the first and
23 most weighty factor on its face weighed in favor of finding the UC Regents as not being an arm
24 of the state. However, past authority would support the opposite result.

25 First, the Supreme Court, in its reversal of the Ninth Circuit decision in *Lawrence Livermore*
26 *Nat'l Lab.*, 65 F.3d 771 (finding the University in its function there to not be an arm of the state),
27 took issue with the Ninth Circuit's characterization of the government's indemnification of the
28 University as weighing the first factor against granting the University Eleventh Amendment

SCANNED

1 immunity from suit in federal court. *Regents of the Univ. of Cal. v. Doe*, 519 U.S. 425, 431 (1997).
2 The Court there stated “that with respect to the underlying Eleventh Amendment question it is the
3 entity’s potential legal liability . . . that is relevant.” *Id.* It is true that here there is no potential legal
4 liability, as Plaintiffs do not seek money damages. However, the fact that Plaintiffs are not
5 pursuing money damages does not alter the relationship between the state of California and the
6 University. If Plaintiffs were seeking money damages, it would be the state of California to which
7 they would look. Hence, the first factor should weigh in favor of granting the UC Regents
8 immunity from suit.

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

21 Third, the Supreme Court has stated that sovereign immunity is not limited to suits seeking
22 money damages. “This jurisdictional bar [under the Eleventh Amendment] applies regardless of
23 the nature of the relief sought.” *Pennhurst*, 465 U.S. 89, 100. Further, the Court has equated the
24 effect of money damages with that of injunctive relief, at least in noting what it is that qualifies a
25 suit as being against a sovereign. “The general rule is that suit is against the sovereign if ‘the
26 judgment sought would expend itself on the public treasury or domain . . . ,’ or if the effect of the
27 judgment would be ‘to restrain the Government from acting, or to compel it to act.’” *Id.* at 102 n.11
28 (citations omitted). Here, in this Eleventh Amendment analysis, given the Supreme Court’s

1 characterization of suits against a sovereign, it is not evident that Plaintiffs' choice not to seek
 2 money damages makes this suit any less against a sovereign entity and, thereby, entitled to
 3 sovereign immunity. Hence, the first factor does not weigh against granting the UC Regents
 4 immunity from suit.

5 The analysis for the other factors is similar to the analysis performed by the Ninth Circuit
 6 in *Lawrence Livermore Nat'l Lab.* and is not repeated here. Because the first and most important
 7 factor weighs in favor of finding UC Regents immune from suit in federal court, which is not
 8 overcome by the other factors in the analysis, the Ninth Circuit five-factor test supports the
 9 proposition that the UC Regents should be found to be an arm of the state. Therefore, the UC
 10 Regents is entitled to Eleventh Amendment immunity from suit in federal court, and the claims
 11 against the UC Regents (including its operating units BOARS and UCOP)⁵ are DISMISSED.

12 C. Federal Jurisdiction for State Law Claims

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

20 The Eleventh Amendment bars suits against a state in federal court without the state's
 21 explicit consent. *In re State of N.Y.*, 256 U.S. 490, 497 (1921). This jurisdictional bar applies not
 22 only when the state is the named party, but also when it is the party in fact. *Edelman v. Jordan*,
 23 415 U.S. 651 (1974). "The general rule is that relief sought nominally against an officer is in fact
 24 against the sovereign if the decree would operate against the latter." *Haw. v. Gordon*, 373 U.S.
 25 57, 58 (1963) (per curiam). An exception to the Eleventh Amendment bar exists to allow suits
 26

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

1 challenging the constitutionality of a state official's action. *Ex parte Young*, 209 U.S. 123.
 2 However, this exception exists only for federal claims seeking prospective injunctive relief. *Ulaleo*
 3 *v. Paty*, 902 F.2d 1395, 1398 (9th Cir. 1990) (citation omitted). Further, *Ex parte Young* is
 4 "inapplicable in a suit against state officials on the basis of state law." *Pennhurst*, 465 U.S. at 106.

5 Defendants contend that Ninth Circuit authority "prohibits federal courts from deciding state
 6 law claims for injunctive or declaratory relief against state officials." (Defs.' Mot. 18.) Such
 7 prohibition, Defendants claim, extends to "personal-capacity claims for injunctive or declaratory
 8 relief under state law." (Defs.' Reply 5.) In support of their argument, Defendants cite three
 9 cases. Indeed, the courts in *Air Transp. Ass'n of Am. v. Pub. Utils. Comm'n of the State of Cal.*,
 10 833 F.2d 200 (9th Cir. 1987), *Han v. U.S. Dep't of Justice*, 45 F.3d 333 (9th Cir. 1994), and
 11 *Leventhal v. Vista Unified Sch. Dist.*, 973 F. Supp. 951 (S.D. Cal. 1997), cite *Pennhurst* as
 12 standing for the proposition that federal courts are barred by the Eleventh Amendment from
 13 deciding state law claims for injunctive or declaratory relief against state officials.⁶ Yet there is no
 14 discussion in these cases of the difference, if any, in the treatment of suits against state officials
 15 in their official or personal capacity.

16 Another Ninth Circuit case, *Ashker v. Cal. Dep't of Corr.*, 112 F.3d 392, 394 (9th Cir. 1997),
 17 sheds more light on the Supreme Court's rationale for finding some cases to be barred by the
 18 Eleventh Amendment while others are not. In *Ashker*, the Ninth Circuit described *Pennhurst* as

19 _____
 20 ⁶ In *Air Transp. Ass'n of Am. v. Pub. Utils. Comm'n of the State of Cal.*, 833 F.2d 200 (9th Cir.
 21 1987), the plaintiffs sought declaratory relief and an injunction to enjoin the enforcement of a
 22 regulation promulgated by the California Public Utilities Commission. The Ninth Circuit cited
 23 *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.

24 In *Han v. U.S. Dep't of Justice*, 45 F.3d 333 (9th Cir. 1994), the plaintiffs sought what the
 25 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).

26 In *Leventhal v. Vista Unified Sch. Dist.*, 973 F. Supp. 951 (S.D. Cal. 1997), the plaintiffs
 27 brought suit against school board members in their official capacity, seeking injunctive and
 28 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.

1 standing for the proposition that the "Eleventh Amendment barred a federal district court from
2 hearing a supplemental state law claim for an injunction against a state officer acting in his official
3 capacity." *Ashker*, 112 F.3d at 394 (emphasis in original). The court went on to discuss the
4 question of suit against an officer in his or her personal capacity on a state law claim for money
5 damages, the issue of a similar suit, but such a claim for injunctive relief was not discussed.
6 However, the Ninth Circuit did take the opportunity to note that in *Pennhurst*, 465 U.S. 89, "[t]he
7 Supreme Court observed that 'a federal suit against state officials on the basis of state law
8 contravenes the Eleventh Amendment when—as here—the relief sought and ordered has an impact
9 directly on the State itself.'" *Ashker*, 112 F.3d at 394. This statement suggests that, in
10 determining whether claims are barred by the Eleventh Amendment, the Supreme Court primarily
11 considers whether such relief would directly impact the state itself. Hence, a state claim for
12 injunctive relief against a state official, in either his or her official or individual capacity, would be
13 barred in federal court, as such relief would necessarily "have an impact directly on the State
14 itself."

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

23 Next, Plaintiffs assert that the Ninth Circuit addressed the issue of personal capacity claims
24 under state law in *Pena v. Gardner*, 976 F.2d 469, 473-74 (9th Cir. 1992), holding that "*Pennhurst*
25 did not address, and does not apply to, personal capacity claims under state law." (Pls.' Opp'n
26

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

1 17.) In *Pena*, the Ninth Circuit found that the Eleventh Amendment did not bar the plaintiff's
2 pendent state claims against state officials acting in their individual capacity. *Pena*, 976 F.2d at
3 474. Notably, the plaintiff in *Pena* did not seek prospective injunctive relief, as Plaintiffs do here.⁸

4 Despite Plaintiffs' attempts to distance *Pennhurst* from the instant matter, the Court is
5 unconvinced that the Eleventh Amendment does not bar from federal court suits containing state
6 claims for injunctive or declaratory relief against state officials in his or her personal capacity.
7 Clearly, in *Pena*, the Ninth Circuit "held that the Eleventh Amendment would not bar federal or
8 pendent state claims seeking *damages* against a state official acting personally." *Ashker*, 112
9 F.3d at 394-95 (citation omitted) (emphasis added). However, the Ninth Circuit in *Pena* appears
10 to have decided on a narrower question than Plaintiffs contend that they did. In other words, the
11 Ninth Circuit did not conclusively decide in *Pena* if the Eleventh Amendment bars state claims
12 seeking injunctive or declaratory relief against a state official acting personally.

13 "A federal court is presumed to lack jurisdiction in a particular case unless the contrary
14 affirmatively appears." *Stock West, Inc. v. Confederated Tribes*, 873 F.2d 1221, 1225 (9th Cir.
15 1989) (citation omitted). As such, given that Plaintiffs have failed to convince this Court that
16 *Pennhurst* is not instructive for the issue at hand, and given the Supreme Court's observation that
17 the Eleventh Amendment bars in federal court state law claims against state officials that seek
18 relief that has an impact directly on the state itself, this Court declines to find that jurisdiction
19 exists over Plaintiffs' state law claims. Hence, Defendants' Motion to Dismiss Plaintiffs' state law
20 claims is GRANTED.

21 D. "Individual Capacity" Claims

22 Defendants request that claims against Defendants in their "individual capacity" be
23 dismissed. Defendants assert that suits against officials in their individual capacity are
24 "appropriate only where plaintiffs seek damages to be paid out of the official's personal assets or
25 action by the individual personally, rather than [sic] as a government official." (Defs.' Mot. 19.)
26
27

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

FILED
U.S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

1 Plaintiffs counter that personal capacity suits for injunctive or declaratory relief, as here, are
2 proper and are allowed. (Pls.' Opp'n 18.)

3 At the least, Defendants' reliance on the Supreme Court's discussion in *Ky. v. Graham*, 473
4 U.S. 159, 165-66 (1985), of the difference between personal capacity and official capacity suits,
5 to mandate their position is misplaced. As Plaintiffs have stated in their Opposition (Pls.' Opp'n
6 18), the Supreme Court's discussion in *Graham*, merely gave "concrete examples of the practical
7 and doctrinal differences between personal and official capacity actions" because "this distinction
8 [between the two types of actions] continues to confuse lawyers and confound lower courts." 473
9 U.S. at 165. There is no indication in *Graham* that the Supreme Court meant to limit or delineate
10 the capacity in which future plaintiffs should bring particular kinds of suit against state official
11 defendants. See *Hafer v. Melo*, 502 U.S. 21, 25 (1991). Defendants' citation to *Am. Civil*
12 *Liberties Union of Miss., Inc. v. Finch*, 638 F.2d 1336, 1338 (5th Cir. 1981) is similarly flawed.

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

26 Indeed, the Ninth Circuit has characterized *Ex parte Young* suits as where "a state official
27 in his or her *official* capacity, when sued for injunctive relief, [is] a person under § 1983, because
28 'official-capacity actions for prospective relief are not treated as actions against the State.'" *Wolfe*

1 v. *Strankman*, 392 F.3d 358, 365 (9th Cir. 2004) (internal citations and quotation marks omitted)
 2 (emphasis added). In making this observation, the Ninth Circuit drew upon Supreme Court case
 3 law. *Id.* Clearly, the legal fiction that the Supreme Court created in *Ex parte Young* is, at best,
 4 only a fiction, and suit brought under *Ex parte Young*, although perhaps treated as a personal
 5 capacity suit,⁹ is actually brought against officials in their official capacity.

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

14 E. Claims Against Dennis J. Galligani

15 Apparently, Dennis J. Galligani has retired from the position of Associate Vice President
 16 for Student Academic Services. (Defs.' Mot. 20.) Defendants request that this Court dismiss
 17 Mr. Galligani as a defendant. *Id.* Plaintiffs argue that "Mr. Galligani's successor should be
 18 substituted when he or she takes office." (Pls.' Opp'n 20.) Federal Rule of Civil Procedure
 19 25(d)(1) specifies that substitution is the proper course to take. Defendants fail to advance any
 20 reason why this Court should deviate from such course. Hence, Defendants' Motion to Dismiss
 21 Mr. Galligani as a defendant is DENIED. Of course, in light of the Court's granting of Defendants'
 22 Motion to Dismiss claims against certain Defendants in their "individual capacity," claims against
 23 Mr. Galligani are limited to federal claims against him in his official capacity.

24
 25
 26
 27 ⁹ "An *Ex parte Young* suit is treated as a personal capacity suit: 'Under the doctrine of *Ex parte*
 28 *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.)

SCANNED

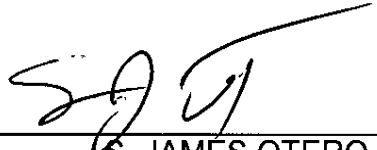
1 IV. CONCLUSION

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

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

11 IT IS SO ORDERED.

12 Dated this 8 day of August, 2006.

13
14 
15 _____
16 S. JAMES OTERO
17 UNITED STATES DISTRICT JUDGE
18
19
20
21
22
23
24
25
26
27
28