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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

ASSOCIATION OF CHRISTIAN SCHOOLS INTERNATIONAL, et al., Plaintiffs, vs. ROMAN STEARNS, SPECIAL ASSISTANT TO THE PRESIDENT, et al., Defendants.	CASE NO. CV 05-06242-SJO (RZx) **DEFENDANTS' REPLY BRIEF IN SUPPORT OF MOTION TO DISMISS** Judge: Honorable S. James Otero Date: December 12, 2005 Time: 10:00 a.m. Room: 1600

Plaintiffs now concede the right of the University to establish and enforce academic standards for college preparatory courses. They limit their case to a claim that the University discriminated against courses that otherwise meet its academic standards only because those courses have religious content or orientation. *See* Opp. at 1. Defendants have not moved to dismiss that limited discrimination claim, however, and any other claim has no legal basis. Plaintiffs have presented no authority for requiring the University to change its standards simply because their desire not to comply with those standards may be religiously motivated. If a biology course fails the University's standards for college preparatory laboratory science, the University should be free to decline to give it a-g credit, regardless of whether the deficiencies arise from religious- or secular-based errors or omissions.

If Plaintiffs' discrimination allegations had any factual basis (and Defendants will show they do not), they might support Plaintiffs' claims under the Equal Protection and Establishment Clauses. Plaintiffs contend, however, that their discrimination allegations also state federal free speech, free exercise, freedom of association, and due process claims. None of the cases that Plaintiffs have cited supports that contention. Nor does any overcome Defendants' procedural and sovereign immunity defenses. The Court should therefore grant this Motion and limit this case to the narrow question whether the University has rejected courses meeting its academic standards only because of bias against religion.

I. Plaintiffs' Cases Do Not Support Their Constitutional Claims.

A. First Amendment Speech. Defendants' motion demonstrated that Plaintiffs have not alleged a sufficient burden on speech to support a First Amendment speech claim.[1] Plaintiffs' cases all involved (1) outright prohibitions on certain speech,[2] (2) government property or some type of public forum from

[1] Although Plaintiffs claim that Defendants did not challenge the speech component of their "Fourth Cause of Action," Defendants clearly did so. *See* Mot. at 5, line 28.

[2] *See Police Dep't v. Mosley*, 408 U.S. 92, 92-93, 92 S. Ct. 2286, 2288 (1972) (ban on picketing that applied to all picketing other than peaceful labor picketing); *Regan v. Time, Inc.*, 468 U.S.

which the speech in question was excluded – essentially, a prohibition on the speech in the forum at issue,[3] (3) forced speech,[4] or (4) time, place and manner regulations.[5] Here, there is no prohibition on teaching or taking any classes.[6] No government property or public forum is at issue, let alone any exclusion of speech from such property. The State is not forcing Plaintiffs to say anything. And the a-g requirements are not time, place or manner restrictions – Plaintiffs acknowledge as much by deleting the words "time, place and manner" from the relevant quotation

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641, 644-46, 104 S. Ct. 3262, 3264-65 (1984) (ban on certain photographic reproductions of currency); *Culinary Workers Union v. Del Papa*, 200 F.3d 614, 616 (9th Cir. 1999) (criminal statute prohibiting "the willful and malicious making of derogatory statements about banks"); *Boos v. Barry*, 485 U.S. 312, 315, 108 S. Ct. 1157, 1160-61 (1988) (prohibition on displaying any sign critical of a foreign government within 500 feet of its embassy); *Board of Airport Comm'rs v. Jews for Jesus*, 482 U.S. 569, 570, 107 S. Ct. 2568, 2570 (1987) (ban on "all 'First Amendment activities'" at airport); *Sable Communications. v. FCC*, 492 U.S. 115, 117, 109 S. Ct. 2829, 2832 (1989) ("outright ban on indecent . . . interstate commercial telephone messages"); *Broadrick v. Oklahoma*, 413 U.S. 601, 602-06, 93 S. Ct. 2908, 2911-13 (1973) (prohibition on "a broad range of political activities" by civil servants). *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Board*, 502 U.S. 105, 112 S. Ct. 501 (1991), involved a statute that took convicted criminals' earnings from works describing their crime for a victim compensation fund. Although the statute did not absolutely prohibit convicts from creating works with descriptions of their crimes, removing the profit incentive to create such work would likely have the same effect.

[3] *Rosenberger v. Rector*, 515 U.S. 819, 829-31, 115 S. Ct. 2510, 2516-17 (1995) (exclusion of certain religious publications from a "limited public forum"); *Widmar v. Vincent*, 454 U.S. 263, 267, 102 S. Ct. 269, 273 (1981) (exclusion of religious worship and discussion from a "[University] forum generally open for use by student groups"); *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 387, 113 S. Ct. 2141, 2144 (1993) (denial of permission to show religious films on public school property); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 504, 89 S. Ct. 733, 735 (1969) (ban on wearing black armbands to public school); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 44, 103 S. Ct. 948, 954 (1983) (exclusion of unions other than the union currently representing the teachers from using public school mailboxes); *Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 753-55, 108 S. Ct. 2138, 2142 (1980) (ordinance granting Mayor discretion to exclude news racks from public property).

[4] *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 626, 63 S. Ct. 1178, 1179 (1943) (requirement that all public school students salute the flag or face expulsion and delinquency proceedings); *Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781, 795-800, 108 S. Ct. 2667, 2677-80 (1988) (invalidating requirement that all fundraisers make certain disclosures).

[5] *Heffron v. Int'l Soc'y*, 452 U.S. 640, 642, 101 S. Ct. 2559, 2561 (1981) (upholding regulation of solicitation at State Fair as valid time, place and manner regulation).

[6] Plaintiffs protest the University's decision that instruction in religious faith, while certainly permissible religious education, is not part of a core college preparatory curriculum. Plaintiffs' suggestion that the University should be required to give a-g credit for religion classes, Opp. at 3, suggests that their agenda is not to obtain approval for courses that meet the University's requirements, but to compel the University to change those requirements to suit Plaintiffs. Plaintiffs do not and cannot offer any legal basis for this Court's doing so.

in their brief.[7] Plaintiffs' cases are thus inapposite.

B. Free Exercise. Plaintiffs do not dispute that they have failed to allege any "substantial burden on the observation of a central religious belief or practice." *Hernandez v. C.I.R.*, 490 U.S. 680, 699, 109 S. Ct. 2136, 2148 (1989). They therefore have not stated a free exercise claim. *See Graham v. C.I.R.*, 822 F.2d 844, 850-51 (9th Cir. 1987), *aff'd by Hernandez*, 490 U.S. 680.

C. Freedom of Association. None of Plaintiffs' allegations suggests that whom they associate with has any relevance to the University's a-g course certification or admissions decisions. In their freedom of association argument, Plaintiffs assert only that students will be "ineligible for admission . . . if they choose disqualified courses." Opp. at 11. This assertion has nothing to do with freedom of association.

D. Due Process. Plaintiffs assert that their procedural due process claim rests on deprivation of a liberty interest in freedom of speech and a property interest in being considered for California's universities. *Id.* at 12. Plaintiffs cite *Cantwell v. Connecticut*, 310 U.S. 296, 60 S. Ct. 900, 903 (1940), but *Cantwell* held only that the First Amendment is incorporated into the Fourteenth Amendment Due Process Clause, so that the First Amendment applies to the States. It did not suggest that plaintiffs might have due process claims based upon First Amendment claims.

To support the argument for a property interest in "the right to be nondiscriminatorily considered" for California's universities, Plaintiffs cite *Goss v. Lopez*, 419 U.S. 565, 95 S. Ct. 729 (1975). Opp. at 12. Yet *Goss* held only that, once Ohio established public schools and required children to attend, students had a property interest in "public education . . . which is protected by the Due Process Clause and which may not be taken away for misconduct without adherence to . . .

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[7] *See* Opp. Br. at 7 (omitting highlighted words from *Heffron*, 452 U.S. at 648: "**A major criterion for a valid time, place and manner restriction is that the** restriction 'may not be based upon either the content or subject matter of speech.'").

minimum procedures." *Id.* at 574. In contrast to the *Goss* plaintiffs who had been suspended from school, *id.* at 568, nothing, let alone a property interest, has been taken away from Plaintiffs here. They have therefore failed to state a due process claim. *See Paul v. Davis*, 424 U.S. 693, 711; 96 S. Ct. 1155, 1165 (1976) (procedural due process applies when "a right or status previously recognized by state law [is] distinctly altered or extinguished").[8]

II. Plaintiffs' Procedural Arguments Are Also Erroneous.

No case cited by Plaintiffs undermines the Ninth Circuit's repeated holding that the Regents is an arm of the state and so cannot be sued under § 1983. *See, e.g.*, *Thompson v. City of Los Angeles*, 885 F.2d 1439, 1443 (9th Cir. 1989).[9] Even if Plaintiffs were correct that some state instrumentalities have sovereign immunity in only certain of their functions, the Regents must have sovereign immunity here, where it is carrying out its core educational mission. Plaintiffs cite *Regents v. Superior Ct.*, 3 Cal. 3d 529, 539, 91 Cal. Rptr. 57, 63 (1970), for the proposition that the Regents is an "officer" and argue that the Regents is therefore subject to suit under *Ex Parte Young*. Yet *Regents* holds that the Regents is an "officer" only for purposes of specific California venue laws. *Id.* at 536. Despite Plaintiffs' mis-quotations to the contrary, the cited California Supreme Court cases say nothing about sovereign immunity. *See* Opp. at 15 n.1 & 16 (quoting *Regents v. Superior Ct.*, 17 Cal. 3d 533, 537, 131 Cal. Rptr. 228, 230 (1976), but substituting "sovereign immunity" for the court's actual words – "sovereign protection").[10]

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[8] Without explanation, Plaintiffs also cite *Troxel v. Granville*, 530 U.S. 57, 120 S. Ct. 2054 (2000). *Troxel* was a substantive, not procedural, due process case. *Id.* at 65. Plaintiffs have not contested Defendants' observation that no substantive due process claim is made here. *See* Mot. at 15 n. 11.

[9] Plaintiffs' list of cases involving claims against other states' equivalents of the Regents (in which there was, as Plaintiffs concede, no "sovereign immunity discussion") has no significance because there is no indication in those cases whether the university in question consented to suit.

[10] Plaintiffs quote dictum in *Pena v. Gardner*, 976 F.2d 469, 473 n.5 (9th Cir. 1992), that federal actions against a State for prospective injunctive relief are permissible. The Ninth Circuit has since squarely held to the contrary. *See Wolfe v. Strankman*, 392 F.3d 358, 364 (9th Cir. 2004) (dismissing claims for declaratory and injunctive relief against California and one of its agencies).

Likewise, that one treatise says *Ex Parte Young* suits are *treated* as "individual-capacity" suits cannot undermine the Ninth Circuit authority to the contrary. *See Wolfe v. Strankman*, 392 F.3d 358, 365 (9th Cir. 2004) (*Ex Parte Young* applies to "official-capacity suits"). Defendants do not disagree that § 1983 suits *for damages* are permitted against state officers in their personal capacity, *see Hafer v. Melo*, 502 U.S. 21, 31, 112 S. Ct. 358, 365 (1991), but Plaintiffs explicitly do not seek damages. Opp. at 19.

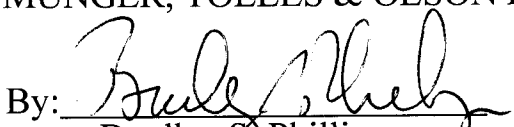
The authorities Plaintiffs cite to support federal jurisdiction over state law claims against officers in their personal capacities say only that such claims are permitted *if they are for damages*. The Ninth Circuit has held that personal-capacity claims for injunctive or declaratory relief under state law are impermissible, *see* Mot. at 18 (citing cases), and allowing such claims would make no sense, as state officials could provide meaningful relief only in their *official* capacities. Moreover, to the extent personal-capacity relief *were* somehow binding on the State, it would be directly forbidden by *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 106, 104 S. Ct. 900, 911 (1984).

CONCLUSION

For the reasons stated, this Court should dismiss the referenced counts of the Complaint. Further, because this motion turns on pure issues of law and is based upon Plaintiffs' own allegations and concessions, Plaintiffs have not requested and the Court should not grant leave to amend. Instead, this case should be narrowed at the threshold to Establishment Clause and Equal Protection discrimination claims.

DATED: November 21, 2005

MUNGER, TOLLES & OLSON LLP

By: 
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I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 355 South Grand Avenue, Thirty-Fifth Floor, Los Angeles, California 90071-1560.

On November 21, 2005, I served the foregoing document described as **DEFENDANTS' REPLY BRIEF IN SUPPORT OF MOTION TO DISMISS** on the interested parties as follows:

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I served the foregoing document by electronic mail and by facsimile utilizing the facsimile numbers and emails addresses on the above service list.

I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Executed on November 21, 2005, at Los Angeles, California.

Loren Rives