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11 UNITED STATES DISTRICT COURT
12 CENTRAL DISTRICT OF CALIFORNIA
13

14 ASSOCIATION OF CHRISTIAN
15 SCHOOLS INTERNATIONAL, et al.,

16 Plaintiffs,

17 vs.

18 ROMAN STEARNS, SPECIAL
19 ASSISTANT TO THE PRESIDENT,
et al.,

20 Defendants.

CASE NO. CV 05-06242-SJO (RZx)

**NOTICE OF MOTION AND
MOTION TO DISMISS PURSUANT
TO FED. R. CIV. P. 12(b)(1) & (6);
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT
THEREOF**

[Request for Judicial Notice and
Declaration of Belinda Morales filed
concurrently herewith]

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

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1 TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

2 PLEASE TAKE NOTICE THAT on December 12, 2005, at 10:00 a.m. or as
3 soon thereafter as counsel may be heard, in the courtroom of The Honorable S.
4 James Otero, in the United States District Court, 312 North Spring Street, 16th
5 Floor, Los Angeles, California, 90012, defendants the Regents of the University of
6 California (“the Regents”) (including its operating units the Office of the President
7 of the University of California and the Board of Admissions & Relations with
8 Schools, which lack capacity to be sued other than as the Regents), Roman Stearns,
9 Susan Wilbur, Dennis J. Galligani, Robert C. Dynes, and Michael Brown
10 (collectively, “Defendants”) will and hereby do move this Court to dismiss:

- 11 1. the first, second, third, and fourth “Causes of Action” in the
12 Complaint;
- 13 2. all claims against the Regents;
- 14 3. the components of the fifth and sixth “Causes of Action” that are
15 based on California law;
- 16 4. all claims against any Defendants in their individual capacities;
17 and
- 18 5. all claims against Dennis J. Galligani.

19 This motion is brought pursuant to Federal Rules of Civil Procedure 12(b)(1)
20 and 12(b)(6) and is made on the following grounds, which are discussed more fully
21 in the attached Memorandum of Points and Authorities: (1) that the federal
22 freedom of speech, free exercise, freedom of association, and due process claims
23 fail because Plaintiffs have not alleged and cannot allege any substantial burden on
24 their freedom of speech, their freedom to practice their religion, or their freedom of
25 association, and they have not identified any liberty or property interest that is
26 entitled to due process protection; (2) the Regents is an arm of the state, and it
27 therefore cannot be sued under 42 U.S.C. § 1983 and has sovereign immunity
28 against state law claims; (3) there is no federal jurisdiction over state law claims

1 against state officers; (4) declaratory and injunctive relief regarding official conduct
2 is not available against state officers in their individual capacities; and (5) Dennis J.
3 Galligani is not a proper defendant because, as the parties have stipulated, he has
4 retired.

5 This motion is based on this Notice of Motion and Motion, the Memorandum
6 of Points and Authorities attached hereto, the Request for Judicial Notice, and the
7 Declaration of Belinda Morales filed concurrently herewith, any reply papers
8 submitted in support of this motion, oral argument of counsel, the complete files
9 and records in this matter, and such additional matters as the Court may consider.

10 This motion is made following the conference of counsel pursuant to Local
11 Rule 7-3, which took place on October 18, 2005.

12 DATED: October 28, 2005

MUNGER, TOLLES & OLSON LLP

13
14 By: 
15 BRADLEY S. PHILIPS

16 Attorneys for Defendants
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1 MEMORANDUM OF POINTS AND AUTHORITIES

2 I. INTRODUCTION

3 In this lawsuit, Plaintiffs contest the University of California’s authority to
4 establish admissions criteria that take into account the breadth and rigor of
5 applicants’ high school courses. As Plaintiffs allege, certain Defendants review the
6 curricula of California high school classes to ensure that the classes will prepare
7 students for university level work sufficiently to justify counting the classes toward
8 the University’s minimum “a-g requirements,” fulfillment of which is one route to
9 eligibility for admission to the University of California. Plaintiffs claim that by
10 engaging in such reviews, Defendants violate a wide array of Plaintiffs’ purported
11 federal and state constitutional and statutory rights, including freedom of speech
12 and association, free exercise of religion, and due process.

13 In fact, however, the allegations in the Complaint make clear that Defendants
14 are not stopping Plaintiffs from teaching or studying anything. First, although the
15 University does not accept every high school class as college preparatory, it also
16 does not penalize students for taking additional classes that are not so accepted.
17 Second, Plaintiffs acknowledge that there are other avenues to eligibility for
18 admission to the University of California that do not involve taking classes that
19 have been approved as satisfying the a-g requirements; these other avenues place no
20 restrictions on applicants’ high school curricula. Compl. ¶¶ 28-29. Third, Plaintiffs
21 do not allege that teaching or taking classes that do satisfy the a-g requirements
22 would require them to forsake or violate their religious beliefs.

23 Despite Plaintiffs’ attempt to characterize Defendants as improperly
24 controlling Plaintiffs’ educational choices, this lawsuit is really an attempt by
25 Plaintiffs to control the Regents’ educational choices. Plaintiffs seek to constrain
26 the Regents’ exercise of its First Amendment-protected right of academic freedom
27 to establish admissions criteria for the University of California. Educational
28 institutions, however, must review the content and viewpoints of students’

1 academic work in order to apply academic standards, and courts have uniformly
2 upheld their right to do so.

3 Because nothing prevents schools from teaching or students from taking
4 whatever classes they wish, and because Plaintiffs do not and cannot allege that
5 teaching or taking classes that satisfy the University's criteria would require them
6 to forsake or violate their religious beliefs, Plaintiffs' freedom of speech, free
7 exercise of religion, and freedom of association claims under the federal
8 Constitution fail as a matter of law and should be dismissed. Because Plaintiffs
9 have not identified any liberty or property interest that is entitled to due process
10 protection, their federal due process claim also fails as a matter of law and should
11 be dismissed.

12 The Regents (including its operating units, which lack the capacity to be sued
13 in any event) should be dismissed altogether from the suit because the Regents is an
14 arm of the state and therefore has sovereign immunity and cannot be sued under 42
15 U.S.C. § 1983. The state law claims against the remaining Defendants, all state
16 officers, should also be dismissed for lack of federal jurisdiction. In addition, the
17 claims against the Defendant officials in their individual capacities should be
18 dismissed because the prospective relief Plaintiffs seek is potentially available
19 against those Defendants only in their official capacities; and the claims against
20 Dennis J. Galligani should be dismissed because, as the parties have stipulated, he
21 has retired, so prospective relief against him would be meaningless.

22 By this motion, Defendants do not challenge Plaintiffs' pleading of federal
23 discrimination claims under the Equal Protection Clause and the Establishment
24 Clause, based on the allegation that Defendants declined to approve certain classes
25 based exclusively on the religious content or viewpoint of those classes. While
26 Defendants will demonstrate that those allegations are meritless, Defendants do not
27 contend here that those claims should be dismissed at the pleading stage.¹

28 ¹ Defendants will await the Court's determination of the appropriate scope of the Complaint

1 **II. BACKGROUND**

2 **A. Eligibility for Admission to the University of California**

3 As the Complaint alleges, there are multiple ways to become eligible for
4 admission to the University of California. A California student who becomes
5 eligible for admission is guaranteed admission to the University though not
6 necessarily to the campus or program of her choice.² The paths to eligibility are:

7 **1. “Eligibility in the Statewide Context”**

8 California high school students may become eligible for University
9 admission by achieving a high enough combination of standardized test scores and
10 grades in “a-g” courses.³ The minimum a-g requirements under this option are: (a)
11 two years of history/social science; (b) four years of English; (c) three years of
12 mathematics; (d) two years of laboratory science providing knowledge of at least
13 two of the subjects of biology, chemistry, and physics; (e) two years of a language
14 other than English; (f) one year of visual or performing arts; and (g) at least one
15 elective. Compl. ¶ 23. Plaintiffs have not alleged and cannot allege that there is
16 any penalty in the University admission process for an applicant’s having taken any
17 classes in addition to the a-g requirements.

18 There is a significant additional option – not mentioned in the Complaint –
19 for an applicant who wants to become eligible for admission based upon
20 standardized test scores and a-g coursework but who has not, for whatever reason,
21 completed all of the a-g requirements: The applicant may instead take an SAT

22 before filing an answer addressing those discrimination claims. *See Thomas Batdorf v. Trans*
23 *Union*, 2000 U.S. Dist. Lexis 6796, *12 (N.D. Cal. May 8, 2000) (“[Defendant] was not required
24 to file an answer to the causes of action it was not moving to dismiss while its motion to dismiss
[wa]s pending. The filing of a motion to dismiss the other causes of action enlarged the time for
[Defendant] to respond to the entire complaint.”).

25 ²http://www.universityofcalifornia.edu/educators/counselors/adminfo/freshman/advising/admission_reqs.html (Declaration of Belinda Morales (“Morales Decl.”), filed concurrently herewith, Exh. A).

27 ³http://www.universityofcalifornia.edu/educators/counselors/adminfo/freshman/advising/admission_scholarship.html (providing the minimum standardized test scores for each grade-point average achieved in a-g courses) (Morales Decl., Exh. B).

1 Subject Test in any subject for which the applicant has not taken the required a-g
2 class. *See* Morales Decl., Exh. C. An applicant can satisfy an a-g class requirement
3 with an SAT Subject Test even if she scores in the bottom third of the test takers
4 (and in some instances even lower than that). *See id.*, Exh. J.

5 In order to obtain a-g certification for a class, the high school offering it must
6 submit to the University a course description that demonstrates that the class meets
7 the University's minimum a-g content requirements.⁴ Certified a-g classes at each
8 high school are posted on a web site maintained by the University.⁵

9 **2. "Eligibility in the Local Context"**

10 Students may become eligible for admission to the University by being in the
11 top 4% of students at participating California high schools. In order to qualify for
12 this eligibility option, a student must complete eleven certified a-g courses by the
13 end of her junior year.⁶

14 **3. "Eligibility by Examination Alone"**

15 Students may become eligible for admission to the University solely by
16 receiving high enough scores on certain standardized tests.⁷

17 **4. "Admission by Exception"**

18 Students may also become eligible for admission by demonstrating their
19 potential to succeed at the University despite not having satisfied the requirements
20 for any of the other paths to eligibility. Each individual University campus has its
21 own criteria for evaluating such applicants.⁸

22 ⁴<http://www.universityofcalifornia.edu/educators/counselors/adminfo/freshman/advising/admission/agr.html> (describing the required content in each subject) (Morales Decl., Exh. C).

23 ⁵ <https://admissions.ucop.edu/doorways/list/> (Morales Decl., Exh. D).

24 ⁶ *See*

25 <http://www.universityofcalifornia.edu/educators/counselors/adminfo/freshman/advising/admission/local.html> (Morales Decl., Exh. E).

26 ⁷<http://www.universityofcalifornia.edu/educators/counselors/adminfo/freshman/advising/admission/exam.html> (Morales Decl., Exh. F).

27 ⁸<http://www.universityofcalifornia.edu/educators/counselors/adminfo/freshman/advising/admission/except.html> (Morales Decl., Exh. G).

1 **B. Allegations in the Complaint**

2 The “[C]omplaint challenges the legality of the authority asserted by
3 defendants to regulate the viewpoints taught in private schools and to regulate
4 private schools beyond specifying core courses, under the guise of imposing
5 barriers to admission to the University of California institutions.” Compl. ¶ 53.
6 Plaintiffs allege that, in implementing the a-g requirements, “[D]efendants have
7 assumed increasingly more authority over secondary schools in California,” *id.*
8 ¶ 16, and “have rejected textbooks and courses based on a viewpoint of religious
9 faith.” *Id.* ¶ 30. Although none of the student Plaintiffs has yet attempted to apply
10 to the University of California, these Plaintiffs allege that “[they] are . . . rendered
11 ineligible to apply to or be accepted by [the] University of California” because they
12 “wish to receive the instruction and to use the texts and viewpoints therein that
13 cause or would cause disapproval of the a-g curriculum.” *Id.* ¶ 3.

14 Plaintiffs allege that both the general act of reviewing the course offerings of
15 Christian schools for a-g certification purposes and the specific act of denying a-g
16 certification to certain courses submitted by one or more Plaintiffs violated
17 Plaintiffs’ rights under the Federal Constitution, the California Constitution, and
18 California’s Unruh Civil Rights Act. The rights purportedly violated include
19 “freedom of speech,” *id.* ¶ 57, “free exercise of religion, in conjunction with . . .
20 association and speech,” *id.* ¶ 76, and “due process of law.” *Id.* ¶ 81.

21 **III. ARGUMENT**

22 **A. Most of Plaintiffs’ federal constitutional claims fail as a matter of law.**

23 **1. Plaintiffs fail to state a First Amendment speech claim.**

24 Plaintiffs’ First Amendment speech claim fails because Defendants are not
25 stopping Plaintiffs from saying whatever they choose and because the University
26 has its own First Amendment right to establish rigorous admission standards.

27 **a. Plaintiffs’ speech has not been restricted.**

28 In their first through fourth “Causes of Action,” Plaintiffs assert that their

1 First Amendment speech rights have been violated by Defendants' a-g course
2 requirement decisions. Yet Plaintiffs' allegations do not describe any burden on
3 speech sufficient to trigger First Amendment concern. In *Branzburg v. Hayes*, 408
4 U.S. 665, 681-82; 92 S. Ct. 2646, 2656-57 (1972), the Supreme Court described the
5 types of restrictions on reporters' speech that could violate the First Amendment.

6 Although phrased in terms of restrictions on the press, that list is instructive:

7 We do not question the significance of free speech, press, or assembly
8 to the country's welfare. . . . But these cases involve no intrusions
9 upon speech or assembly, no prior restraint or restriction on what the
10 press may publish, and no express or implied command that the press
11 publish what it prefers to withhold. No exaction or tax for the privilege
12 of publishing, and no penalty, civil or criminal, related to the content
13 of published material is at issue here. The use of confidential sources
14 by the press is not forbidden or restricted; reporters remain free to seek
15 news from any source by means within the law. No attempt is made to
16 require the press to publish its sources of information or
17 indiscriminately to disclose them on request.

18 *Id.* (internal citations omitted).

19 Plaintiffs have not alleged that any of these types of restrictions exists here.
20 Defendants have not intruded upon any of Plaintiffs' classes. There are no actual
21 restraints or restrictions on what Plaintiffs may teach or learn. Plaintiffs do not
22 allege that teaching and taking classes that satisfy the University's a-g requirements
23 would prevent them from teaching or taking any other classes they choose. *See*
24 *Windsor Park Baptist Church, Inc. v. Ark. Activities Ass'n*, 658 F.2d 618, 622 (8th
25 Cir. 1981) ("It is not argued, for example, that having to teach a given number of
26 units of Mathematics prevents the school from teaching all the Bible classes it
27 wishes, in any way it wishes, with any teachers it wishes."). Indeed, Plaintiffs
28 themselves report that Calvary Christian School and other schools are continuing to

1 teach and students are continuing to take science, religion, and ethics classes that do
2 not meet the a-g requirements. *See* Compl. ¶ 60. Plaintiffs have not been
3 commanded to teach or learn anything to which they claim to object, even if they
4 wish to become eligible for admission to the University – Plaintiffs have not
5 alleged that they are unable to use other, already existing, classes or to take SAT
6 Subject Tests to meet the a-g requirements. Besides, they have admitted that there
7 are avenues for admission that do not involve the a-g requirements. *See id.* ¶¶ 27-
8 29. Plaintiffs have not been subject to any tax related to their classes, and they have
9 not been subject to any civil or criminal penalty for teaching or taking any class. In
10 sum, Plaintiffs are free to teach or take any class they wish and they are free to
11 refrain from teaching or taking any specific material to which they object. They
12 therefore have failed to state a First Amendment speech claim.

13 **b. The University does not engage in unconstitutional**
14 **“viewpoint” discrimination merely by deciding which**
15 **courses meet its admissions requirements.**

16 Plaintiffs’ first and second “Causes of Action” assert that the University’s
17 mere act of evaluating courses and deciding which meet its own entry requirements
18 is unconstitutional “viewpoint discrimination.” Plaintiffs argue that such supposed
19 “regulation of . . . [course] content” abridges their free speech rights, Compl. ¶ 57,
20 and constitutes a “content-based regulation of speech, which dictates the viewpoint
21 and content of speech.” *Id.* ¶ 66. These claims fail. As courts have long held,
22 because enforcement of academic standards inherently requires “regulation” of
23 speech content, Plaintiffs have no right to freedom from academic evaluation.

24 No less than the right of Plaintiffs to express their own views, the
25 University’s right to set its own admissions standards is protected by the First
26 Amendment. “Academic freedom, though not a specifically enumerated
27 constitutional right, long has been viewed as a special concern of the First
28 Amendment. The freedom of a university to make its own judgments as to
education *includes the selection of its student body.*” *Univ. of Cal. Regents v.*

1 *Bakke*, 438 U.S. 265, 312; 98 S. Ct. 2733, 2759 (1978) (Powell, J. concurring)
2 (emphasis added). Justice Frankfurter famously articulated ‘the four essential
3 freedoms’ of a university – to determine for itself on academic grounds who may
4 teach, what may be taught, how it shall be taught, *and who may be admitted to*
5 *study.*” *Sweezy v. New Hampshire*, 354 U.S. 234, 263; 77 S. Ct. 1203, 1218 (1957)
6 (Frankfurter, J., concurring) (emphasis added); *see also Regents of Univ. of Mich. v.*
7 *Ewing*, 474 U.S. 214, 226 n.12; 106 S. Ct. 507, 514 (1985) (“Academic freedom
8 thrives . . . on autonomous decision-making by the academy itself. Discretion to
9 determine, on academic grounds, who may be admitted to study has been described
10 as one of the four essential freedoms of a University.”). This constitutionally-based
11 academic autonomy, in combination with recognition of the superior expertise of
12 professional educators, has led courts to warn against second-guessing a
13 university’s academic judgments. *See, e.g., Univ. of Pa. v. EEOC*, 493 U.S. 182,
14 199; 110 S. Ct. 577, 587 (1990).

15 Enforcing academic standards necessarily requires that universities evaluate
16 and approve or disapprove the means, content, and viewpoints of academic
17 expression. *See Ark. Educ. Television Comm’n v. Forbes*, 523 U.S. 666, 673-74;
18 118 S. Ct. 1633, 1639-40 (1998) (“[A] public school prescribing its curriculum . . .
19 will facilitate the expression of some viewpoints instead of others.”). Teachers
20 grading academic work routinely “reward” or “punish” students based on the
21 teacher’s evaluation of the soundness of the ideas they have expressed. *Settle v.*
22 *Dickson County Sch. Bd.*, 53 F.3d 152, 155 (6th Cir. 1995) (“[T]eachers, like
23 judges, must daily decide which arguments are relevant, which computations are
24 correct, which analogies are good or bad, and when its time to stop writing or
25 talking.”). The same is true for admission officers making decisions on the basis of
26 student essays or standardized test scores (which reflect the student’s “view” of the
27 correct answers on the test). *Cf. Nat’l Endowment for the Arts v. Finley*, 524 U.S.
28 569, 586; 118 S. Ct. 2168, 2178 (1998) (“The NEA’s mandate is to make esthetic

1 judgments, and the inherently content-based ‘excellence’ threshold for NEA
2 support sets it apart from the subsidy at issue in *Rosenberger* -- which was available
3 to all student organizations that were ‘related to the educational purpose of the
4 University,’ and from comparably objective decisions on allocating public benefits,
5 such as access to a school auditorium or a municipal theater.”), *quoting*
6 *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 835; 115 S.Ct.
7 2510, 2514 (1995).

8 Because viewpoint and content-based distinctions are part and parcel of the
9 application of academic standards, courts have uniformly held that public schools
10 do not violate the First Amendment merely because they evaluate and accept or
11 reject the academic merit of speech. *Hazelwood School Dist. v. Kuhlmeier*, 484
12 U.S. 260, 273; 108 S. Ct. 562, 570 (1988), held that “educators do not offend the
13 First Amendment by exercising editorial control over the style and content of
14 student speech in school sponsored expressive activities.” In *Brown v. Li*, 308 F.3d
15 939 (9th Cir. 2002), the Ninth Circuit rejected a claim that faculty could not control
16 the content and viewpoints expressed in a thesis acknowledgement section.
17 “[C]onsistent with the First Amendment—a teacher may require a student to write a
18 paper from a particular viewpoint, even if it is a viewpoint with which the student
19 disagrees, so long as the requirement serves a legitimate pedagogical purpose.”
20 *Id.* at 953 (Opinion of Graber, J.); *see also Settle*, 53 F.3d at 155-56 (“So long as
21 the teacher violates no positive law or school policy, the teacher has broad authority
22 to base her grades for students on her view of the merits of the students’ work. . . .
23 So long as the teacher limits speech or grades speech in the classroom in the name
24 of learning and not as a pretext for punishing the student for her race, gender,
25 economic class, religion or political persuasion, the federal courts should not
26 interfere.”); *Fleming v. Jefferson County Sch. Dist. R-1*, 298 F.3d 918, 926 (10th
27 Cir. 2002) (“[W]e conclude that *Hazelwood* allows educators to make viewpoint-
28 based decisions about school-sponsored speech.”); *Axson-Flynn v. Johnson*, 356

1 F.3d 1277, 1291 (10th Cir. 2004) (same).⁹

2 Educators' regulation of the content and viewpoints of academic speech need
3 only be "reasonably related to legitimate pedagogical concerns." *Brown*, 308 F.3d
4 at 949, *quoting Hazelwood*, 484 U.S. at 273. "The school's methodology may not
5 be necessary to the achievement of its goals and may not even be the most effective
6 means of teaching, but it can still be 'reasonably related' to pedagogical concerns."
7 *Axon-Flynn*, 356 F.3d at 1292. Courts may not override educators' judgment on
8 these matters "unless it is such a substantial departure from accepted academic
9 norms as to demonstrate that the person or committee responsible did not actually
10 exercise professional judgment." *Ewing*, 474 U.S. at 225.

11 To the extent the University "regulates" the content of speech by reviewing
12 high school course content and deciding which courses it will and will not credit for
13 its own admissions purposes, the University's actions fall well within its
14 constitutional authority. The University's admissions policies articulate a number
15 of "legitimate pedagogical concerns" in a core area of University autonomy—
16 selection of its student body. These goals are not limited to ensuring that students
17 are able to attain high grades in their University studies; they also include making
18 sure that students "[h]ave attained a body of knowledge that will provide breadth
19 and perspective to new, more advanced studies" and "[h]ave attained essential
20 critical thinking and study skills."¹⁰ The means by which the University seeks to
21 achieve those goals—requiring that students take a minimum prescribed
22 preparatory curriculum and reviewing high school courses to determine whether
23 they meet the University's curricular standards—is "reasonably related" to its

24 _____
25 ⁹ Of course, as *Settle* notes, the University's discretion to evaluate the content of academic speech
26 in no way authorizes it to discriminate unlawfully based on the *status* or *characteristics* of the
27 speaker, including his or her religion. To the extent that Plaintiffs here allege that the University
28 has done so, those allegations relate to Plaintiffs' equal protection claim, not their First
Amendment speech claim. Defendants expect to prove that Plaintiffs' equal protection claim is
meritless, but Defendants are not moving to dismiss it at this time.

¹⁰ <http://pathstat1.ucop.edu/ag/a-g/purpose.html> (Morales Decl., Exh. H).

1 objectives. That “regulation” impinges far less directly on speech than the outright
2 punishment or reward of student curricular speech that has routinely been upheld.
3 The University’s policies are therefore not unconstitutional.

4 **2. Plaintiffs have failed to allege any burden on their practice of**
5 **religion sufficient to support a free exercise claim.**

6 Plaintiffs’ reframing their claim as a free exercise claim rather than a speech
7 claim in their third “Cause of Action” does not make the claim any more viable.
8 *See Watchtower Bible and Tract Soc’y of New York, Inc. v. Village of Stratton*, 536
9 U.S. 150, 171; 122 S. Ct. 2080, 2092 (2002) (Scalia, J., concurring in the judgment)
10 (if an otherwise valid regulation on speech would, for religious reasons, stop some
11 people from speaking, those individuals’ religious objections would not invalidate
12 the restriction).

13 As the Supreme Court has explained, “[t]he free exercise inquiry asks [first]
14 whether government has placed a substantial burden on the observation of a central
15 religious belief or practice.” *Hernandez v. C.I.R.*, 490 U.S. 680, 699; 109 S. Ct.
16 2136, 2148 (1989); *see also Jimmy Swaggart Ministries v. Bd. of Equalization of*
17 *Cal.*, 493 U.S. 378, 391; 110 S. Ct. 688, 697 (1990) (rejecting a free exercise
18 challenge to a tax “because appellant’s religious beliefs do not forbid payment of
19 the . . . tax”). Plaintiffs have not alleged and cannot allege that their religious
20 beliefs require them to teach or take only classes that do not satisfy the a-g
21 requirements, that their religious beliefs prohibit them from teaching or taking
22 classes that do satisfy the a-g requirements, or that their religious beliefs prohibit
23 them from taking the SAT Subject Tests that the University of California accepts as
24 satisfying the a-g requirements. *See* Compl. ¶ 35 (“Plaintiffs support, and do not
25 object to, understanding the major strands of scientific thought, methods, facts,
26 hypotheses, theories, and laws.”). Even if satisfying the a-g requirements were an
27 absolute condition for admission to the University (which it is not), Plaintiffs’
28 allegations therefore would not suggest that Defendants had required anything

1 “proscribed by a religious faith,” or forbidden anything “mandated by religious
2 belief,” as is required to violate the Free Exercise Clause. *Hobbie v. Unemployment*
3 *Appeals Comm’n of Fla.*, 480 U.S. 136, 141; 107 S. Ct. 1046, 1049 (1987) (internal
4 quotation omitted); *see also Graham v. C.I.R.*, 822 F.2d 844, 850-51 (9th Cir.
5 1987), *aff’d by Hernandez v. C.I.R.*, 490 U.S. 680 (1989) (“To show a free exercise
6 violation, the religious adherent . . . has the obligation to prove that a governmental
7 regulatory mechanism . . . pressur[es] him or her to commit an act forbidden by the
8 religion or . . . prevent[s] him or her from engaging in conduct . . . which the faith
9 mandates.”); *Menora v. Ill. High Sch. Ass’n*, 683 F.2d 1030, 1033-35 (7th Cir.
10 1982) (holding that it was not an unconstitutional burden on Orthodox Jewish
11 students to require them to refrain from wearing their traditional “yarmulkes
12 insecurely fastened by bobby pins” and instead to design other head coverings that
13 comply with interscholastic athletic safety regulations if the students could do so
14 without violating Jewish law).

15 Even if Plaintiffs need to teach or take extra classes or exams in order to
16 satisfy both the a-g requirements and their desire for non-a-g classes, this is not
17 enough of a burden to constitute a free exercise violation. The Free Exercise
18 Clause does not prohibit the government from doing things that “make the practice
19 of . . . religious beliefs more expensive.” *Braunfeld v. Brown*, 366 U.S. 599, 605-
20 06; 81 S. Ct. 1144, 1147 (1961) (rejecting a free exercise challenge to Sunday
21 closing laws that forced Orthodox Jews to choose between “retaining their present
22 occupations and incurring economic disadvantage or engaging in some other
23 commercial activity which does not call for either Saturday or Sunday labor” even
24 though that could “result in some financial sacrifice in order to observe their
25 religious beliefs”); *see also Windsor Park Baptist Church, Inc. v. Ark. Activities*
26 *Ass’n*, 658 F.2d 618, 622 (8th Cir. 1981) (suggesting that being unable to
27 participate in interscholastic activities such as basketball is not enough of a burden
28 to trigger free exercise concerns, at least where it is not “claimed that

1 basketball . . . or any other interscholastic activity is an integral part of plaintiff's
2 religion"). To constitute a free exercise violation, a governmental "interference
3 must be more than an inconvenience; the burden must be substantial and an
4 interference with a tenet or belief that is central to religious doctrine." *U.S. v.*
5 *Turnbull*, 888 F.2d 636, 638-39 (9th Cir. 1989).

6 Plaintiffs do not allege that needing to teach or take extra classes or exams
7 substantially interferes with a tenet or belief that is central to their religious
8 doctrine. In *Hubbard v. Buffalo Indep. Sch. Dist.*, 20 F. Supp. 2d 1012 (W.D. Tex.
9 1998), the court considered a free exercise challenge by a previously home-
10 schooled student against a public school district's policy of requiring students
11 transferring from non-accredited schools or home schools to pass proficiency
12 exams at their own expense in order to receive credit toward graduation for the
13 courses they had previously taken. The court held that there was no free exercise
14 objection to a requirement that calls for extra studying and testing. The court
15 emphasized that "[b]y Plaintiffs' own admission they have no religious objections
16 to the school district's testing policy." *Id.* at 1015. Although "[t]he Court agree[d]
17 with Plaintiffs that taking the tests would necessitate some study and sacrifice on
18 [the student's] part," it held that "making time to study . . . is not the same as a
19 genuine free exercise claim." *Id.* Similarly here, students may take SAT Subject
20 Tests to satisfy any a-g requirement to which they object.

21 **3. The First Amendment freedom of association claim fails because**
22 **Plaintiffs have not alleged any burden on their ability to choose**
23 **their associates.**

24 The Supreme Court has explained that the Constitution protects freedom of
25 association in "two distinct senses." *Bd. of Dirs. of Rotary Intern. v. Rotary Club of*
26 *Duarte*, 481 U.S. 537, 544; 107 S. Ct. 1940, 1945 (1987). "First . . . the
27 Constitution protects against unjustified government interference with an
28 individual's choice to enter into and maintain certain intimate or private
relationships." *Id.* "Second," it protects "the freedom of individuals to associate

1 for the purpose of engaging in protected speech or religious activities.” *Id.*

2 Neither of these protections is implicated here. The Complaint contains no
3 mention of intimate or private relationships or any allegation of restrictions on
4 Plaintiffs’ ability to associate with whomever they choose. The a-g requirements
5 ask only that students take a minimum number of classes with sufficiently rigorous
6 content across a range of subjects, or that they take SAT Subject Tests instead.
7 There is no allegation, nor could there be, that, in implementing the a-g
8 requirements, Defendants have based course evaluations on who will be teaching or
9 taking the course, or that Defendants have penalized any applicants for their choice
10 of associates. This case is thus in stark contrast to those in which the Supreme
11 Court has found that the right to associate for the purpose of engaging in protected
12 speech or religious activities has been violated. *See, e.g., Elfbrandt v. Russell*, 384
13 U.S. 11, 16; 86 S. Ct. 1238, 1240-41 (1966) (invalidating a law subjecting any
14 public employee who became a member of the Communist Party after the employee
15 had taken an oath to uphold the Constitution to immediate discharge and criminal
16 penalties); *Nat’l Ass’n for Advancement of Colored People v. State of Ala. ex rel.*
17 *Patterson*, 357 U.S. 449, 462; 78 S. Ct. 1163, 1171-72 (1958) (holding that it would
18 violate the freedom of association for the State to require the NAACP to reveal its
19 membership lists). The freedom of association claim in the third “Cause of Action”
20 should therefore be dismissed.

21 **4. The Fourteenth Amendment procedural due process claim fails**
22 **because Plaintiffs have not identified any liberty or property**
23 **interest that is entitled to due process protection.**

24 The fourth “Cause of Action” in the Complaint focuses on allegations that
25 Defendants have exceeded their authority under state law. As discussed below, *see*
26 Part III.C, all such state law claims are subject to dismissal under *Pennhurst State*
27 *School & Hospital v. Halderman*, 465 U.S. 89; 104 S. Ct. 900 (1984). To the
28 extent Plaintiffs also attempt to state a federal procedural due process claim, that
claim fails as a matter of law because Plaintiffs have not identified any liberty or

1 property right of which they have been deprived.¹¹ See *Am. Mfrs. Mut. Ins. Co. v.*
2 *Sullivan*, 526 U.S. 40, 59; 119 S. Ct. 977, 989 (1999) (“The first inquiry in every
3 due process challenge is whether the plaintiff has been deprived of a *protected*
4 interest in ‘property’ or ‘liberty.’”) (emphasis added); *Paul v. Davis*, 424 U.S. 693,
5 711; 96 S. Ct. 1155, 1165 (1976) (explaining that procedural due process
6 protections are triggered when “a right or status previously recognized by state law
7 [is] distinctly altered or extinguished” by state action).

8 Plaintiffs’ allegations fail to meet this standard for two reasons. First,
9 Plaintiffs have not alleged that anything they previously possessed has been taken
10 away or otherwise altered or extinguished. Second, Plaintiffs have no legal
11 entitlement, under state or federal law, to have any particular classes designated as
12 meeting the a-g requirements, and they do not have any legal entitlement to attend
13 the University other than in compliance with its admissions criteria. In any event,
14 the student Plaintiffs have not alleged that they are unable to attend the University,
15 both because they have not alleged that their schools cannot offer and they cannot
16 take courses that satisfy the a-g requirements and because, as detailed above, there
17 are alternative paths to admission.

18 **5. The a-g requirements are not an unconstitutional condition.**

19 Any attempt to characterize the University’s admissions criteria as an
20 “unconstitutional condition” would likewise fail. The “unconstitutional
21 conditions’ doctrine holds that the government may not deny a benefit to a person
22 on a basis that infringes [a] constitutionally protected” right. *Bd. of County*
23 *Comm’rs, Wabaunsee County v. Umbehr*, 518 U.S. 668, 674; 116 S. Ct. 2342, 2347
24 (1996). As detailed above, however, the University’s admissions criteria do not
25 infringe on any constitutionally protected rights. See *Ohio Adult Parole Auth. v.*
26 *Woodard*, 523 U.S. 272, 286; 118 S. Ct. 1244, 1252 (1998) (“finding it

27
28 ¹¹ Plaintiffs do not make a substantive due process claim.

1 “unnecessary to address” an “unconstitutional conditions” argument where Court
2 found that the condition in question would not be unconstitutional even if it were
3 mandatory); *Vance v. Barrett*, 345 F.3d 1083, 1088 (9th Cir. 2003) (“As a
4 prerequisite to discerning . . . an unconstitutional condition . . . we must first
5 examine the validity of the underlying alleged constitutional rights.”). The
6 University’s admission criteria do not prohibit schools or students from doing
7 anything that they have a constitutional right to do – schools may offer and
8 applicants may take any classes they choose in addition to the a-g requirements.
9 Nor do the criteria require schools or students to do anything that they have a
10 constitutional right not to do – schools are not required to offer and applicants are
11 not required to take any specific class to which they object. As already noted, there
12 are paths to admission that do not require taking a-g certified courses. Regardless,
13 Plaintiffs have not alleged that their religious beliefs prohibit them from teaching or
14 taking classes that satisfy the a-g requirements or from taking the SAT Subject
15 Tests instead.

16 Even if the University’s admission criteria did burden a constitutionally
17 protected right, they would implicate the unconstitutional conditions doctrine only
18 if the criteria were not sufficiently related to the benefit of a University of
19 California education. *See Dolan v. City of Tigard*, 512 U.S. 374, 385, 114 S. Ct.
20 2309, 2317 (1994) (“Under the . . . doctrine of ‘unconstitutional conditions,’ the
21 government may not require a person to give up a constitutional right . . . in
22 exchange for a discretionary benefit conferred by the government *where the benefit*
23 *sought has little or no relationship to the [right].*”) (emphasis added). Here, there
24 is an immediate, necessary connection between a University education and the
25 requirement that students demonstrate that they are adequately prepared to take
26 advantage of it.

27 Applicants of course must meet some set of eligibility requirements if they
28 wish to attend the University, and those requirements all arguably involve some

1 form of speech. But the unconstitutional conditions doctrine does not give students
2 a constitutional right to be admitted to the University of California without
3 satisfying speech-related admissions requirements. If it did, the University would
4 not even be able require applicants to write an essay on a specified subject, because
5 doing so would amount to forcing applicants to speak in violation of the First
6 Amendment, or because reviewing the quality of the essay would amount to content
7 or viewpoint discrimination.

8 **B. Various defendants are not subject to suit.**

9 Plaintiffs bring this action under 42 U.S.C. § 1983, which creates a right of
10 action against “[e]very person” who, under color of state law, violates the federal
11 rights of a party. Compl. at 2, ln. 13. As the Supreme Court held in *Will v.*
12 *Michigan Department of State Police*, 491 U.S. 58, 64; 109 S. Ct. 2304, 2308
13 (1989), state entities are not “persons” subject to suit under § 1983. It is firmly
14 settled that the Regents¹² is an arm of the State of California and is therefore not
15 subject to suit under § 1983. *See e.g., Armstrong v. Meyers*, 964 F.2d 948, 949-50
16 (9th Cir. 1992) (The Regents “is an arm of the state for Eleventh Amendment
17 purposes, and therefore is not a ‘person’ within the meaning of” 42 U.S.C. § 1983).
18 Thus, the claims against the Regents (and its operating units BOARS and UCOP)
19 must be dismissed.

20 The Complaint does not state any basis for jurisdiction over Plaintiffs’ state
21 law claims. *See* Compl. at 2, lns. 11-13 (“This Court has jurisdiction of this action

22 _____
23 ¹² The Regents was also erroneously sued as “Board of Admissions and Relations with Schools”
24 (“BOARS”) and the “University of California Office of the President” (“UCOP”), both of which
25 are merely operating units of the Regents. The Ninth Circuit has explained that “[u]nder Rule
26 17(b) of the Federal Rules of Civil Procedure, [a governmental entity’s] capacity to be sued in
27 federal court is to be determined by the law of [the State].” *Streit v. County of Los Angeles*, 236
28 F.3d 552, 565 (9th Cir. 2001). Under § 945 of the California Government Code, only “[a] public
entity may sue or be sued.” *Id.* “Section 811.2 of the Government Code defines a ‘public entity
to include ‘the State, the Regents of the University of California, a county, city, district, public
authority, public agency, and any other political subdivision or political corporation in the State.’”
Id. Pursuant to Article IX, section 9 of the California Constitution, the Regents is the entity
authorized to “sue and be sued” on behalf of the University of California. *See* CAL. CONST. ART.
IX, § 9(f). BOARS and UCOP are divisions of the Regents, not separate entities subject to suit.

1 pursuant to 28 U.S.C. § 1331.”). Moreover, because the Regents is an arm of the
2 state, it has sovereign immunity against all claims brought by individuals in federal
3 court. *Jackson v. Hayakawa*, 682 F.2d 1344, 1350 (9th Cir. 1982) (“[T]he Board of
4 Regents [is] considered to be [an] instrumentalit[y] of the state for purposes of the
5 Eleventh Amendment.”); *Edelman v. Jordan*, 415 U.S. 651, 662-63; 94 S. Ct. 1347,
6 1355 (1974) (“[T]his Court has consistently held that an unconsenting State is
7 immune from suits brought in federal courts by her own citizens as well as by
8 citizens of another State.”). The state law claims against the Regents (including its
9 operating units BOARS and UCOP) therefore must be dismissed.

10 **C. No federal jurisdiction exists for state law claims against state officials.**

11 Again, the Plaintiffs have not stated a basis for federal jurisdiction over their
12 state law claims. Even if they had, the state law claims – under the California
13 Constitution (first through sixth “Causes of Action”) and under the Unruh Civil
14 Rights Act (fifth “Cause of Action”) – would be subject to dismissal against the
15 remaining defendants under *Pennhurst*, 465 U.S. at 106, which held that the
16 Eleventh Amendment prohibits federal courts from granting injunctive relief
17 against state officials for violations of state law. *See id.* (“[I]t is difficult to think of
18 a greater intrusion on state sovereignty than when a federal court instructs state
19 officials on how to conform their conduct to state law. Such a result conflicts
20 directly with the principles of federalism that underlie the Eleventh Amendment.”).
21 The Ninth Circuit has specifically held that *Pennhurst* prohibits federal courts from
22 deciding state law claims for injunctive or declaratory relief against state officials –
23 the two forms of relief Plaintiffs seek here. *See Air Transp. Ass’n of Am. v. Pub.*
24 *Utils. Comm’n of State of Cal.*, 833 F.2d 200, 203-04 (9th Cir. 1987) (dismissing
25 claims for injunctive and declaratory relief on the ground that, under *Pennhurst*,
26 “[t]he eleventh amendment . . . bars claims in federal court against state officials
27 based on state law violations”); *Han v. United States Dep’t. of Justice*, 45 F.3d 333,
28 339 (9th Cir. 1995) (“We are barred by the Eleventh Amendment from deciding

1 claims against state officials based solely on state law.”) (citing *Pennhurst*); see
2 also *Leventhal v. Vista Unified Sch. Dist.*, 973 F. Supp. 951, 956 (S.D. Cal. 1997)
3 (“In *Pennhurst*, the Supreme Court held that the Eleventh Amendment bars federal
4 courts from granting injunctive relief against state officials for violations of state
5 law. The Court thus lacks jurisdiction to hear Plaintiffs’ pendent state law claims
6 for declaratory and injunctive relief.”) (internal citations omitted).

7 **D. The Complaint’s “individual capacity” claims fail.**

8 Because Plaintiffs seek only declaratory and injunctive relief, the claims
9 against certain Defendants in their “individual capacity” should be dismissed. See
10 *Wolfe v. Strankman*, 392 F.3d 358, 360 n.2 (9th Cir. 2004) (“The individual
11 defendants were also sued in their personal capacities, but the declaratory and
12 injunctive relief [the plaintiff] seeks is only available in an official capacity suit.”).
13 The Supreme Court has made clear that where, as here, claims are targeted at the
14 actions of a state entity, suit should be brought against officers of that entity in the
15 officers’ official capacity. *Kentucky v. Graham*, 473 U.S. 159, 165-66; 105 S. Ct.
16 3099, 3104-05 (1985). Then, if any of the specific named defendants ceases to hold
17 the same job, the new occupant of that office will automatically be substituted as a
18 defendant so that the suit and/or any injunction obtained will continue to be
19 effective against the holder of the office in question. See *id.* at 166 n.11; Fed. R.
20 Civ. P. 25(d)(1). In contrast, personal-capacity, or individual-capacity, suits against
21 government officials are appropriate only where plaintiffs seek damages to be paid
22 out of the official’s personal assets or action by the individual personally, rather
23 than as a government official. The Supreme Court explained in *Kentucky v.*
24 *Graham*:

25 Personal-capacity suits seek to impose personal liability upon a
26 government official for actions he takes under color of state law.

27 Official-capacity suits, in contrast, generally represent only another
28 way of pleading an action against an entity of which an officer is an

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agent. . . [A]n official-capacity suit is, in all respects other than name, to be treated as a suit against the entity. . . Thus, while an award of damages against an official in his personal capacity can be executed only against the official's personal assets, a plaintiff seeking to recover on a damages judgment in an official-capacity suit must look to the government entity itself.

473 U.S. at 165-66 (internal citations omitted); *see also American Civil Liberties Union of Mississippi, Inc. v. Finch*, 638 F.2d 1336, 1338 (5th Cir. 1981) (concluding that claims for declaratory and injunctive relief must be against the defendant officials in their official capacity and that claims for damages must be against the defendants in their individual capacities).

E. The claims against Dennis J. Galligani should be dismissed.


Dennis J. Galligani has retired from the position of Associate Vice President for Student Academic Services. *See* Stipulation, Appendix 1 to the Request for Judicial Notice, filed concurrently herewith. Prospective relief against him therefore would be meaningless. Because Plaintiffs seek only prospective injunctive and declaratory relief, Mr. Galligani should be dismissed as a defendant.

IV. CONCLUSION

For the foregoing reasons, the Court should grant this motion to dismiss.

DATED: October 28, 2005

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