APPENDIX OF UNPUBLISHED OPINIONS

Pisacane v. Desjardins
C.A.1 (Mass.),2004.

United States Court of Appeals,First Circuit.
Vincent PISACANE, Individually and as a parent and next friend of Catherine Pisacane, James Carlo Pisacane, Cordelia Rose Pisacane, and Eve Isabella Pisacane, Plaintiff, Appellant,
andKate Pisacane, Plaintiff,
v.
Margot DESJARDINS, Individually and as she is Superintendent of Schools for the Town of Westport; Joan Tripp, Individually and as she is a member of the school committee of the Town of Westport; Town of Westport, Defendants, Appellees,
Kevin P. Feeley, An attorney for the Town of Westport; Murphy, Hesse, Toomey & Lehane, LLP., as attorneys for the Town of Westport, Defendants.
No. 02-1694.

Oct. 18, 2004.

*447 Appeal from the United States District Court for the District of Massachusetts Mark L. Wolf, U.S. District Judge.

Thomas P. Collins with whom Robert D. Loventhal was on brief for appellant.
William P. Breen with whom Murphy, Hesse, Toomey & Lehane, LLP was on brief for appellees.

Before LYNCH, Circuit Judge, CAMPBELL, Senior Circuit Judge, and LIPEZ, Circuit Judge.
*448 CAMPBELL, Senior Circuit Judge.
**1 This is an appeal from the district court's entry of summary judgment in favor of appellees, Margot Desjardins (individually and as superintendent of schools for the Town of Westport ("Town")) and Joan Tripp (individually and as member of the school committee of the Town) and against appellant, Vincent Pisacane. We dismiss the appeal for lack of jurisdiction.

I

Pisacane died on December 16, 2002, after the notice of appeal was filed but before appellate briefs were due. Under Federal Rule of Appellate Procedure 43(a)(1), if a party dies while an appeal is pending, the deceased party's personal representative may file a motion to substitute. "If the decedent has no representative, any party may suggest the death on the record, and the court of appeals may then direct appropriate proceedings." Fed. R.App. P. 43(a)(1). While Fed. R.App. P. 43(a) does not expressly provide for the dismissal of an appeal where no motion to substitute has been filed, courts have construed the rule as conferring upon courts such a power. *See, e.g., Ortiz v. Dodge,* 126 F.3d 545, 550-51 (3d Cir.1997) ("[I]t is quite clear that, at some point, the failure to substitute a proper party for a deceased appellant moots the case."); *Crowder v. Housing Auth. of the City of Atlanta,* 908 F.2d 843, 846 n. 1 (11th Cir.1990) (construing Rule 43 as conferring "an implied power to dismiss" an appeal where no request for substitution is made); *Gamble v. Thomas,* 655 F.2d 568, 569 (5th Cir.1981) (same).

Shortly after Pisacane's death, this court was advised by Pisacane's counsel that efforts were being made to obtain a personal representative and that Pisacane's surviving second wife, Kathleen, had been designated executrix in Pisacane's will. After granting extensions of time within which to file Pisacane's appellate brief (extensions requested on the ground that counsel could only then receive instructions as to how to proceed), this court indicated, on June 26, 2003, that any further extension would require an explanation of what steps had been taken with respect to obtaining an administrator, the reason for the delay, and when an administrator was likely to be appointed. Pisacane's counsel then filed a brief nominally on behalf of Pisacane without providing any further information as to the status of the appointment of a personal representative. This court thereupon heard the appeal, without objection from appellees, on the tacit assumption that Pisacane's counsel would have secured authority to proceed with this appeal from those legally entitled to represent the decedent.

On September 29, 2004, having heard nothing further on the subject of a personal representative and prior

to issuing our opinion in this appeal, this court ordered Pisacane's counsel to move to substitute a personal representative. We cautioned counsel that failure to substitute within the time specified, seven days, would result in dismissal of the appeal. The court was under the impression that by the time of its order, such a representative would have been identified and appointed. Counsel, however, responded to our order by requesting an extension of time until December and sending us copies of papers indicating that little, if anything, had been done until receipt of the order to secure the appointment of a personal representative.

**2 [1] A court doubtless has leeway in a case such as this to allow counsel a reasonable amount of time to complete the formalities necessary to have appointed a personal representative. On the present facts, however, we can see no justification *449 to allow Pisacane's counsel's request for more time. First, this court was generous in past allowances of time for this purpose, and the more than a year since the filing of appellant's brief has provided considerable additional time. Yet little or nothing has been done. Second, for reasons set forth in the balance of this opinion, *infra,* Pisacane's appeal is without merit. No practical purpose would be served by encouraging and awaiting the late appointment of a personal representative in order to dispel mootness *nunc pro tunc,* only to issue our opinion dismissing the appeal on the merits. No person interested in Pisacane's estate will be prejudiced by dismissal of the appeal now.

Accordingly, we have separately denied counsel's motion for more time to seek the appointment of a personal representative and to substitute same herein. Without such substitution, the appeal lacks an essential party and is moot. Accordingly, we dismiss it for lack of jurisdiction.

II

In this section we review the merits of the appeal but solely for the limited purpose of demonstrating that dismissal at this time, without affording further opportunity to appoint a personal representative, cannot prejudice any of decedent Pisacane's successors in interest.

Pisacane, individually and as a parent and next friend of his children, Catherine, James, Cordelia, and Eve, filed a complaint in the district court alleging, *inter alia,* that appellees had violated 42 U.S.C. § 1983 by denying Pisacane his rights to substantive due process under the Fifth and Fourteenth Amendments and to free speech under the First Amendment.[FN1] The district court awarded summary judgment in favor of appellees.[FN2]

> FN1. Pisacane filed the complaint jointly with his wife, Kate, whose claims were later dismissed after settlement, and his minor children, whose claims were also dismissed. Accordingly, Pisacane was the only remaining plaintiff when summary judgment was granted, and we therefore consider only his claims.
>
> FN2. Pisacane also raised state law claims. The district court, after granting summary judgment in favor of appellees on all federal law claims, declined to retain jurisdiction over Pisacane's state law claims and dismissed them without prejudice. Pisacane does not dispute that if we affirm the entry of summary judgment on the federal law claims, then we should affirm the dismissal of his state law claims. *See*28 U.S.C. § 1367(c). *See also United Mine Workers of Am. v. Gibbs,* 383 U.S. 715, 726, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966).

We review de novo the entry of summary judgment, considering the facts in the light most favorable to the party opposing summary judgment. *Aponte Matos v. Toledo Davila,* 135 F.3d 182, 185 (1st Cir.1998). Pisacane based his substantive due process claims primarily on the following alleged incidents: (1) in retaliation for Pisacane's complaints concerning a science textbook, his daughter, Catherine, was denied entry into a journalism class being taught at her school; (2) after Kate threatened to file a formal complaint, Desjardins, as superintendent of schools for the Town, stated that she could not guarantee Catherine's safety if such a complaint was filed; (3) after filing a request for school records relative to his children, Pisacane was told that the response to the request could be picked up at Desjardins' office, and, shortly after he and Kate arrived at the office, a police officer escorted them out of the building based on Desjardins' misrepresentation that they had been disruptive; (4) Pisacane and Kate went to Desjardins' office to get school records and were informed by Desjardins that they had been banned from the

building; and (5) at a school committee hearing, Pisacane's wife, *450 Kate, was recognized by Tripp to speak, but, soon after Kate began to speak, Tripp, based on the content of Kate's speech, ruled that Kate was out of order and had a police officer remove her from the meeting.

**3 We turn first to Pisacane's substantive due process claim. As Pisacane does not contend the appellees' conduct "shocks the conscience," he must demonstrate, in respect to himself, "a deprivation of an identified liberty or property interest protected by the Fourteenth Amendment." *Brown v. Hot, Sexy, & Safer Prod., Inc.*, 68 F.3d 525, 531 (1st Cir.1995) (citations omitted). Like the district court, we find no such deprivation.

[2] Pisacane argues that the appellees' conduct violated his identified liberty interest "to direct the upbringing and education of children under [his] control." *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534-35, 45 S.Ct. 571, 69 L.Ed. 1070 (1925). "Numerous cases, however, have made it clear that this constitutional right is limited in scope." *Swanson v. Guthrie Indep. Sch. Dist. No. 1-L*, 135 F.3d 694, 699 (10th Cir.1998). In *Brown*, we ruled that this right embraces the principle that the state cannot prevent parents from choosing for their child a specific educational program but did not include the right to dictate the curriculum at the public school to which parents have chosen to send their children. 68 F.3d at 533-34.

Here, the asserted facts do not show that appellees interfered with Pisacane's choice to enroll his children at a particular institution or in educational programs otherwise open to them. The Town, indeed, allowed Pisacane to remove Catherine from the Town's public schools for home teaching upon certain conditions. We add that nothing in the Town's conduct and its conditions relative to homeschooling, insofar as now open to review on appeal, raises issues of constitutional dimension.[FN3] *See Care & Protection of Charles*, 399 Mass. 324, 504 N.E.2d 592, 600-02 (1987) (interpreting state and federal constitutional law and holding that school committee may properly consider length of home school year, require certain hours of instruction, may examine competency of parents to teach children, may have access to textbooks, lesson plans, and instructional aids, and may require periodic standardized testing).

FN3. During the summary judgment hearing, Pisacane contended that Desjardins imposed unreasonable restrictions on his and his wife's attempt to homeschool, such as requiring standardized testing and "failing to effectively monitor the progress of the children's education." These arguments were not, however, raised in his appellate brief and are therefore waived. *Pratt v. United States*, 129 F.3d 54, 62 (1st Cir.1997) ("It is firmly settled in this circuit that arguments not advanced and developed in an appellant's brief are deemed waived.").

The appellees' asserted refusal to let Pisacane dictate to the school about the science textbook, and their alleged retaliatory denial to Catherine of a position in a journalism class, would not violate the parental due process right. As said, the right does not include parental control over a public school's curriculum and class assignments. *Brown*, 68 F.3d at 533-34. As to Desjardins' purported statement that she could not guarantee Catherine's safety if a complaint were filed over denial of entry to the journalism class, and assuming dubitante any constitutional claim is asserted, it is undisputed that Pisacane did, in fact, file such a complaint that same day; hence he was undeterred by any threat made. Desjardins' alleged statement cannot, therefore, be said to have interfered materially with Pisacane's parental rights.

*451 [3] As to the cited incidents allegedly denying Pisacane access to the records of his children, Pisacane points to no precedent holding that disputes over the timing and manner of release of children's school records give rise to invocation of a federal constitutional right of parents to control their children's education. Even supposing, without deciding, that a public school's unconditional refusal to show a student's records to parents might, in appropriate circumstances, pose an issue under the federal constitution, the school did not engage in such an unconditional refusal here. Kate was, on one occasion at least, given access to the requested records, and records were sent to the Pisacane home shortly after the Pisacanes were allegedly banned from the building.

**4 Under a similar rationale, Tripp's refusal to allow Pisacane's wife to speak publicly at the school committee hearing did not reach the level of a violation of Pisacane's substantive due process right, as a parent, to direct his children's education. Pisacane's brief contends that Tripp suppressed Kate's

speech because it concerned the prevention of the Pisacanes from obtaining school records. So viewed, the incident was yet another piece of Pisacane's claim that he and his wife were unconstitutionally thwarted in regard to the obtaining of their children's records. Whether refusal to let Kate speak also violated his, as well as Kate's, free speech rights under the First Amendment is a separate issue, see below, but we see no viable federal substantive due process claim available to Pisacane based upon these facts.

[4] We turn next to Pisacane's claim that the suppression of his wife Kate's speech at the school committee hearing deprived him of his freedom of expression guaranteed by the First Amendment. The short answer to this contention is that Pisacane lacks standing to assert a First Amendment claim resting upon the alleged denial of his wife's free speech rights. " 'There are good and sufficient reasons for th[e] prudential limitation on standing when rights of third parties are implicated-the avoidance of the adjudication of rights which those not before the Court may not wish to assert, and the assurance that the most effective advocate of the rights at issue is present to champion them.' "*Elk Grove Unified Sch. Dist. v. Newdow,* 542U.S. 1, ---- n. 7, 124 S.Ct. 2301, 2311 n. 7, 159 L.Ed.2d 98 (2004) (quoting *Duke Power Co. v. Carolina Envtl. Study Group,* 438 U.S. 59, 80, 98 S.Ct. 2620, 57 L.Ed.2d 595 (1978)). Pisacane did not attend the meeting and he does not rest his claim on the contention that Kate was acting as his agent. Kate, in fact, has settled all her own claims, including presumably her First Amendment claim, with appellees.

III

Given the absence of any personal representative of the decedent, we dismiss this appeal for lack of jurisdiction. This dismissal is not prejudicial to those potentially interested in Pisacane's estate because, if we were to reach the merits, we would affirm the district court's entry of summary judgment in favor of appellees on Pisacane's federal law claims and affirm the district court's dismissal without prejudice of Pisacane's state law claims. *See*28 U.S.C. § 1367(c).

So Ordered.

C.A.1 (Mass.),2004.
Pisacane v. Desjardins
115 Fed.Appx. 446, 2004 WL 2339204 (C.A.1 (Mass.)), 194 Ed. Law Rep. 131

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Alabama and Coushatta Tribes of Texas v. Trustees of Big Sandy Independent School Dist.
E.D.Tex.,1993.

United States District Court,E.D. Texas,Lufkin Division.
ALABAMA AND COUSHATTA TRIBES OF TEXAS, a sovereign Indian Nation, et al., Plaintiffs,
v.
TRUSTEES OF the BIG SANDY INDEPENDENT SCHOOL DISTRICT, et al., Defendants.
No. 9:92 CV 170.

March 12, 1993.

***1323** Donald Juneau,Richard B. Sobol, New Orleans, LA, for plaintiffs.
Michael Ray Buchanan, Dallas, TX, Jerry L. Hatton, Beaumont, TX, for defendants.

MEMORANDUM OPINION

JUSTICE, District Judge.

Plaintiffs, Native American students and their tribe, have applied for a preliminary injunction in the above-styled civil action. A hearing on their application was held on January 4, 1993. Plaintiffs contend that the dress code promulgated and enforced by the Big Sandy Independent School District violates their constitutional right to the free exercise of religion, in conjunction with other First and Fourteenth Amendment rights. Because plaintiffs have stated a "hybrid claim," the dress code regulation will be subjected to the highest level of scrutiny.

The findings of fact and conclusions of law relating to this action are set forth in this memorandum opinion. Unless specified to the contrary, the individual witnesses' testimony was adopted in the findings of fact.

I. *Findings of Fact*

Plaintiffs, the Alabama and Coushatta Tribes of Texas ("Tribe") and twelve Native American students, through their parents and guardians, commenced this action for injunctive relief and monetary damages against the Trustees of the Big Sandy Independent School District ("Trustees"), individually and in their official capacities as Trustees, Thomas Foster, Superintendent of the Big Sandy Independent School District, individually and in his official capacity, and Robert Fountain, Principal of Big Sandy Independent School District, individually and in his official capacity. Plaintiffs allege that their constitutional rights to free exercise of religion and free speech under the First Amendment, and to due process and equal protection under the Fourteenth Amendment, have been violated by a school dress code. A temporary restraining order was issued against the defendants on October 15, 1992.

The Tribe is a sovereign nation recognized as one tribal unit by the United States. 25 U.S.C. §§ 731-737. Historically, the Tribe used, possessed, and occupied a portion of what is known as the Big Thicket in Polk County, Texas. The Alabama and Coushatta Reservation is now situated in Polk County, Texas.

The following persons are members of the Tribe, and are plaintiffs in this action: Gilman Abbey, through his parent and guardian, Arlene Abbey; Harris Thompson, Jr., through his parent and guardian, Harris Thompson, Sr.; Danny John, through his parent and guardian, Joe John; Joslynn and Ian Liscano, through their parent and guardian, Rowena Liscano; Lonnie Williams, through his parent and guardian, Laberta Williams; Maynard, Simeon, Emmanuel, and Seth Williams, through their parents and guardians, Waynne and Leonard Williams.

The Big Sandy Independent School District has enforced a dress code restricting the hair length of all male students for the past twenty-five years. The current version of the regulation provides as follows:
Boys' hair should be of reasonable length and style so as not [to] interfere with the instructional program. Boys' hair should [be] no longer than the top of a standard dress collar.

It does not appear that the hair code was enacted for any discriminatory purpose, but for the following reasons:
a. To create an atmosphere conducive to learning and to minimize disruptions attributable to personal appearance, conduct, grooming and hygiene, and

attire.
b. To foster an attitude of respect for authority, and to prepare students to enter *1324 the workplace, which often has rules regarding dress, conduct and appearance.
c. To ensure that the conduct and grooming of students who represent the District in extracurricular activities create a favorable impression for the District and the community.

Eighty-nine students at the Big Sandy Independent School District are members of the Tribe. The Native American male students who are named plaintiffs in this action wear their hair long, in violation of the school's dress code.

One of the plaintiffs, Gilman Abbey, age seventeen, a tenth grader, was told by Robert Fountain, Principal of Big Sandy, to cut his hair at the beginning of the school year. Abbey refused, and, on September 2, 1992, he was taken out of scheduled classes and placed in in-school detention. School officials also threatened to discipline Maynard, Simeon, Emmanuel, and Seth Williams on the first day of school for wearing their hair long. These students cut their hair after Fountain told them they could not return to school until they did.

On September 16, 1992, Ian Liscano, a seventh grade student, and Joslyn Liscano, a fifth grader, were placed in in-school detention for wearing their hair long. Danny John, an eleventh grader, and Harris Thompson, Jr., a tenth grade student, were placed in in-school detention on September 21, 1992, for having long hair. On September 29, 1992, Lonnie Williams, an eighth grade student, was placed in in-school detention for the same reason.

Although there were students other than Native American students placed in in-school detention, the only students who were disciplined for violation of the prohibition on long hair were Native Americans.

Foster testified that the school's general practice is to give a three day written notice before students are suspended. He assumed, but did not know for certain, that the practice was followed with regard to these students. Foster did not know whether students and parents are informed of their right to appeal in-school detention to the Board. There was no evidence that the plaintiffs' parents were given notice of the suspensions, or told of any avenues of appeal.

While in detention, a student receives his assignments, but is not given regular instruction by the teacher of the subject. A teacher's aide, Marilyn Langley, presides over the students in detention, and provides some assistance to the students. Langley has a college degree in business, but does not have a teaching certificate. Regular teachers schedule conference periods, during which time they are available to assist the suspended students upon the students' request.

The plaintiffs generally fell behind in their school work while they were suspended, in comparison to the students who attended regular classes. Danny John testified that he fell somewhat behind while he was suspended, but worked hard to keep up, and attended extra tutoring sessions after school during his suspension. He stated that Langley was only able to give him limited assistance, and that he needed access to the teachers for each of his regular classes. Langley testified that John was receptive to her assistance, and that he frequently requested conferences with his regular teachers so that he could keep up with the other students.

Gilman Abbey testified that, although he and the other Native American students were allowed to return to regular classes in October, because of the temporary restraining order issued by this court, he is still behind in his work, especially in geometry. Langley stated that Abbey was not receptive to her assistance, but that he was a poor student who would be a poor student whether he was in in-school suspension or not.

At the preliminary injunction hearing, a witness for the plaintiffs, Hiram F. Gregory, Ph.D., an anthropologist specializing in southeastern Native American tribes, testified that, prior to the 1900's, many southeastern tribes wore their hair long as a symbol of moral and spiritual strength. It was a common Native American belief that the hair, similar to other body parts, was sacred, and that to cut the hair was a complicated and significant procedure. A hair cut was considered the equivalent of dismemberment of a body part. Generally, hair was to be cut *1325 only as a sign of mourning a close family member's death. Southeastern tribes believed that, to cut the hair at any other time, without the safeguards of tribal ritual, would disrupt the "oneness" of that person's spirit and subject that person's body to invasion by witchcraft.

While Dr. Gregory was able to testify extensively about the religious practices of southeastern Native American tribes in general, he stated that there is a lack of detailed information about the Alabama-Coushatta Tribe's traditional beliefs. The Tribe believes that its traditions and religious beliefs are the property of the tribal people, and has adopted taboos prohibiting the sharing of such information with outsiders.

Dr. Gregory testified that the Tribe traditionally engaged in a form of shamanism or animism, where everything in nature is believed to be sacred and filled with a spirit. Before the Tribe's conversion to Christianity, the Tribe relied heavily on medicine men, who were responsible for healing people, controlling events, and divining the future.

The Tribe was converted to Christianity in the 1890's by Presbyterian missionaries. The missionaries urged tribal members to give up traditional practices, such as playing stick ball and dancing, which were manifestations of native religious beliefs. During the early 1900's, there was immense pressure on Native American peoples, including the Tribe, to adapt and become assimilated into the Caucasian culture. The assimilative process included pressure on Native American men to cut their hair short, in imitation of the hair styles of white men.

After the conversion to Christianity, tribal members continued to practice their ancient religious beliefs and traditions, as they did not believe that Christianity and Native American religion were mutually exclusive concepts. To the southeastern Native American tribes, traditional practices could harmoniously coexist with Christian practices. Both were part of an overall belief system, which encompassed every aspect of a tribal member's life, and which was not limited to formal religious practices which took place on a regular schedule in a church or temple.

Today, the Tribe encourages its members to obtain an education, for the purpose of competing for employment off the reservation, while retaining traditional culture to the extent possible. Many tribal members still speak their own languages and observe Native American customs and practices, including participating in ceremonial dances, called celebrations or pow-wows, and dance competitions. Celebrations are dances held as expressions of Native American tradition and religious belief, and also as individual artistic statements. Many of the dancers wear Native American costumes and hair styles.

Another practice which has survived the conversion to Christianity and adaptation to Caucasian culture is the ritual of cutting a child's hair at a certain age. Members of the Tribe's kindred Coushatta nation, residing in Louisiana, continue to cut their children's hair at the age of four months, an event which holds great cultural significance to the family and the tribe.[FN1]

> FN1. The Louisiana Coushatta nation is closely related to their Texas cousins. Both were converted to Christianity during the same time period. While each nation has its own language, many tribal members speak both languages, and members frequently intermarry.

There has been a strong movement in North America in recent years among younger Native Americans, including members of the Tribe, to return to their traditional culture and heritage. Instead of attempting to revive each independent tribal religion, many traditional Native American religions are now practiced by young people in a combined fashion. One facet of this "Pan-Tribal" movement is the wearing of long hair.

Abbey testified that his desire to wear his hair long was reinforced when he attended the Heart of the Earth Survival School in Minneapolis, Minnesota, during the summer of 1992. The school was a part of the American Indian Movement ("AIM"), and approximately two hundred students, grades kindergarten through twelfth, were involved. The school taught the students that long hair has religious significance, and that it is part of their Native American heritage. Abbey believes that the only time he should cut his hair is to show mourning when a close family ***1326** member dies. However, Abbey has been baptized in the Christian faith, and occasionally attends a Christian church.

Danny John testified that he believed that hair was part of his religion, as well as his Native American culture and tradition. He has heard about the religious significance of long hair from tribal elders. John thought of his hair as a part of his body, similar to a

finger or other appendage. He believed that, if his hair were cut, he would spend the afterlife searching for that missing hair. To have long hair is a personal decision of his, which is supported by his parents. John has been baptized in the Christian faith, but has renounced the Christian religion in favor of a Native American religion.

Both Abbey and John participate in the ceremonial dances. Both perform the "fancy" feather dance, which is a form of celebration. The participants wear costumes, and many, but not all, fancy dancers have long hair. It is traditional to braid the hair for the dance. Abbey testified that his spirit is released through the dance. John testified that the fancy dance, as well as the round and the buffalo dance, is like a modern-day battlefield, where the dancers, including himself, often compete against other tribes. He also stated that dancing transported him back to the spirit world.

The Tribe and the parents of the students disciplined for wearing their hair long encourage and support their children's participation in celebrations, pow-wows, and other Native American ceremonies and cultural activities. The Tribe and the parents, while not requiring young men to wear their hair long, approve of the practice because of its religious significance, and because of the desire to preserve the Tribe's cultural heritage and traditions. Battise and the tribal council feel concern about the isolation which their young people feel in school as a result of the problems caused by the hair issue.

Plaintiffs have established that the minor members of the Tribe have a sincerely held religious belief in the spiritual properties of wearing the hair long. The majority of the Native American parents of the students do not themselves believe that long hair is a fundamental tenet of their own Christian religious practices; however, the parents fully support their children's belief in the spiritual aspects of hair, and actively encourage their children to respect their tribal heritage and participate in Native American traditions. [FN2]

> FN2. The disparity in the beliefs of the parents and their children may be the result of the recent movement among younger Native Americans to recognize and revitalize their Native American heritage, after more than a century of assimilation into white culture.

Many of the adult male members of the tribe wear their hair short. However, some adult males wear their hair long, including Leonard Williams, the father of plaintiffs, Maynard, Emmanuel, Simeon, and Seth Williams. The children's mother, Waynne Williams, testified that her husband would cut his hair off only if a close family member died. Further, Williams had instructed her to cut his braid off if he died, and to lay it across his chest. She testified that he kept his hair long because of his religious beliefs.

Danny John testified that he has tried to get the Board to change its dress code to allow Native American students to wear their hair long before this fall. He claimed that he asked JoAnne Battise, the tribal administrator, to talk to the Board in this regard during the last school year. Battise testified that she did, in fact, contact Superintendent Foster and Principal Fountain to request a change in the dress code last year, but that nothing was done.

Battise stated that she was never notified that the hair issue had been put on the school board's agenda, but that she and other parents attended a school board meeting on September 1, 1992, to discuss the dress code. Battise testified that the board allowed tribal members to voice their concerns about the hair regulation, but did not vote on the issue at that time. Battise and one of the student's mothers, Waynne Williams, stated that, during the September 1 meeting, a tribal member named Armando Rodriquez informed the board that the desire to wear long hair was based on religion, but that a board member responded by telling him that long hair went out with the hippies.

*1327 According to board minutes, the hair issue was tabled at the September 1 meeting, and the board voted on it at the next meeting on September 14, 1992. Battise testified that the tribal members who were present at the second meeting were not allowed to speak. The dress code remained intact.

A few teachers and teacher's aides testified that, since the entry of the temporary restraining order in this case, they have noticed increased disciplinary problems, such as tardiness, student responses in Alabama-Coushatta language, and racial epithets, and social polarization between the Native American male students and other students. However, trustee Paul Cain testified that, while it could be better, the

educational environment at Big Sandy schools has not been diminished. Superintendent Foster was unaware of any major disciplinary problems, and there have been no reports of increased disciplinary problems to the Board. No one could say whether the alleged disciplinary problems were attributable to the wearing of long hair by Native American male students.

II. *Conclusions of Law*

The court has jurisdiction over this action pursuant to 28 U.S.C. § 1343(a)(3) and (4).

Plaintiffs seek a preliminary injunction for the alleged violation of their rights to free exercise of religion and free speech under the First Amendment to the United States Constitution, and to equal protection and due process, as guaranteed by the Fourteenth Amendment to the United States Constitution. Plaintiffs have also asserted a claim for damages under 42 U.S.C. § 1983.

Plaintiffs are entitled to a preliminary injunction if they establish the following elements:
a. There is a substantial likelihood of success on the merits;
b. The injuries threatened if the conduct is not enjoined will be irreparable and irrevocable;
c. The threatened injuries far outweigh any real harm to defendants;
d. The granting of preliminary injunctive relief is in the public interest.

Mississippi Power & Light v. United Gas Pipe Line Co., 760 F.2d 618, 621 (5th Cir.1985).

A. *The Tribe's Standing as Parens Patriae*

[1] The Tribe claims that it has standing to assert the claims of its members who are affected by the hair length restriction under the doctrine of *parens patriae.* It is evident that the Tribe has an interest in the preservation of its Native American heritage, culture, and religion, and in encouraging its members, especially its young people, to observe and participate in its sacred ceremonies. The doctrine of *parens patriae* allows a sovereign to bring an action on behalf of the interest of all of its citizens. *Louisiana v. Texas,* 176 U.S. 1, 19, 20 S.Ct. 251, 257, 44 L.Ed. 347 (1900). It has been used to allow states to recover damages to quasi-sovereign interests, such as the health, safety and welfare of the people, pollution-free interstate waters and air, and the general economy of the state. *West Virginia v. Chas. Pfizer & Co.,* 440 F.2d 1079, 1089 (2nd Cir.1971), *cert. denied,*404 U.S. 871, 92 S.Ct. 81, 30 L.Ed.2d 115 (1971). However, a sovereign tribe must be acting on behalf of *all* of its members in order to litigate as *parens patriae. Kickapoo Tribe of Oklahoma v. Lujan,* 728 F.Supp. 791, 795 (D.D.C.1990); *Assiniboine & Sioux Tribes v. Montana,* 568 F.Supp. 269, 277 (D.Mont.1983).

[2] While the application of the hair restriction may in some way affect members of the Tribe other than the Native American students at Big Sandy and their families, the Tribe is not representing the interests of all its members in this case, as the doctrine of *parens patriae* requires. Therefore, the Tribe may not bring this action as *parens patriae* of its members. The Tribe's interest in promoting its children's appreciation for tribal heritage and religion will be discussed, however, in connection with the interest of the Tribe and parents in their children's upbringing.

B. *Constitutional Rights of Native American Students*

Plaintiffs assert that the First Amendment free exercise of religion and free speech ***1328** clauses, and the Fourteenth Amendment due process and equal protection clauses, are implicated by the dress code, which prohibits male students from wearing their hair long.

1. The Right to Wear Long Hair

The Bill of Rights protects the fundamental rights of citizens "against the State itself and all of its creatures-Boards of Education not excepted." *Wes t Virginia State Board of Education v. Barnette,* 319 U.S. 624, 637, 63 S.Ct. 1178, 1185, 87 L.Ed. 1628 (1943). Although school boards perform "important, delicate, and highly discretionary functions," these functions must be performed "within the limits of the Bill of Rights." *Id.*

In *Karr v. Schmidt,* 460 F.2d 609 (5th Cir.), *cert. denied,*409 U.S. 989, 93 S.Ct. 307, 34 L.Ed.2d 256 (1972), the United States Court of Appeals for the Fifth Circuit held that there is no constitutionally protected right to wear one's hair in a public high school in the length and style that suits the wearer. Nonetheless, the court recognized that:

Federal courts ... have unflinchingly intervened in the management of local school affairs where fundamental liberties, such as the right to equal education, required vindication ... [But] [s]tate regulations which do not affect fundamental freedoms are subject to a much less rigorous standard of judicial review than is applicable when such fundamental rights are at stake.

Karr, 460 F.2d at 616.

[3] The Fifth Circuit held that the hair length restriction did not violate the students' First Amendment right to free speech, nor did it discriminate against male students in violation of the Fourteenth Amendment equal protection clause. *Id.* Since no fundamental right was implicated, the court applied the deferential "rational basis" standard, and found that the hair regulation was reasonably intended to accomplish constitutionally permissible state objectives: eliminating classroom distraction; avoiding violence among students; and eliminating potential health and safety hazards. *Id.* at 617. *See also New Rider v. Board of Educ. of Ind. School Dist. No. 1, Okl.,* 480 F.2d 693 (10th Cir.), *cert. denied,*414 U.S. 1097, 94 S.Ct. 733, 38 L.Ed.2d 556 (1973) (where students failed to establish that a fundamental right had been violated, court applied rational basis test and upheld school's hair regulations). The Fifth Circuit announced a *per se* rule in *Karr*-school dress codes are valid *as long as they do not affect fundamental freedoms.* 460 F.2d at 616.

2. Free Exercise of Religion

Unlike the plaintiff in *Karr,* plaintiffs in the present action have alleged that the Board's hair regulation infringes upon several fundamental rights, including the free exercise of religion, and undermines the right of parents and the Tribe to direct the religious upbringing of their children. Plaintiffs also allege that the regulation adversely affects the right of parents and the Tribe to encourage respect for Native American heritage, a heritage which is inextricably intertwined with the students' religious beliefs.

a. *Sincerity of Students' Belief*

[4] To establish that a state regulation violates the First Amendment free exercise clause, the claimants must show that they have a sincerely held religious belief which conflicts with and is burdened by the regulation. Laurence H. Tribe, *American Constitutional Law* § 14-12, at 1242 (2d ed. 1988).

[5] The factfinder, whether the court or a jury, may determine whether a claimant's religious belief is sincerely held; however, the factfinder may not delve into the question of religious verity, or the reasonableness of the belief. *United States v. Ballard,* 322 U.S. 78, 86-87, 64 S.Ct. 882, 886-87, 88 L.Ed. 1148 (1944). *See Teterud v. Burns,* 522 F.2d 357 (8th Cir.1975) (Native American inmate allowed to wear long braided hair in the penitentiary in accordance with his sincerely held religious beliefs). Further, "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection." *Thomas v. Review Board,* 450 U.S. 707, 714, 101 S.Ct. 1425, 1430, 67 L.Ed.2d 624 (1981); *Society of Separationists v. Herman,* 939 F.2d 1207, 1215 (5th Cir.1991). *See also Hobbie v. Unemployment Appeals Commission,* 480 ***1329** U.S. 136, 144, 107 S.Ct. 1046, 1050, 94 L.Ed.2d 190 (1987) (sincere religious beliefs, although recently acquired, are fully protected).

Whether the court finds that the plaintiffs' belief is reasonable is of no consequence:
[T]here is no requirement that a religion meet any organizational or doctrinal test to qualify for First Amendment protection. Further, orthodoxy is not an issue in determining whether religion qualifies for First Amendment protection.

Gallahan v. Hollyfield, 516 F.Supp. 1004, 1006 (E.D.Va.1981), *aff'd,*670 F.2d 1345 (4th Cir.1982) (citations omitted). *See also Wisconsin v. Yoder,* 406 U.S. 205, 216-18, 92 S.Ct. 1526, 1533-34, 32 L.Ed.2d 15 (1972).

[6][7] Thus, the definition of a "religion" which is entitled to First Amendment protection must not be limited to concepts embodied in traditional religions. Orthodox religions of the world generally have certain characteristics in common, such as a belief in the existence of a Supreme Deity, and a goal or purpose for human existence. *Smith v. Board of School Com'rs of Mobile County,* 655 F.Supp. 939, 979 (S.D.Ala.), *rev'd on other grounds,*827 F.2d 684 (11th Cir.1987). The existence of these characteristics may guide the court's determination of whether the belief in question is religious. However, the inquiry should not come to an end if traditional

characteristics are not present. Whenever a belief system encompasses fundamental questions of the nature of reality and relationship of human beings to reality, it deals with essentially religious questions. *Id.* at 979 (determining that secular humanism is a religious belief system entitled to the protections of the religion clause).

[8] The Native American Indian movement, while it may seem rather nebulous and unstructured to persons versed in more traditional religions, such as Christianity, Judaism, Hinduism, or Islam, is certainly a religion, as is apodictically shown by its system of beliefs concerning the relationship of human beings and their bodies to nature and reality. It is, therefore, entitled to First Amendment protection.

[9] Even if the wearing of long hair is not a fundamental tenet of Native American religious orthodoxy, "[p]roof that the practice is deeply rooted in religious belief is sufficient." *Teterud v. Burns,* 522 F.2d 357, 360 (8th Cir.1975). Moreover, although the practice may also be "a matter of tradition, the wearing of long hair for religious reasons is a practice protected from government regulation by the Free Exercise Clause." *Id. See also Braxton v. Board of Public Instruction of Duval Co., Fla.,* 303 F.Supp. 958, 959 (M.D.Fla.1969) (where a goatee is worn by an African American teacher as an expression of his heritage, culture, and racial pride, the teacher enjoys the protection of the First and Fourteenth Amendments).

Teterud involved a Native American prisoner's challenge to prison hair length regulations. The Eighth Circuit found that the plaintiff's desire to wear his hair long and braided went beyond purely secular considerations of racial pride and personal preference. *Teterud,* 522 F.2d at 359. The court cited the testimony of a social anthropologist, Professor Thomas, himself a member of a Cherokee tribe, at some length:

I think the older Cree would say that when God created the Cree he gave him long hair and that is, you know, that is as it should be ... You see, that is in the nature of the world that the Cree has long hair. Now, to not have long hair is unnatural for a Cree. So that for those Crees who I think are, you know, like the kind [who] put theirself into their religion, they will tend to grow their hair long.

Id. at 359 n. 4.

Another anthropologist, Professor Holder, explained that, as hair is considered to be a body part, a Native American considers it a gift from nature, or a link with the universe, which has always been considered to be sacred. *Id.* at 360 n. 5.

The opinion of the Eighth Circuit in *Teterud* is persuasive. The court found that the Native American inmate had a sincere religious belief in wearing long hair, even though his belief did not conform to orthodox opinions and beliefs. *Id.* at 361. Similarly, in *Gallahan,* 516 F.Supp. at 1006, the court found that the Cherokee inmate had a sincere***1330** religious belief, even though he had only worn his hair long for a few years, and even though the inmate admitted that there were no written creeds requiring long hair established by his forefathers or family. *See also Sequoyah v. Tennessee Valley Authority,* 620 F.2d 1159, 1163 (6th Cir.), *cert. denied,*449 U.S. 953, 101 S.Ct. 357, 66 L.Ed.2d 216 (1980) (the fact that Cherokees have no written creeds or houses of worship are of little import when construing the individual beliefs of the plaintiff's religion). In *Gallahan,* the court rejected the state's argument that the inmate had merely adopted these beliefs as a convenient method of maintaining a certain hairstyle. 516 F.Supp. at 1006.

Furthermore, consistent with the testimony of Dr. Gregory in the present case, the Eighth Circuit recognized that "the Indian religion, unlike Christian religions, is not exclusive. Its followers can, without contradiction, participate in different religions simultaneously." *Teterud,* 522 F.2d at 361. Thus, the fact that several of the students in the present case practice the Christian religion, while maintaining Native American religious beliefs and practices, does not undermine their claim that long hair constitutes a sincerely held religious belief.

Moreover, the fact that some members of the Tribe do not object to cutting their hair does not defeat the plaintiffs' claim. The court must consider the sincerity of the plaintiffs' own religious belief, not anyone else's. *See Moskowitz v. Wilkinson,* 432 F.Supp. 947, 949 (D.Conn.1977).

Finally, plaintiffs are not stripped of their right to free exercise of their own religious beliefs simply because wearing one's hair long is not absolutely mandated by the Tribe or its religious or cultural leaders.

Moskowitz, 432 F.Supp. at 949; *Gallahan,* 516 F.Supp. at 1006.

b. *The School's Interest in Regulating Hair Length*

[10] Once plaintiffs have proven the sincerity of their religious belief, the burden then shifts to the state or governmental agency to show that the regulation advances an unusually important governmental goal, and that an exemption would substantially hinder the fulfillment of that goal. *See Wisconsin v. Yoder,* 406 U.S. 205, 215, 92 S.Ct. 1526, 1533, 32 L.Ed.2d 15 (1972).

[11][12] While freedom to believe in a particular religious creed or doctrine is absolute, freedom to act pursuant to one's religion is not. "Conduct remains subject to regulations for the protection of society." *Cantwell v. Connecticut,* 310 U.S. 296, 303-04, 60 S.Ct. 900, 903, 84 L.Ed. 1213 (1940). In cases which do not involve challenges to the state's compelling interest in regulating and protecting the public health and safety through its criminal statutes, the state may only employ the least restrictive means of regulating conduct which is a religious practice or belief. *See Sherbert v. Verner,* 374 U.S. 398, 402-03, 83 S.Ct. 1790, 1792-93, 10 L.Ed.2d 965 (1963); *Yoder,* 406 U.S. at 233, 92 S.Ct. at 1542. *Cf. Employment Div., Dept. of Human Resources of Oregon v. Smith,* 494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990) (rejecting the "least restrictive means" test with regard to a challenge to a criminal statute which was facially nondiscriminatory and neutrally applied).

It is unclear, after *Smith,* whether a valid free exercise claim in a civil context, unaccompanied by other constitutional claims, would be entitled to the intense scrutiny necessitated by the least restrictive means, or compelling state interest, standard. *See Smith,* 494 U.S. at 884, 110 S.Ct. at 1603 (whether or not the *Sherbert* compelling state interest analysis applies "beyond the unemployment compensation field, we would not apply it to require exemptions from a generally applicable *criminal* law") (emphasis added).

Several circuits, focusing on dicta in the *Smith* opinion, have held that free-standing free exercise claims, whether in a civil or criminal context, are now subject to only a rational basis review. *See Cornerstone Bible Church v. City of Hastings,* 948 F.2d 464 (8th Cir.1991) (applying *Smith* rational basis test, without analysis, to neutral zoning ordinance); *Vandiver v. Hardin County Bd. of Educ.,* 925 F.2d 927 (6th Cir.1991) (upholding equivalency examination requirement for home study credit); *Salvation Army v. N.J.* ***1331***Dept. of Community Affairs,* 919 F.2d 183 (3rd Cir.1990) (finding state's neutral boarding house regulations valid); *St. Bartholomew's Church v. City of New York,* 914 F.2d 348 (2nd Cir.1990), *cert. denied,*499 U.S. 905, 111 S.Ct. 1103, 113 L.Ed.2d 214 (1991) (upholding New York City's Landmarks Law). *See also Yang v. Sturner,* 750 F.Supp. 558 (D.R.I.1990) (rejecting Hmong couple's challenge to state's neutrally applicable law governing autopsies).

Other circuits have expressly limited *Smith*'s application to laws which punish *criminal* conduct. *See American Friends Service Committee Corp. v. Thornburgh,* 961 F.2d 1405 (9th Cir.1991); *N.L.R.B. v. Hanna Boys Center,* 940 F.2d 1295 (9th Cir.1991), *cert. denied,*504 U.S. 985, 112 S.Ct. 2965, 119 L.Ed.2d 586 (1992). *See also United States v. Boyll,* 774 F.Supp. 1333 (D.N.M.1991); *Church of Scientology v. City of Clearwater,* 756 F.Supp. 1498, 1514 (M.D.Fla.1991). These cases more closely follow established Supreme Court precedent. "However free the exercise of religion may be, [it has always been] subordinate to the criminal laws of the country...." *Davis v. Beason,* 133 U.S. 333, 342-43, 10 S.Ct. 299, 300-301, 33 L.Ed. 637 (1890).

Although an array of free exercise challenges have been brought before the Fifth Circuit in the aftermath of *Smith,* the court has not yet had occasion to determine the breadth of *Smith*'s applicability. *See Murray v. City of Austin, Tex.,* 947 F.2d 147, 152 (5th Cir.1991), *cert. denied,*505 U.S. 1219, 112 S.Ct. 3028, 120 L.Ed.2d 899 (1992) (presence of the cross in the city of Austin's insignia does not violate the religion clauses); *Society of Separationists, Inc. v. Herman,* 939 F.2d 1207, 1215-17 (5th Cir.1991) (judge's attempt to coerce a prospective juror to make an affirmation in spite of her sincere religious objections, an infringement of both free speech and free exercise of religion, violated the First Amendment); *United States v. Allibhai,* 939 F.2d 244, 249-50 (5th Cir.1991), *cert. denied,*502 U.S. 1072, 112 S.Ct. 967, 117 L.Ed.2d 133 (1992) (rejecting Muslims' argument that they were impermissibly targeted in a criminal investigation, and referring to *Smith* for guidance regarding the "interplay between the First Amendment and the enforcement of criminal laws"); *Munn v. Algee,* 924

F.2d 568, 574 (5th Cir.), *cert. denied,*502 U.S. 900, 112 S.Ct. 277, 116 L.Ed.2d 229 (1991) (without determining the applicable standard (rational basis or compelling state interest), holding that a free exercise claim did not excuse a Jehovah's witness from failing to mitigate damages); *Peyote Way Church of God, Inc. v. Thornburgh,* 922 F.2d 1210, 1213, 1220 (5th Cir.1991) (discussing *Smith* as eviscerating judicial scrutiny of free exercise challenges to generally applicable criminal prohibitions). Thus, there is no clear precedent in the Fifth Circuit with regard to the level of scrutiny to be applied to independent free exercise challenges to generally applicable, noncriminal, regulations.

The holding in *Smith* arose in a very discrete context, where the Court determined that the state's interest in regulating criminal conduct, thereby protecting the public health, safety, and welfare, was so overwhelming that a free exercise challenge, standing alone, could not be maintained. *See Smith,* 494 U.S. at 884-85, 110 S.Ct. at 1603. *See also Church of Scientology,* 756 F.Supp. at 1513 ("[a]lthough the state cannot punish religious views and beliefs, the state [through the exercise of its police powers] can punish the external manifestation of those views if the resulting conduct is a clear and present danger to the safety, morals, health or general welfare of the community and is violative of laws enacted for their protection").[FN3]

> FN3. It has been suggested that the *Smith* opinion was merely an overreaction to the nation's current political agenda-the war on drugs. *See Smith,* 494 U.S. at 908, 110 S.Ct. at 1616 (Blackmun, J., dissenting).

A finding that *Smith* is generally applicable to every free exercise challenge, whether in the civil or criminal context, would be a gross aberration from decades of established Supreme Court precedent in the First Amendment arena. *See Bowen v. Roy,* 476 U.S. 693, 728, 106 S.Ct. 2147, 2167, 90 L.Ed.2d 735 (1986) (O'Connor, J., concurring in part and dissenting in part); *United* ***1332***States v. Lee,* 455 U.S. 252, 102 S.Ct. 1051, 71 L.Ed.2d 127 (1982); *Thomas v. Review Board,* 450 U.S. 707, 719, 101 S.Ct. 1425, 1432, 67 L.Ed.2d 624 (1981); *Yoder,* 406 U.S. at 221, 92 S.Ct. at 1536; *Gillette v. United States,* 401 U.S. 437, 91 S.Ct. 828, 28 L.Ed.2d 168 (1971); *Sherbert v. Verner,* 374 U.S. 398, 402-02, 83 S.Ct. 1790, 1792-93, 10 L.Ed.2d 965 (1963).[FN4] Moreover, it would represent the erosion, if not the absolute obliteration, of one of the most basic principles our Founders, recently freed from the oppression of European government, sought to establish through the Bill of Rights-the free exercise of religion as a fundamental right of the new American democracy.[FN5]

> FN4. As Justice Blackmun stated in dissent, the *Smith* decision "effectuates a wholesale overturning of settled law concerning the Religion Clauses of our Constitution." 494 U.S. at 908, 110 S.Ct. at 1616 (Blackmun, J., dissenting). Justice O'Connor agreed that the majority gave "a strained reading of the First Amendment ... [and] disregard[ed] our consistent application of free exercise doctrine to cases involving generally applicable regulations that burden religious conduct." *Id.* at 892, 110 S.Ct. at 1607 (O'Connor, J., concurring in the judgment).

> FN5. The dissent in *Smith* accused the majority of distorting longstanding precedent to reach its conclusion that "strict scrutiny of a state law burdening the free exercise of religion is a 'luxury' that a well-ordered society cannot afford, and that the repression of minority religions is an 'unavoidable consequence of democratic government.' " *Smith,* 494 U.S. at 908-09, 110 S.Ct. at 1616 (Blackmun, J., dissenting). Justice Blackmun continued:
> I do not believe the Founders thought their dearly bought freedom from religious persecution a 'luxury,' but an essential element of liberty-and they could not have thought religious intolerance 'unavoidable,' for they drafted the Religion Clauses precisely in order to avoid that intolerance.
> *Id.* at 909, 110 S.Ct. at 1616.

In any event, the present case does not require a resolution of whether *Smith* applies to neutral civil laws, such as the Big Sandy hair regulation, which allegedly burden free-standing free exercise interests, as plaintiffs have alleged a hybrid claim of free exercise, free speech, due process, and equal protection rights.

[13] When some other constitutional right is combined with a free exercise claim in a so-called "hybrid claim," the state must demonstrate more than merely a reasonable relation to a valid, secular state

purpose to sustain the validity of the regulation over First Amendment concerns. *Yoder,* 406 U.S. at 233, 92 S.Ct. at 1542; *Smith,* 494 U.S. at 881, 110 S.Ct. at 1601. Where either parental interests or free speech are asserted in conjunction with a free exercise claim, something more than a mere "reasonable relation to some purpose within the competency of the State is required to sustain the validity of the State's requirement under the First Amendment." *Smith,* 494 U.S. at 881 n. 1, 110 S.Ct. at 882 n. 1 (citing *Yoder,* 406 U.S. at 233, 92 S.Ct. at 1542). *See Herman,* 939 F.2d at 1216 (Fifth Circuit applied strict scrutiny to religion-plus-speech claim).

The prison cases, while not controlling in the context of public schools, are instructive on the issue of whether the hair regulation bears more than a "reasonable relation" to the school's stated purpose for the dress code.[FN6] In *Teterud,* the Eighth Circuit, affirming the district court, found that a prison hair regulation was overbroad and violative of the Native American inmate's free exercise rights. 522 F.2d at 360-61. Other circuits have followed suit, and have stricken prison hair regulations as violative of inmates' First Amendment rights. *See, e.g., Gallahan v. Hollyfield,* 516 F.Supp. 1004 (E.D.Va.1981), *aff'd,*670 F.2d 1345 (4th Cir.1982) (Cherokee inmate successfully challenged regulation which prohibited long hair); *Moskowitz v. Wilkinson,* 432 F.Supp. 947 (D.Conn.1977) (prison ban on wearing of beards is unconstitutional as applied to prisoners, such as plaintiff, an Orthodox Jew, ***1333** who wear beards for religious purposes).[FN7]

> FN6. Because of the "reality of incarceration and the inherent conflict with various legitimate penological objectives," especially the interest in security, the United States Supreme Court has held that the constitutional rights of prisoners are "considerably more circumscribed than those of the general public." *Powell v. Estelle,* 959 F.2d 22, 23 (5th Cir.), *cert. denied,*506 U.S. 1025, 113 S.Ct. 668, 121 L.Ed.2d 592 (1992) (citing *Pell v. Procunier,* 417 U.S. 817, 822-23, 94 S.Ct. 2800, 2804-05, 41 L.Ed.2d 495 (1974) and *Turner v. Safley,* 482 U.S. 78, 89, 107 S.Ct. 2254, 2261, 96 L.Ed.2d 64 (1987)).
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> FN7. Although prisoners' constitutional claims are no longer afforded heightened scrutiny, *see O'Lone v. Shabazz,* 482 U.S. 342, 348, 107 S.Ct. 2400, 2404, 96 L.Ed.2d 282 (1987), the cases cited above are helpful to the "least restrictive means" analysis which must be applied in the present case.

Undoubtedly, a prison is a much more restrictive environment than are public schools. *See Powell,* 959 F.2d at 23. Surely, prison wardens have a far greater interest in regulating the dress and grooming of inmates than do principals and school boards in regulating that of junior high and high school students. The courts have recognized that, in the prison context, there may be some potential for inmates to hide weapons or drugs in their long hair. *Gallahan,* 516 F.Supp. at 1006. Further, long hair could obscure facial identification and, if not kept clean, cause sanitary problems. *Id.* Nonetheless, both courts determined that the state interest in prison security and sanitation did not justify the burdensome restriction on sincere religious beliefs. *Id.*; *Teterud,* 522 F.2d at 361. The courts noted that there are certainly less restrictive means of achieving these valid prison objectives than the hair length regulation in question. *Gallahan,* 516 F.Supp. at 1007; *Teterud,* 522 F.2d at 361.

Similarly, several circuits have held that, although the establishment of a dress code is a proper function of a school board, an exemption to school dress codes is necessary where the regulations unduly burden the sincerely held religious beliefs of students. *See Menora v. Illinois High School Ass'n,* 683 F.2d 1030 (7th Cir.1982), *cert. denied,*459 U.S. 1156, 103 S.Ct. 801, 74 L.Ed.2d 1003 (1983); *Hatch v. Goerke,* 502 F.2d 1189 (10th Cir.1974). The fact that the dress code applies uniformly to all students does not save the regulation. "A regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for governmental neutrality if it unduly burdens the free exercise of religion." *Yoder,* 406 U.S. at 220, 92 S.Ct. at 1536.

[14] The Trustees have failed to show that the restriction on hair length is a valid means of achieving its objectives of maintaining discipline, fostering respect for authority, and projecting a good public image. As there is a complete lack of evidence on less restrictive, alternative means of achieving these goals, the court will not engage in speculation as to what those alternatives may be. However, several courts have found viable alternatives to hair length restrictions in prison cases, which would not be unduly burdensome to a sincerely held religious

belief in wearing long hair. *See Teterud,* 522 F.2d at 361. Surely, school officials can likewise implement alternatives which pass constitutional muster.

3. Free Speech

Plaintiffs assert that a number of other constitutional rights are affected by the hair length restriction. First, they claim that to wear one's hair long is an expressive or communicative activity to a Native American, especially with regard to the performance of ceremonial dances, and that, as such, it is protected by the First Amendment free speech clause. The Fifth Circuit rejected a similar argument in *Karr,* 460 F.2d 609. However, the plaintiffs in *Karr* did not state any facts to support a claim that the wearing of long hair is a form of expressive activity. In contrast, the testimony of tribal members and the expert testimony of the anthropologist, Dr. Gregory, was compelling evidence that long hair in Native American culture and tradition is rife with symbolic meaning.

[15] Students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Hazelwood School Dist. v. Kuhlmeier,* 484 U.S. 260, 266, 108 S.Ct. 562, 567, 98 L.Ed.2d 592 (1988) (citing *Tinker v. Des Moines Independent Community School Dist.,* 393 U.S. 503, 506, 89 S.Ct. 733, 736, 21 L.Ed.2d 731 (1969)). They cannot be punished merely for expressing their personal views on the school premises unless school authorities have reason to believe that such expression will "substantially interfere with the work of the school or impinge upon the rights of other students." *Tinker,* 393 U.S. at 509, 89 S.Ct. at 738.

***1334** In *Tinker,* the Supreme Court held that students could not be prohibited from wearing black armbands in protest of American involvement in Vietnam, when the armbands did not cause disruption of school discipline or decorum. 393 U.S. at 505, 89 S.Ct. at 735. The expressive activity at issue in *Tinker* was considered "closely akin to pure speech" protected by the First Amendment. *Id.* at 505-06, 89 S.Ct. at 736. *See also West Virginia State Board of Education v. Barnette,* 319 U.S. 624, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943) (under the First Amendment, students may not be compelled to salute the flag).

While a few teachers and teachers' aides testified that there had been an overall increase in disciplinary problems at Big Sandy Independent School District since the entry of the temporary restraining order in this case, none could establish any connection whatsoever between the wearing of long hair and the perceived problems. Anticipation of disruption due to the wearing of long hair does not justify the curtailment of the students' silent, passive expression of their faith and heritage.

> [I]n our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression. Any departure from absolute regimentation may cause trouble. Any variation from the majority's opinion may inspire fear. Any word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk ...; and our history says that it is this sort of hazardous freedom-this kind of openness-that is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious, society.

Tinker, 393 U.S. at 508-09, 89 S.Ct. at 737-38 (citations omitted). *See Butts v. Dallas Independent School District,* 436 F.2d 728 (5th Cir.1971) (wearing black armbands is not the equivalent of "fighting words," and, absent a definite showing of disruption in the classroom, students may not be prohibited from exercising their First Amendment rights in this manner).

Like the armbands, the wearing of long hair by Native American students is a protected expressive activity, which does not unduly disrupt the educational process or interfere with the rights of other students. As such, the regulation, as applied to these students, violates the First Amendment free speech clause.

4. Right of Parents to Direct Their Children's Upbringing

[16] Plaintiffs also allege that the free exercise claim is made in conjunction with the right of the parents and the Tribe to raise and educate their children, to guide their children's religious beliefs, and to instill respect in the young members of the Tribe for their Native American heritage. As discussed above, the right of parents to participate and direct their children's education and religious upbringing is firmly established in constitutional doctrine. *Yoder,* 406 U.S. 205, 92 S.Ct. 1526; *Pierce v. Society of Sisters,* 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070

(1925).

Several parents testified that they were active in the Christian faith, and that they did not require their children to wear their hair long. However, parents and other tribal members fully supported their children's decision to wear long hair as a spiritual and expressive symbol of Native American religion and tradition. The Supreme Court has not required unanimity of religious beliefs between parent in child. In *Yoder,* the Court recognized that such "intrusion ... into family decisions in the area of religious training would give rise to grave questions of religious freedom ..." and that the holding in the case "in no way determines the proper resolution of possible competing interests of parents, children, and the State." 406 U.S. at 231-232, 92 S.Ct. at 1541.

Plaintiffs have stated a valid constitutional claim that the hair regulation unduly burdens the parental right to guide their children's education and upbringing.

***1335** 5. Due Process

a. *Procedural Due Process*

[17] Plaintiffs also claim that the in-house detention of the Native American students violated the procedural due process guarantees of the Fourteenth Amendment. Students have a legitimate claim of entitlement to public school education. *Goss v. Lopez,* 419 U.S. 565, 573, 95 S.Ct. 729, 735, 42 L.Ed.2d 725 (1975). The suspension of a student implicates that student's right to be free from any deprivation of liberty and property without due process of law. *Id.*

It is firmly established in the Fifth Circuit that students must be afforded notice and a right to be heard before they may be suspended from school for a lengthy or indefinite period of time. *Dixon v. Alabama State Board of Education,* 294 F.2d 150 (5th Cir.), *cert. denied,*368 U.S. 930, 82 S.Ct. 368, 7 L.Ed.2d 193 (1961). *See Goss,* 419 U.S. at 582-83, 95 S.Ct. at 740-41. Absent some extraordinary situation requiring immediate action before a hearing, students are entitled to an opportunity to appear and argue for leniency or special consideration. *Hatch v. Goerke,* 502 F.2d 1189, 1195 (10th Cir.1974).

[18] Several of the plaintiffs were suspended for over a month before they were allowed to return to regular classes pursuant to the court's temporary restraining order. There was no evidence that the plaintiffs were given adequate notice and a right to be heard. While Superintendent Foster testified that the normal procedure was to send a three day written notice home with the student prior to any suspension, Foster did not know whether that procedure had been followed with regard to any of the plaintiffs. There was no documentary proof that any notice was given. Further, Waynne Williams testified that her children were told on the first day of the fall term that if they did not have their hair cut before the next day, they would not be allowed to return to school. She did not recall receiving any notice or opportunity to discuss the application of the dress code with school officials.

Foster testified that the students or parents could appeal the suspension to the superintendent and the school board, but admitted that the availability of review by the school board was not set down in writing. There was no evidence that either the children's parents or the Tribe were notified of the right to appeal the suspensions to the school board. The procedure given these students, or lack thereof, falls short of that required by the due process clause of the Fourteenth Amendment.

b. *Substantive Due Process*

Plaintiffs also allege a violation of their substantive due process rights. They claim that the punishment, in-school suspension, was disproportionate to the perceived offense, the wearing of long hair, and that the dress code had no rational basis in instructional, pedagogical, or disciplinary theory.

To constitute a violation of substantive due process, the school officials' action must have been based on unconstitutional criteria, or have been arbitrary and capricious. *See Regents of Univ. of Mich. v. Ewing,* 474 U.S. 214, 106 S.Ct. 507, 88 L.Ed.2d 523 (1985); *Amelunxen v. Univ. of Puerto Rico,* 637 F.Supp. 426 (D.P.R.1986), *aff'd,*815 F.2d 691 (1st Cir.1987). If the decision to suspend the students was not made in bad faith, and the procedures applied were not unfair, the suspensions will stand unless they are "such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment." *Amelunxen,* 637 F.Supp. at 431 (citing *Ewing,* 474 U.S. at 225, 106 S.Ct. at 513). Thus, if the suspensions were patently unreasonable or disproportionate to the offense, the plaintiffs would

be entitled to relief. *Cunningham v. Beavers,* 858 F.2d 269 (5th Cir.1988), *cert. denied,*489 U.S. 1067, 109 S.Ct. 1343, 103 L.Ed.2d 812 (1989).

[19] Although the hair regulation does not satisfy the heightened scrutiny applied under First Amendment analysis, it is rationally related to the legitimate goals of creating an atmosphere conducive to learning and to minimize disruptions attributable to personal appearance; fostering an attitude of respect for authority; and preparing students to enter the workplace. *See Karr v. Schmidt,* 460 ***1336** F.2d 609 (5th Cir.1972). In-school suspension for a period of a month to six weeks, which afforded the students at least some opportunity to pursue their regular coursework and receive assistance from teachers and teachers' aides, is not an unreasonable punishment. While in-school suspension, imposed to punish relatively innocuous infringements of the school dress code, may indeed constitute a substantive due process violation when it extends for a longer period of time, resulting in a marked learning disadvantage for suspended students, the suspensions which took place in the present case do not.

6. Equal Protection

Finally, plaintiffs allege that the application of the dress code to Native American students violates the Fourteenth Amendment's guaranty of equal protection. They claim that the suspension of the students arbitrarily denied them of educational benefits on account of their race.

[20] The Fourteenth Amendment mandates similar treatment under the law for those who are similarly situated. *Peyote Way Church of God, Inc. v. Thornburgh,* 922 F.2d 1210, 1214 (5th Cir.1991); *Cunningham v. Beavers,* 858 F.2d 269, 272 (5th Cir.1988). The Big Sandy dress code is a racially neutral law, which singles out no particular group or individual. When a neutral law has a disproportionately adverse effect upon a racial minority, it violates the equal protection clause if the disproportionate impact can be traced to a discriminatory purpose, which "implies that the decisionmaker selected a particular course of action at least in part because of, and not simply in spite of, the adverse impact it would have on an identifiable group." *United States v. Galloway,* 951 F.2d 64, 65 (5th Cir.1992).

The record is devoid of any evidence that the hair regulation was promulgated for a discriminatory purpose, or that school officials had a discriminatory motive in the enforcement of the regulation. Instead, the defendants have stated reasonable, nondiscriminatory reasons for the dress code, including the maintenance of discipline and promotion of respect for authority. The plaintiffs have not disputed the validity of the goals underlying the dress code.

[21][22] An equal protection claim will be reviewed under the rational basis test when there is no evidence of discriminatory purpose underlying a racially neutral regulation. *Cunningham,* 858 F.2d at 273. "If evaluation of the challenged regulation reveals any conceivable state purpose that can be considered as served by the legislation, then it must be upheld." *Id.* Certainly, maintenance of discipline and order in public schools is a prerequisite to establishing the most effective learning atmosphere and as such is a proper object for state and school board regulation.

Id. (citing *Ingraham v. Wright,* 525 F.2d 909, 916-917 (5th Cir.1976) (en banc), *aff'd,*430 U.S. 651, 97 S.Ct. 1401, 51 L.Ed.2d 711 (1977)). The hair regulation advances a legitimate purpose, and it survives plaintiffs' equal protection challenge. *See Hatch v. Goerke,* 502 F.2d 1189, 1192 (10th Cir.1974).

C. *Preliminary Injunction*

[23] The plaintiffs are entitled to a preliminary injunction, since they have satisfied the elements established in *Mississippi Power & Light v. United Gas Pipe Line Co.,* 760 F.2d 618 (5th Cir.1985). As discussed above, there is a substantial likelihood of success on the merits of the First Amendment claims and the Fourteenth Amendment procedural due process claim.

The injuries threatened if the conduct is not enjoined will be irreparable and irrevocable. Plaintiffs have made an adequate showing that they are given inferior instruction while in in-house detention. Students in detention are given their daily assignments and are monitored by a teacher's aide. However, the students, in actuality, are given very little opportunity to question their teachers about the assignments, and they receive only minimal assistance or tutorial help while in detention. The

plaintiffs allege that, prior to the issuance of the restraining order, the students were falling behind in their studies. If they were removed from their regular classes and returned to detention, they may never attain the educational level enjoyed by other students. If the defendants were not enjoined,***1337** the Native American students would be placed in the deplorable position of choosing between the free exercise of their religious beliefs and obtaining an adequate education.

The threatened injuries far outweigh any real harm to defendants. Although the defendants have alleged that there has been an increase in disciplinary problems since the issuance of the temporary restraining order, there has been no showing that the alleged increase is the result of the wearing of long hair. Further, the alleged problems appear to be insubstantial in comparison to the potential injury to the plaintiffs if the defendants' conduct were not enjoined.

Finally, the granting of preliminary injunctive relief is in the public interest, as it promotes tolerance for diverse viewpoints, and fosters understanding and sensitivity towards Native American students, and, indeed, toward all students who have beliefs which fall outside of our society's mainstream, ethnocentric belief system.

D. *Qualified Immunity*

[24][25] The individual defendants assert that they are entitled to qualified official immunity from plaintiffs' claims for damages. State officials enjoy qualified immunity unless their actions violate "clearly established statutory or constitutional rights of which a reasonable person would have known." *Savidge v. Fincannon,* 836 F.2d 898, 907 (5th Cir.1988) (citing *Harlow v. Fitzgerald,* 457 U.S. 800, 818, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396 (1982)). School officials are charged with knowledge of the basic constitutional rights of the students, and are immune only if they held a reasonable belief at the time of the conduct in question that there was a lawful right to act as they did. *Bilbrey by Bilbrey v. Brown,* 738 F.2d 1462, 1465 (9th Cir.1984) (citing *Wood v. Strickland,* 420 U.S. 308, 322, 95 S.Ct. 992, 1001, 43 L.Ed.2d 214 (1975)). This is not to say that school officials are "charged with predicting the future course of constitutional law." *Pierson v. Ray,* 386 U.S. 547, 557, 87 S.Ct. 1213, 1219, 18 L.Ed.2d 288 (1967). A compensatory award will be appropriate only if the school official has acted with "such disregard of the student's clearly established constitutional rights that his action cannot reasonably be characterized as being in good faith." *Bilbrey,* 738 F.2d at 1465.

In light of *Karr v. Schmidt,* 460 F.2d 609, which established that school dress codes are not subject to attack by students absent allegations of infringement on a fundamental right such as religion, and *Smith,* 494 U.S. 872, 110 S.Ct. 1595, which muddied the waters of the First Amendment free exercise doctrine, it cannot be said that a competent school official knew or should have known that the Big Sandy dress code was unconstitutional as applied to Native American students. Thus, the defendants, in their respective individual capacities, are entitled to qualified immunity with regard to the First Amendment claims.

Further, the defendants did not violate a clearly established constitutional right of which a reasonable person would have known with regard to plaintiffs' procedural due process claim. The Trustees, Superintendent Foster, and Principal Fountain reasonably believed that students and their parents were aware of the provisions of the school dress code, which had been in place for nearly twenty-five years. They also reasonably believed that some sort of notice had been given to the students and their parents prior to any lengthy suspension. Parents and tribal council members met with the Board on two occasions in September to discuss the hair length regulation, and, after concerned individuals were allowed to speak on the issue, the Board voted to retain the regulation. Accordingly, the school officials, in their individual capacities, are immune from plaintiffs' claim for monetary damages resulting from the due process violation.

E. *Attorney's Fees*

[26][27] Plaintiffs are seeking interim attorney's fees under 42 U.S.C. § 1988. Attorney's fees are available to parties who prevail in First Amendment actions. *Iranian Students Ass'n v. Sawyer,* 639 F.2d 1160 (5th Cir.1981). Although plaintiffs' claim for damages pursuant to 42 U.S.C. § 1983 was unsuccessful, the entry of the preliminary injunction results in a material alteration of ***1338** the legal relationship between the plaintiffs and the Trustees of Big Sandy, the superintendent, and the principal. *See Texas State Teachers Ass'n v. Garland Ind. School Dist.,* 489

U.S. 782, 109 S.Ct. 1486, 103 L.Ed.2d 866 (1989). Thus, plaintiffs are prevailing parties for the purposes of an award of fees under § 1988, where they have successfully vindicated their First and Fourteenth Amendment rights and altered school policy. *Id. See also Wyatt v. Cole,* 928 F.2d 718, 722 (5th Cir.1991), *rev'd on other grounds,* 504 U.S. 158, 112 S.Ct. 1827, 118 L.Ed.2d 504 (1992); *Jackson v. Galan,* 868 F.2d 165, 168-69 (5th Cir.1989); *Haskell v. Washington Tp.,* 864 F.2d 1266, 1279 (6th Cir.1988). However, where injunctive relief is ordered, the award of attorney's fees will generally be imposed solely against the defendants in their official capacities, since the injunctive relief sought and won by the plaintiffs can only be obtained from the defendants acting in their official capacities. *Scott v. Flowers,* 910 F.2d 201, 213 n. 25 (5th Cir.1990).

[28] Plaintiffs seek fees incurred in the pursuit of this preliminary injunction. An award of interim attorney's fees is proper where the liability of the opposing party has been established, and the substantial rights of the parties have been determined. *Hanrahan v. Hampton,* 446 U.S. 754, 757, 100 S.Ct. 1987, 1989, 64 L.Ed.2d 670 (1980); *Haskell,* 864 F.2d at 1279. *See Frazier v. Board of Trustees,* 765 F.2d 1278 (5th Cir.1985), *amended,* 777 F.2d 329 (5th Cir.1985); *Espino v. Besteiro,* 708 F.2d 1002 (5th Cir.1983). Plaintiffs have satisfied this standard.

Plaintiffs will be allowed to file their properly documented and detailed petition for reasonable attorney's fees within twenty days of the service of this order.

III. *Conclusion*

For the reasons set forth above, the plaintiffs are entitled to a preliminary injunction enjoining the defendants from enforcing the Big Sandy Independent School District's hair regulation against Native American students. An order incorporating the terms set forth above shall issue concurrently with this memorandum opinion.

E.D.Tex.,1993.
Alabama and Coushatta Tribes of Texas v. Trustees of Big Sandy Independent School Dist.
817 F.Supp. 1319, 82 Ed. Law Rep. 442

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Christian Legal Soc. Chapter of University of California v. Kane
N.D.Cal.,2006.
Only the Westlaw citation is currently available.
United States District Court,N.D. California.
CHRISTIAN LEGAL SOCIETY CHAPTER OF UNIVERSITY OF CALIFORNIA, Hastings College of the Law, a/k/a Hastings Christian Fellowship,
Plaintiff,
v.
Mary Kay KANE, et al., Defendants.
No. C 04-04484 JSW.

May 19, 2006.

Gregory Baylor, Steven Aden, Timothy Tracey, Springfield, VA, Timothy M. Smith, McKinley & Smith, Steven Burlingham, Gary Till & Burlingham, Sacramento, CA, for Plaintiff.
Ethan P. Schulman, Dipanwita Deb Amar, Long Xuan Do, Howard, Rice, Nemerovski, Canady, Falk, San Francisco, CA, Matthew Rutledge Schultz, for Defendants.

AMENDED ORDER RE MOTIONS FOR SUMMARY JUDGMENT
JEFFREY S. WHITE, J.
*1 This Amended Order is issued to correct clerical error Defendants brought to the Court's attention. In the Courts' original order, the header "Hastings' Nondiscrimination Policy Regulates Speech" should have read "Hastings' Nondiscrimination Policy Regulates Conduct." The Court issues this amended ordered solely to correct this clerical error.

Now before the Court is the motion for summary judgment filed by plaintiff Christian Legal Society Chapter of University of California, Hastings College of the Law, a/k/a Hastings Christian Fellowship ("CLS") and cross-motions for summary judgment filed by defendants Mary Kay Kane, Judy Chapman, Maureen E. Corcoran, Eugene L. Freeland, Carin T. Fujisaki, John T. Knox, Jan Lewenhaupt, James E. Mahoney, Brian D. Monaghan, Bruce L. Simon, John K. Smith, and Tony West (collectively "Hastings" or "Hastings Defendants") and intervenor-defendant Hastings Outlaw ("Outlaw"). Having carefully reviewed the parties' papers and considered their arguments and the relevant legal authority, and good cause appearing, the Court hereby DENIES CLS's motion for summary judgment and GRANTS Hastings' and Outlaws' cross-motions for summary judgment.[FN1]

FN1. Hastings objects to portions of the Declaration of Steven H. Aden submitted by CLS. Outlaw joined in the evidentiary objections. The Court sustains the objection based on lack of personal knowledge to paragraph 13 of the Aden Declaration to the extent it declares that the "Hastings Republicans is (sic) a chapter of California College Republicans and as such, abides by its constitution" and the portion of Exhibit K attaching the Constitution of the California College Republicans. The Court overrules the remaining evidentiary objections.
Since the hearing on the cross-motions, the parties have each filed several requests for leave to file supplemental authority. To the extent the parties seek leave to provide briefing on the supplemental authority and on the issues raised by the parties' cross-motions, the requests are DENIED. To the extent the parties merely seek leave to file additional authority, the Court has reviewed and considered the new authority, and thus DENIES the requests as MOOT.

FACTUAL BACKGROUND

This case concerns whether a religious student organization may compel a public university law school to fund its activities and to allow the group to use the school's name and facilities even though the organization admittedly discriminates in the selection of its members and officers on the basis of religion and sexual orientation.

CLS is an unincorporated student organization comprised of students attending University of California, Hastings College of the Law (the "Law School"). (Joint Stipulation of Facts for Cross-Motions for Summary Judgment ("Joint Stip."), ¶ 1.) The mission of CLS is "to maintain a vibrant Christian Law Fellowship on the School's campus which enables its members, individually and as a group, to love the Lord with their whole beings-

hearts, souls, and minds-and to love their neighbors as themselves."(*Id.*, Ex. E.) In the beginning of the 2004-2005 academic year, CLS applied for, but was denied the privilege of becoming a recognized student organization at the Law School. (*Id.*, ¶¶ 38-42.)

University of California, Hastings College of the Law is a public law school located in San Francisco and is part of the University of California school system. (*Id.*, ¶ 2.) Mary Kay Kane is the Chancellor and Dean of the Law School. Judy Chapman is the Director of the Office of Student Services, and the remaining defendants, Maureen E. Corcoran, Eugene L. Freeland, Carin T. Fujisaki, John T. Knox, Jan Lewenhaupt, James E. Mahoney, Brian D. Monaghan, Bruce L. Simon, John K. Smith, and Tony West, are members of the Board of Directors of the Law School. (*Id.*, ¶¶ 3-5.)

The Hastings Defendants permit student organizations to register with the Office of Student Services. (*Id.*, ¶ 6.) Student organizations must be registered in order to gain access to the following benefits: (a) use of the Law School's name and logo; (b) use of certain bulletin boards in the basement of Snodgrass Hall; (c) eligibility for a Law School organization email address; (d) eligibility to send out mass emails through the Associated Students of the University of California at Hastings; (e) eligibility for a student organization account with fiscal services at the Law School; (f) eligibility to apply for student activity fee funding; (g) eligibility to apply for limited travel funds; (h) ability to place announcements in the Hastings Weekly, a weekly newsletter prepared and distributed by the Office of Student Services; (I) eligibility to apply for permission to use limited office space; (j) eligibility for the use of an organization voice mailbox for telephone messages; (k) listing on the Office of Student Services' website and any hard copy lists, including the Student Guidebook and admissions publications; (l) participation in the annual Student Organizations Faire; and (m) use of the Student Information Center for distribution of organization materials to the Law School community. (*Id.*, ¶ 9.) Registered student organizations may also apply for permission to use the Law School's rooms and audio-visual equipment for meetings. The Hastings Defendants have extended this benefit to CLS even though it is not a registered student organization. (*Id.*, ¶ 10.)The Hastings Defendants provide non-registered organizations access to certain bulletin boards and chalk boards at the Law School to make announcements.(*Id.*, ¶ 11.)Although the Hastings Defendants informed CLS that it could use the facilities at the Law School for its meetings, CLS never requested to use such facilities during the 2004-2005 academic year. (*Id.*, ¶¶ 58, 61.)

***2** As a condition of becoming a "registered student organization," the Hastings Defendants require a student organization to comply with the Law School's Policies and Regulations Applying to College Activities, Organizations and Students, which requires, *inter alia,* registered student organizations to abide by the Policy on Nondiscrimination ("Nondiscrimination Policy").(*Id.*, ¶¶ 12, 14.)The Nondiscrimination Policy provides:

> The College is committed to a policy against legally impermissible, arbitrary or unreasonable discriminatory practices. All groups, including administration, faculty, student governments, College-owned student residence facilities and programs sponsored by the College, are governed by this policy of nondiscrimination....
> The University of California, Hastings College of the Law shall not discriminate unlawfully on the basis of race, color, religion, national origin, ancestry, disability, age, sex or sexual orientation. This nondiscrimination policy covers admission, access and treatment in Hastings-sponsored programs and activities.

(*Id.*, ¶ 15.)Hastings requires registered student organizations to allow any student to participate, become a member, or seek leadership positions, regardless of their status or beliefs. (*Id.*, ¶ 18.)

From the 1994-1995 academic year to the 2003-2004 academic year, a student organization calling itself either Hastings Christian Legal Society or the Hastings Christian Fellowship was a registered student organization at Hastings. (*Id.*, ¶ 22.)From the 1994-1995 academic year through the 2001-2002 academic year, the student organization used a set of bylaws which appear to be an old version of the chapter bylaws distributed by the National Christian Legal Society. (*Id.*, ¶ 23.)These bylaws provided that the objectives of the organization were to "encourage those who identify themselves as followers of Jesus Christ to more faithfully live out their commitment in their personal and academic lives, to prepare members for future lives as Christian attorneys, and to provide a witness and outreach for Jesus Christ in the Hastings community."(*Id.*, Ex. C.) The bylaws

required voting members to acknowledge in writing their agreement with the following "Statement of Faith":

Trusting in Jesus Christ as my Savior, I believe in:
• The Bible as the inspired word of God;
• The Deity of our Lord, Jesus Christ, God's son;
• The vicarious death of Jesus Christ for our sins; His bodily resurrection and His personal return.
• The presence and power of the Holy Spirit in the work of regeneration.
• Jesus Christ, God's son, is Lord of my life;

(*Id.*, Ex. C.) However, there is no evidence that Hastings Christian Legal Society or the Hastings Christian Fellowship ever enforced this requirement.(*Id.*, ¶ 57.)Moreover, the bylaws also stated that the members and the organization would "comply with the Policies and Regulations Applying to College Activities, Organizations, and Students."(*Id.*, Ex. C.)

***3** During the 2002-2003 and 2003-2004 academic years, the student organization used a different set of bylaws. These bylaws provided: "HCF welcomes all students of the University of California, Hastings College of law."(*Id.*, ¶ 25.)This organization did not exclude members on the basis of religion or sexual orientation. (*Id.*)

During the 2003-2004 academic year, approximately five to seven students attended their meetings and events. (*Id.*, ¶ 26.)During that year, one of the participants in the meetings was an openly lesbian student and two were students who held beliefs inconsistent with what CLS considers to be orthodox Christianity. (*Id.*, ¶¶ 27-28.)

At the end of the 2003-2004 academic year, Isaac Fong ("Fong"), Dina Haddad ("Haddad") and Julie Chan ("Chan") became the leaders of the Hastings Christian Fellowship. Fong and Haddad decided to affiliate their student organization officially with a national organization known as the Christian Legal Society ("CLS-National").(*Id.*, ¶ 30-31.)CLS-National requires its formally-associated student chapters to use a specific set of bylaws. (*Id.*, ¶ 32, Ex. E.) The bylaws require any student who wants to become a member to sign a "Statement of Faith" which provides:

Trusting in Jesus Christ as my Savior, I believe in:
• One God, eternally existent in three persons, Father, Son and Holy Spirit.
• God the Father Almighty, Maker of heaven and earth.
• The Deity of our Lord, Jesus Christ, God's only Son conceived of the Holy Spirit, born of the virgin Mary; His vicarious death for our sins through which we receive eternal life; His bodily resurrection and personal return.
• The presence and power of the Holy Spirit in the work of regeneration.
• The Bible as the inspired Word of God.

(*Id.*, ¶ 33.)CLS will not permit students who do not sign the Statement of Faith to become members or officers. CLS also bars individuals who engage in "unrepentant homosexual conduct" or are members of religions that have tenets which differ from those set forth in the Statement of Faith from becoming members or officers. (*Id.*, ¶¶ 34-35.)The bylaws also pronounce a "code of conduct" for officers which provides that officers "must exemplify the highest standards of morality as set forth in Scripture."(*Id.*, Ex. E at 2.)

While only actual members of CLS may vote for or remove officers, stand for election to become an officer, or vote to amend the organization's constitution, CLS's meetings and activities are open to all students, regardless of their religion or sexual orientation. (*Id.*, ¶ 36.)

In early September 2004, CLS also applied to the Office of Student Services for travel funds to attend CLS-National's annual conference, and initially, Hastings informed CLS that such funds were being set aside for CLS. (*Id.*, ¶ 37.)On September 17, 2004, CLS submitted its registration form and set of bylaws to the Office of Student Services. (*Id.*, ¶ 38.)Hastings informed CLS that its bylaws did not appear to be compliant with the Nondiscrimination Policy, in particular the religion and sexual orientation provisions, and invited CLS to discuss changing them. Hastings further advised CLS that to become a recognized student organization, CLS would have to open its membership to all students irrespective of their religion or sexual orientation. (*Id.*, ¶¶ 39-41.)Subsequently, due to CLS's failure to become a registered student organization, Hastings informed CLS that the travel funds previously set aside for CLS had been withdrawn. (*Id.*, ¶ 42.)

***4** Despite not being a recognized student

organization, throughout the 2004-2005 academic year, CLS held weekly Bible-study meetings, and hosted a beach barbeque, a Thanksgiving dinner, a campus lecture on the Christian faith and legal practice, several fellowship dinners, an end-of-year banquet, and several informal social activities. CLS also invited Hastings students to attend Good Friday and Easter Sunday church services with the organization.(*Id.*, ¶ 44.)The Bible studies were led by one of CLS's officers, but any attendee or member was welcome to lead the group in prayer, share prayer requests, and otherwise participate in prayer. (*Id.*, ¶¶ 49, 51.)

Between nine to fifteen Hastings students regularly attended CLS's meetings and activities during the 2004-2005 academic year. (*Id.*, ¶ 48.)Julie Chan, CLS's treasurer, resigned from her position and membership in January 2005. In addition to CLS's officers, one other student became an official member of CLS during the academic year. (*Id.*, ¶¶ 47-48.)No known non-Christian, gay, lesbian, or bisexual students sought to join CLS as a member or officer, or attend any of its meetings during the 2004-2005 academic year. (*Id.*, ¶¶ 50, 54.)As of October 2005, seven Hastings students, including three officers, joined CLS as members for the 2005-2006 academic year. (*Id.*, ¶ 64.)

CLS filed a complaint in this action asserting that Hastings is violating: (1) CLS's rights to freedom of expressive association pursuant to the First Amendment of the United States Constitution; (2) CLS's free speech pursuant to the First Amendment; (3) the Establishment Clause of the First Amendment; (4) the Due Process Clause of the Fourteenth Amendment; (5) the Free Exercise Clause of the First Amendment; and (6) the Equal Protection Clause of the Fourteenth Amendment. On April 12, 2005, the Court granted a motion by Hastings to dismiss CLS's establishment, due process, and equal protection claims, but granted CLS leave to amend its equal protection claim. On May 3, 2005, CLS filed an amended complaint which asserts an amended equal protection claim. CLS, Hastings, and Outlaw have each filed cross-motions for summary judgment on each of CLS's claims for free speech, expressive association, free exercise and equal protection.

ANALYSIS

A. Legal Standard on Summary Judgment.

A principal purpose of the summary judgment procedure is to identify and dispose of factually unsupported claims. *Celotex Corp. v. Cattrett,* 477 U.S. 317, 323-24, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). Summary judgment is proper when the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law."Fed.R.Civ.P. 56(c).

A party moving for summary judgment who does not have the ultimate burden of persuasion at trial, must produce evidence which either negates an essential element of the non-moving party's claims or show that the non-moving party does not have enough evidence of an essential element to carry its ultimate burden of persuasion at trial. *Nissan Fire & Marine Ins. Co. v. Fritz Cos.,* 210 F.3d 1099, 1102 (9th Cir.2000). A party who moves for summary judgment who does bear the burden of proof at trial, must produce evidence that would entitle him or her to a directed verdict if the evidence went uncontroverted at trial.*C.A.R. Transp. Brokerage Co., Inc. v. Darden,* 213 F.3d 474, 480 (9th Cir.2000).

*5 Once the moving party meets his or her initial burden, the non-moving party must go beyond the pleadings and by its own evidence "set forth specific facts showing that there is a genuine issue for trial."Fed.R.Civ.P. 56(e). In order to make this showing, the non-moving party must "identify with reasonable particularity the evidence that precludes summary judgment."*Keenan v. Allan,* 91 F.3d 1275, 1279 (9th Cir.1996). It is not the Court's task to "scour the record in search of a genuine issue of triable fact."*Id.* (quoting *Richards v. Combined Ins. Co.,* 55 F.3d 247, 251 (7th Cir.1995)). If the non-moving party fails to make this showing, the moving party is entitled to judgment as a matter of law. *Celotex,* 477 U.S. at 323. An issue of fact is "genuine" only if there is sufficient evidence for a reasonable fact finder to find for the non-moving party. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248-49, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). A fact is "material" if it may affect the outcome of the case. *Id.* at 248."In considering a motion for summary judgment, the court may not weigh the evidence or make credibility determinations, and is required to draw all inferences in a light most favorable to the non-moving party."*Freeman v. Arpaio,* 125 F.3d 723, 735 (9th Cir.1997).

B. Cross-Motions for Summary Judgment.

CLS contends that Hastings' enforcement of its Nondiscrimination Policy, and its refusal to grant CLS an exception to exclude students on the basis of religion and sexual orientation, infringes its members' rights to free speech, free association, free exercise, and equal protection. As set forth below, the Court finds that Hastings' uniform enforcement of its Nondiscrimination Policy infringes none of these constitutional rights.

1. First Amendment: Free Speech.

a. Regulation of Conduct.

i. Hastings' Nondiscrimination Policy Regulates Conduct.

The parties dispute whether Hastings' Nondiscrimination Policy regulates speech or conduct. The Nondiscrimination Policy prohibits discrimination on the basis of religion and sexual orientation, among other categories. (Joint Stip., ¶ 15.) Courts have consistently held that regulations prohibiting discrimination, similar to Hastings' Nondiscrimination Policy, regulate conduct, not speech. *See Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston,* 515 U.S. 557, 115 S.Ct. 2338, 132 L.Ed.2d 487 (1995); *Roberts v. United States Jaycees,* 468 U.S. 609, 624, 104 S.Ct. 3244, 82 L.Ed.2d 462 (1984); *Jews for Jesus, Inc. v. Jewish Cmty Relations Council of New York,* 968 F.2d 286, 295 (2d Cir.1992).

In *Roberts,* two local chapters of the United States Jaycees ("Jaycees") had been admitting women as full members for years, in violation of the Jaycees' organization's bylaws restricting "regular" membership to men between the ages of 18 and 35. *Roberts,* 468 U.S. at 613-14. When the Jaycees sought to revoke the charters of the local chapters, members of the chapters filed complaints alleging the exclusion of women from full membership violated the state Human Rights Act, which prohibited discrimination in public accommodations on the basis of race, color, creed, religion, disability, national origin or sex.*Id.* at 614-15.The Supreme Court found that "[o]n its face," the state anti-discrimination statute "[did] not aim at the suppression of speech, [did] not distinguish between prohibited and permitted activity on the basis of viewpoint, and [did] not license enforcement authorities to administer the statute on the basis of such constitutionally impermissible criteria."*Id.* at 623.The Court further found that the goal of the statute was to eliminate discrimination and assure the state's citizens equal access to publicly available goods and services and that this goal was "unrelated to the suppression of expression."*Id.* at 624.

***6** In *Jews for Jesus,* under the threat of an economic boycott from the Jewish Community Relations Council of New York ("JCRC") and other organizations, a resort cancelled a contract to provide meals and accommodations to a non-profit religious corporation, Jews for Jesus, Inc. *Jews for Jesus,* 968 F.2d at 290. Jews for Jesus and a member of the organization argued that the JCRC aided or incited the resort to deprive them of their right to public accommodations without discrimination on the basis of race and/or creed under state law. *Id.* at 293.The state statute at issue prohibited discrimination in public accommodations on the basis of race, creed, color, or national origin. *Id.* at 293.The Second Circuit rejected the JCRC's contention that the state anti-discrimination statute was unconstitutional as applied because it impermissibly regulated its "speech" in applying economic pressure on the resort. *Id.* at 295.The court found that the state statue prohibiting discrimination on the basis of, among other things, race and religion, was "plainly aimed at conduct, *i.e.,* discrimination, not speech."*Id.*

In *Hurley,* Massachusetts enforced a state statute prohibiting discrimination in public accommodations against a group of private citizens in an unincorporated association, the South Boston Allied War Veterans Council ("Council"), who were organizing a St. Patrick's Day parade. *Hurley,* 515 U.S. at 561. Gay, lesbian, and bisexual descendants of Irish immigrants formed an organization called GLIB "to march in the parade as way to express pride in their Irish heritage as openly gay, lesbian, and bisexual individuals."*Id.* When the Council refused to allow GLIB to participate in the parade, GLIB and several of its members filed an action against the Council alleging it violated the state public accommodations law which prohibited discrimination on the basis of sexual orientation. *Id.* The state trial court agreed with GLIB and rejected the Council's claim that requiring it to admit GLIB would violate its First Amendment rights because the Council's parade had a wide variety of themes and conflicting

messages. *Id.* at 562.

The Supreme Court found that the public accommodations law "[did] not, on its face, target speech or discriminate on the basis of its content, the focal point of its prohibition being rather on the act of discriminating against individuals."*Id.* at 572.Nevertheless, the Court reversed the state court's ruling because of the "peculiar" manner in which the statute had been applied.*Id.* The Court found that parades are a form of expression and that the selection of a parade's contingents is entitled to protection under the First Amendment. *Id.* at 568-70.The Court held that every contingent participating in the parade affects the message conveyed by the private organizers, and thus, the state court's application of the statute essentially required the Council to alter the expressive content of its parade. *Id.* at 572-73.It was significant to the Court's analysis that the dispute did not concern an attempt to exclude participation of all openly gay, lesbian, or bisexual individuals from marching in approved parade units. In fact, the Council expressly disclaimed any intent to exclude gay, lesbian or bisexual individuals from participating generally. Rather, the Court found that the Council was concerned with excluding a group from marching behind a particular banner. *Id.* at 572.

*7 The Supreme Court recently reiterated the distinction between regulating speech and conduct in *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, --- U.S. ----, 126 S.Ct. 1297, 164 L.Ed.2d 156 (2006), when it affirmed the enforcement of the Solomon Amendment against law schools with policies that prohibit discrimination on the basis of, among other things, sexual orientation. The Solomon Amendment provides that "if any part of an institution of higher education denies military recruiters access equal to that provided other recruiters, the entire institution will lose certain federal funds."*Id.* at 1302.The Supreme Court rejected the argument by an association of laws schools and law faculties that requiring law schools with anti-discrimination policies to provide the same level of access to the military recruiters as employers who do not discriminate on the basis of sexual orientation infringed the association's members' First Amendment rights. The Court held that:

[t]he Solomon Amendment neither limits what law schools may say nor requires them to say anything. Law schools remain free under the statute to express whatever views they may have on the military's congressionally mandated employment policy, all the while retaining eligibility for federal funds.... As a general matter, the Solomon Amendment regulates conduct, not speech. It affects what law schools must *do*-afford equal access to military recruiters-not what they may or may not *say*.

Id. at 1307 (emphasis in original); *see also Evans v. City of Berkeley,* 38 Cal.4th 1, 40 Cal.Rptr.3d 205, 212, 129 P.3d 394 (2006) (holding that a city's requirement that an organization comply with a nondiscrimination resolution did not require the organization to espouse or denounce any particular viewpoint).

Akin to *Hurley, Roberts, Jews for Jesus,* and *Evans,* the Court finds that on its face, Hastings' Nondiscrimination Policy targets conduct, *i.e.* discrimination, not speech. As in *Rumsfeld,* the Court finds that the Nondiscrimination Policy regulates conduct, not speech because it affects what CLS must *do* if it wants to become a registered student organization-not engage in discrimination-not what CLS may or may not *say* regarding its beliefs on non-orthodox Christianity or homosexuality.

In *Hurley,* even though the Court found that the anti-discrimination statute did not target speech on its face, the Court focused on the "peculiar" application of the statute to require a private entity organizing a parade to admit a group seeking to march behind a particular banner. Significantly, the private group expressly disclaimed any intent to exclude all openly gay, lesbian, or bisexual individuals from participating in other approved parade contingents. *Hurley,* 515 U.S. at 572-73. In contrast to *Hurley,* CLS is not excluding certain students who wish to make a particular statement, but rather, CLS is excluding all students who are lesbian, gay, bisexual, or not orthodox Christian.[FN2]

> FN2. Although CLS argues that it does not discriminate on the basis of sexual orientation, but merely excludes students who engage in or advocate homosexual conduct, (CLS Mot. at 22), this is a distinction without a difference. *See Lawrence v. Texas,* 539 U.S. 558, 583, 123 S.Ct. 2472, 156 L.Ed.2d 508 (2003 (O'Connor, J., concurring) (rejecting attempt to distinguish statute discriminating against "homosexual conduct" from one discriminating on the basis of sexual orientation: "While it is true that the law

> applies only to conduct, the conduct targeted by this law is conduct that is closely correlated with being homosexual. Under such circumstances, [the State] sodomy law is targeted at more than conduct. It is instead directed toward gay persons as a class."); *see also Karouni v. Gonzales,* 399 F.3d 1163, 1173 (9th Cir.2005) (finding "no appreciable difference between an individual ... being persecuted for being a homosexual and being persecuted for engaging in homosexual acts").

*8 The facts in this case further demonstrate that Hastings' Nondiscrimination Policy is directed at conduct, not speech. Notably, here, a predecessor of CLS met as a recognized group on Hastings' campus for the previous ten years. (Joint Stip, ¶ 22: "From the 1994-1995 academic year to the 2003-2004 academic year, a student organization calling itself either Hastings Christian Legal Society ("HCLS") or the Hastings Christian Fellowship ("HCF") existed as a registered student organization at Hastings."). The predecessor group did not exclude members on the basis of religion or sexual orientation.(*Id.* at 25.)As long as the organization admitted all students who wanted to join, it was free to express any ideas or viewpoints. It was not until CLS refused to comply with the Nondiscrimination Policy that Hastings withheld recognition. (*Id.,* ¶¶ 33-35, 39-41.)

At the hearing on these motions, CLS argued that Hastings' enforcement of its Nondiscrimination Policy suppressed CLS's speech that "homosexuality is not Christian." First, as discussed above, the evidence does not show that CLS has been precluded from expressing any particular idea or viewpoint. Rather, to become a recognized student group, Hastings requires that CLS merely refrain from excluding students on the basis of their religion or sexual orientation. Second, even if the record could be construed to support CLS's position that its "speech" regarding homosexuality has been suppressed, CLS has not shown that the Nondiscrimination Policy targets speech as opposed to conduct. As the Supreme Court stated in *R.A.V.,* if the government regulates conduct for reasons unrelated to its expressive content, such conduct does not become shielded from regulation merely because it expresses a discriminatory idea or philosophy. *R.A.V v. City of St. Paul,* 505 U.S. 377, 390, 112 S.Ct. 2538, 120 L.Ed.2d 305 (1992); *see also Jews for Jesus,* 968 F.2d at 295 ("simply because speech or other expressive conduct can in some circumstances be the vehicle for violating a statute directed at regulating conduct does not render that statute unconstitutional.").

Therefore, the Court concludes that on its face and in its application to CLS, the Nondiscrimination Policy regulates conduct, not speech.

ii. Analysis Pursuant to *United States v. O'Brien.*

Because the Court finds that the Nondiscrimination Policy regulates conduct, the Court will analyze whether CLS's free speech rights have been infringed pursuant to the standard from *United States v. O'Brien,* 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968), which sets forth the standard for determining when government regulation of conduct violates First Amendment speech protections. *See Jews for Jesus,* 968 F.2d at 295 (analyzing constitutionality of nondiscrimination statute under *O'Brien* standard); *Presbytery of New Jersey of the Orthodox Presbyterian Church v. Florio,* 902 F.Supp. 492 (D.N.J.1995) (same). Under *O'Brien,* governmental regulation of conduct is valid, even if it incidentally restricts speech, so long as: (1) the regulation is within the constitutional power of the government; (2) it furthers an important or substantial government interest; (3) the government interest is unrelated to the suppression of free expression; and (4) the incidental restriction on the alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest. *O'Brien,* 391 U.S. at 377.

*9 States have the constitutional authority and a substantial, indeed compelling, interest in prohibiting discrimination on the basis of religion and sexual orientation. *See Roberts,* 468 U.S. at 624 (holding that the state had a compelling interest "of the highest order" in eradicating sex discrimination); *see also Jews for Jesus,* 968 F.2d at 295 ("New York has the constitutional authority to prohibit, and a substantial, indeed compelling, interest in prohibiting racial and religious discrimination in obtaining public accommodations."); *Presbytery of New Jersey,* 902 F.Supp. at 521 (finding state interest in eliminating discrimination on the basis of, *inter alia,* sexual orientation, was "not only substantial but also [could] be characterized as compelling"); *Gay Rights Coal. of Georgetown Univ. Law Center v. Georgetown Univ.,* 536 A.2d 1, 38 (D.C.1987) ("The eradication of sexual orientation discrimination is a compelling

governmental interest."). The interest in prohibiting discrimination is particularly critical in the context of education. *See e.g., Grutter v. Bollinger,* 539 U.S. 306, 331-32, 123 S.Ct. 2325, 156 L.Ed.2d 304 (2003) ("ensuring that public institutions are open and available to all segments of American society, including people of all races and ethnicities, represents a paramount government objective.... [N]owhere is the importance of such openness more acute than in the context of higher education.") (quotations and internal citations omitted); *see also Butt v. State of California,* 4 Cal.4th 668, 680, 15 Cal.Rptr.2d 480, 842 P.2d 1240 (1992) ("In view of the importance of education to society and to the individual child, the opportunity to receive the schooling furnished by the state must be made available to all on an equal basis.").

Moreover, "[t]he governmental interest in prohibiting such discrimination ... is not directed at or related to suppression expression."*Jews for Jesus,* 968 F.2d at 295;*see also Roberts,* 468 U.S. at 624 (goal of eliminating discrimination "is unrelated to the suppression of expression"); *Presbytery of New Jersey,* 902 F.Supp. at 521 (same). Therefore, the Court concludes that the Policy prohibiting discrimination on the basis of religion and sexual orientation, among other categories, is within the Hastings' constitutional authority as a state institution, and that the Nondiscrimination Policy furthers a governmental interest unrelated to the suppression of free expression-protecting students from discrimination. Furthermore, as discussed above, the facts here, including Hastings' recognition of a predecessor of CLS for the previous ten years, confirm that Hastings' Nondiscrimination Policy is directed at conduct unrelated to the suppression of expression. (Joint Stip, ¶¶ 22, 25, 33-35, 39-41.) Thus, the first three prongs of the *O'Brien* test have been satisfied.

With respect to the last prong of the *O'Brien* test, courts have found that the incidental restrictions on free speech rights when a government enforces an anti-discrimination statute against an organization seeking to exclude individuals were no greater than essential to the furtherance of the state's interest in prohibiting discrimination. *See Jews for Jesus,* 968 F.2d at 296 (holding the nondiscrimination statute was "no broader than necessary to further the legitimate goal of eradicating discrimination."); *see also Evans,* 40 Cal.Rptr.3d at 217, 129 P.3d 394 (holding that requiring a group to agree in advance not to discriminate was "a reasonable and narrowly tailored step to implement the diversity and nondiscrimination provisions" of a city resolution)."[A]n incidental burden on speech is no greater than essential, and therefore permissible under *O'Brien,* so long as the neutral regulation promotes a substantial government interest that would be achieved less effectively absent the regulation."*Rumsfeld,* 126 S.Ct. at 1311. The Hastings' Nondiscrimination Policy easily meets this standard. Hastings' interest in eradicating discrimination would certainly be achieved less effectively without a policy which prohibits the harmful conduct. Moreover, the Court notes that the Nondiscrimination Policy only targets the conduct of discrimination. As long as student groups do not exclude students based on the prohibited categories, the groups are free to express any beliefs or perspectives they choose. Thus, the Court finds Hastings' implementation of its Nondiscrimination Policy the most direct method of achieving Hastings' goal of eradicating harmful discrimination.

***10** Accordingly, the Court concludes that Hastings' enforcement of its Nondiscrimination Policy meets all four prongs of the *O'Brien* test, and thus, does not unconstitutionally infringe CLS's freedom of speech.

b. Regulation of Speech.

Alternatively, even if Hastings' Nondiscrimination Policy may be construed as regulating speech directly, it still passes constitutional muster. The validity of Hastings restricting access to its campus, and the level of scrutiny the Court must apply, turns on the type of forum Hastings has created. *See DiLoreto v. Downey Unified School Dist. Bd. of Ed.,* 196 F.3d 958, 964 (9th Cir.1999) ("The existence of a right to access to a public property and the standard by which limitations upon such right must be evaluated differ depending upon the character of the property at issue."). The parties dispute whether the forum at issue is a "designated public forum" or a "limited public forum." As the Ninth Circuit summarized in *DiLoreto:*

Forum analysis divides government property into three categories: public fora, designated public fora, and nonpublic fora....

A traditional public forum, such as a public park or sidewalk, is a place that has traditionally been available for public expression.... Regulation of speech in a traditional public forum is permissible "only if ... narrowly drawn to achieve a compelling

state interest.... When the government intentionally opens a nontraditional forum for public discourse it creates a designated public forum.... Restrictions on expressive activity in designated public fora are subject to the same limitations that govern a traditional public forum.
All remaining public property is classified as nonpublic fora. The government may limit expressive activity in nonpublic fora if the limitation is reasonable and not based on the speaker's viewpoint.

Id. at 964-65 (quotations and citations omitted). A "limited public forum" is "a type of nonpublic forum that the government has opened to certain groups or to certain topics."*Id.* at 965.Restrictions on expression in limited public forums are governed by the same standards that apply to nonpublic forums, *i.e.,*"restrictions that are viewpoint neutral and reasonable in light of the purpose served by the forum are permissible."*Id.*[FN3]

> FN3. CLS argues that the contours between the terms "designated public forum" and "limited public forum" have not always been clear and that the terms may be used interchangeably, but the Ninth Circuit has made clear that in this circuit, these terms have different meanings. *See Hopper v. City of Pasco,* 241 F.3d 1067, 1074 (9th Cir.2001). As the *Hopper* court explained "a limited public forum is a sub-category of a designated public forum that the government has intentionally opened up to certain groups or certain topics.... In a limited public forum, restrictions that are viewpoint neutral and reasonable in light of the purpose served by the forum are permissible."*Id.* at 1074-75 (quotations and citations omitted).

"Generally, school facilities may be deemed to be public forums only if school authorities have by policy or practice opened those facilities for indiscriminate use by the general public."*DiLoreto,* 196 F.3d at 966 (quotations and citations omitted). There is no evidence before the Court, and CLS does not contend, that Hastings has *indiscriminately* opened up its campus and allowed registration, and the attendant benefits, to the public generally. Nor is there evidence that any group of students may register. Rather, it is undisputed that Hastings restricts registration to student organizations that comply with Hastings' Policies and Regulations Applying to College Activities. (*See* Stip. Facts, ¶ 12.) Hastings also requires student organizations to comply with the Nondiscrimination Policy and to open their membership to all students. (*Id.* at ¶¶ 14, 17.)Moreover, registration is restricted to non-commercial student groups. (*Id.,* Ex. B at 62.) Finally, the Supreme Court and the Ninth Circuit have held that where a college or university creates a fund available for student organizations, as Hastings has done here, it creates a limited public forum. *See Board of Regents of the Univ. of Wisconsin Sys. v. Southworth,* 529 U.S. 217, 229-30, 120 S.Ct. 1346, 146 L.Ed.2d 193 (2000); *Rounds v. Oregon State Bd. of Higher Educ.,* 166 F.3d 1032, 1039 (9th Cir.1999); *see also Rosenberger v. Rector & Visitors of the Univ. of Virginia,* 515 U.S. 819, 829-31, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995) (applying standards applicable to limited public forums to restrictions on student activity fund available for student groups that, among other things, comply with certain procedural requirements). Therefore, the Court concludes that Hastings created a limited public forum and thus, the restrictions on access to this forum are permissible so long as they are viewpoint-neutral and reasonable.

i. Viewpoint Neutrality.

***11** Viewpoint discrimination occurs when the government targets "particular views taken by speakers on a subject."*Rosenberger,* 515 U.S. at 829. If the rationale for the restriction on expressive activity is the "specific motivating ideology or the opinion or perspective of the speaker," then the government has engaged in viewpoint discrimination. *Id.*

In *Rosenberger,* student groups at the University of Virginia were eligible to submit bills for reimbursement if they became a "Contracted Independent Organization" ("CIO").*Id.* at 823.An organization entitled Wide Awake Productions ("Wide Awake") met all the requirements to be qualified to become a CIO and receive reimbursements. *Id.* at 825.Wide Awake was formed by a group of students to, among other things, "publish a magazine of philosophical and religious expression."*Id.* Although Wide Awake was given CIO status, the university denied Wide Awake's request to be reimbursed for the cost of printing its publication "for the sole reason that their student paper 'primarily promotes or manifests a particular belie[f] in or about a deity or an ultimate reality.' " *Id.* at 822-23, 827.The Court concluded that the

university had engaged in viewpoint discrimination because it excluded student journalistic efforts with a religious editorial viewpoint. *Id.* at 831.In fact, the university expressly justified denying funds for Wide Awake's publication on the ground that its contents revealed an "avowed religious perspective." *Id* . at 832.

The factual situations presented by *Widmar v. Vincent,* 454 U.S. 263, 102 S.Ct. 269, 70 L.Ed.2d 440 (1981), *Lambs Chapel v. Center Moriches Union Free School,* 508 U.S. 384, 113 S.Ct. 2141, 124 L.Ed.2d 352 (1993), and *Good News Club v. Milford Center School,* 533 U.S. 98, 121 S.Ct. 2093, 150 L.Ed.2d 151 (2001), provide other clear examples of viewpoint discrimination. In *Widmar,* the university excluded student groups and speakers *"based* on their desire to use a generally open forum to engage in religious worship and discussion."*Widmar,* 454 U.S. at 269 (emphasis added). In *Lambs Chapel,* the evidence in the record demonstrated that the school district excluded a particular film series *because* the presentation would have been from a religious perspective.*Lambs Chapel,* 508 U.S. at 393-94. In *Good News Club,* the school district excluded a club "based on its religious nature." *Good News Club,* 533 U.S. at 107.

In contrast here, Hastings has not excluded CLS *because* it is a religious group but rather because it refuses to comply with the prerequisites imposed on all student organizations. To become a registered student group, Hastings requires all student groups to comply with Hastings' Policies and Regulations Applying to College Activities, including the Nondiscrimination Policy. (*See* Stip. Facts, ¶¶ 12, 14, 17.) Pursuant to the Nondiscrimination Policy, a student organization cannot exclude interested students from participating on the basis of, among other things, religion or sexual orientation. The student groups must remain open to all students who want to join or participate.(*Id.,* ¶¶ 15, 17.)

***12** Courts have found nondiscrimination statutes akin to Hastings' Nondiscrimination Policy to be viewpoint neutral. *See Roberts,* 468 U.S. at 615 (holding that a state law prohibiting discrimination on the basis of "race, color, creed, religion, disability, national origin or sex" did "not distinguish between prohibited and permitted activity on the basis of viewpoint"); *see also Board of Dirs. of Rotary Int'l v. Rotary Club of Duarte,* 481 U.S. 537, 549, 107 S.Ct. 1940, 95 L.Ed.2d 474 (1987); *Boy Scouts of Am. v. Wyman,* 335 F.3d 80, 94 (2d Cir.2003). Notably, in *Roberts,* the Court found that the state statute had not been applied "for the purpose of hampering the organization's ability to express its view."*Roberts,* 468 U.S. at 615. Rather, the statute "reflect[ed] the State's strong historical commitment to eliminating discrimination and assuring its citizens equal access to publicly available goods and services."*Id.*

In *Rotary Club of Duarte,* similar to *Roberts,* a local chapter of a national organization admitted women as members in violation of the national organization's requirements. As a result, the national organization revoked the local chapter's charter. *Duarte,* 481 U.S. at 541. In evaluating whether enforcing a statute against the national organization which barred discrimination in public accommodations violated the First Amendment rights of the organization's members, the Court held that the state statute made "no distinctions on the basis of the organization's viewpoint."*Id.* at 549.

In *Wyman,* the Connecticut State Employee Campaign Committee denied the application of a local chapter of the Boy Scouts of America to participate in the state's workplace charitable contribution campaign. *Wyman,* 335 F.3d at 83. The decision to exclude the Boy Scout chapter was based on a ruling by a state commission that the Boy Scout's policy of excluding homosexuals from membership and employment opportunities violated Connecticut's Gay Rights Law.*Id.* at 83.The Second Circuit concluded that the state anti-discrimination statute "prohibits discriminatory membership and employment policies not because of the viewpoints such policies express, but because of the immediate harms-like denial of concrete economic and social benefits-such discrimination causes homosexuals."*Id.* at 94.

CLS's arguments regarding viewpoint discrimination are unavailing. CLS contends that Hastings engages in viewpoint discrimination because it prohibits CLS from using religion as a criteria for selecting members and officers. (CLS Mot. at 16.) CLS is confusing the appropriate analysis by focusing on the reasons CLS is acting, as opposed to the reasons underlying Hastings' Nondiscrimination Policy. CLS also asserts that, as a religious group, it is unfairly disadvantaged. It argues that while other organizations, such as sports teams or political groups, may exclude students based on their athletic ability or political beliefs, CLS may not exclude the

students of its choice.(*Id.*) Again, CLS is confusing the analysis by focusing on the effect and the reason *CLS* is acting, as opposed to the reasons underlying *Hastings'* conduct. Moreover, the fact that a neutral policy may affect a group with a certain perspective or belief system does not render the policy viewpoint based.*Madsen v. Women's Health Ctr.,* 512 U.S. 753, 763, 114 S.Ct. 2516, 129 L.Ed.2d 593 (1994). In *Madsen,* a group of anti-abortion protestors challenged an injunction which prohibited them from demonstrating in certain places and in particular ways outside of a health clinic that performed abortions. The Court rejected the protesters' argument that the injunction was viewpoint-based:

***13** That petitioners all share the same viewpoint regarding abortion does not in itself demonstrate that some invidious content- or viewpoint-based purpose motivated the issuance of the order. It suggests only that those in the group *whose conduct* violated the court's order happen to share the same opinion regarding abortions being performed at the clinic. In short, the fact that the injunction covered people with a particular viewpoint does not itself render the injunction content or viewpoint based.

Id. (emphasis in original). Rather, the focus of the Court's inquiry for determining neutrality is government's purpose. *Id.; see also Menotti v. City of Seattle,* 409 F.3d 1113, 1129 (9th Cir.2005) (holding that the fact that an injunction barring access near the World Trade Organization conference "predominantly affected protestors with anti-WTO views did not render it content based").

Finally, in its reply brief, CLS argues that Hastings "refuses to recognize the CLS chapter because it takes a decidedly Christian point of view ... on issues of human sexuality and gender identity."(CLS Reply at 17.) However, there is no evidence in the record to support CLS's argument that Hastings will not allow CLS to become a recognized student organization because of CLS's religious perspective. In fact, the evidence in the record demonstrates otherwise. For the ten years preceding this lawsuit, a predecessor of CLS existed as a registered student organization at Hastings. (Joint Stip, ¶ 22.) The predecessor organization used the name of "Hastings Christian Legal Society" and "Hastings Christian Fellowship." (*Id.*) From the 1994-1995 academic year through the 2001-2002 academic year, the predecessor organization used the same set of bylaws, which appear to be an old version of the bylaws sent to student chapters by the National Christian Legal Society. (*Id.,* ¶ 23.)It was not until the 2004-2005 academic year, when it became clear that CLS would not comply with the Nondiscrimination Policy and Hastings' requirement that registered student organizations be open to all interested students that Hastings' withdrew CLS's recognition. (*Id.,* ¶¶ 33-35, 39-41.)

Thus, the Court concludes that the Nondiscrimination Policy, and Hastings' enforcement of this policy, is viewpoint neutral.

ii. Reasonableness.

In addition to being viewpoint neutral, restrictions on access to a limited public forum must be reasonable. "The reasonableness of a governmental restriction limiting access to a nonpublic forum must be assessed 'in light of the purpose of the forum and all of the surrounding circumstances." ' *Cogswell v. City of Seattle,* 347 F.3d 809, 817 (9th Cir.2003) (quoting *Cornelius v. NAACP Legal Def. and Educ. Fund, Inc.,* 473 U.S. 788, 809, 105 S.Ct. 3439, 87 L.Ed.2d 567 (1985)). "The reasonableness analysis emphasizes the consistency of the limitation in the context of the forum's intended purpose." *Id.* (citing *DiLoreto,* 196 F.3d at 967).

***14** In evaluating the reasonableness of Hastings' restrictions, the Court notes that "a university differs in significant respects from public forums such as streets or parks or even municipal theaters. A university's mission is education, and decisions of [the Supreme Court] have never denied a university's authority to impose reasonable regulations compatible with that mission upon the use of its campus and facilities."*Widmar,* 454 U.S. at 268 n. 5. Universities have a "right to exclude even First Amendment activities that violate reasonable campus rules or substantially interfere with the opportunity of other students to obtain an education."*Id.* at 277.

Hastings' purpose in recognizing and funding student organizations is to further students' education and participation in the law school environment and to foster students' interests and connections with their fellow students. Moreover, as a public institution, Hastings is subject to federal and state laws prohibiting discrimination. To promote the purpose of this forum and to comply with the spirit of the laws prohibiting discrimination, Hastings requires that student groups be open to all interested students,

without discrimination on the basis of any protected status. (Stip.Facts, ¶¶ 12, 14, 15, 17.) The Court concludes that Hastings' requirement of compliance with its Nondiscrimination Policy is a reasonable regulation that is consistent with and furthers its educational purpose. Accordingly, even if Hastings' Nondiscrimination Policy is considered a regulation of speech, Hastings' enforcement of this policy did not infringe upon CLS's First Amendment rights of free speech.

2. First Amendment: Expressive Association.

Although not expressly included in the First Amendment, the Supreme Court has recognized the freedom of expressive association as an right implicit in this amendment. As the Supreme Court explained in *Roberts:*

[a]n individual's freedom to speak, to worship, and to petition the government for the redress of grievances could not be vigorously protected from interference by the State unless a correlative freedom to engage in group effort toward those ends were not also guaranteed.... Consequently, [the Supreme Court has] long understood as implicit in the right to engage in activities protected by the First Amendment a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends.

Roberts, 468 U.S. at 622;*see also Boy Scouts v. Dale,* 530 U.S. 640, 647-48, 120 S.Ct. 2446, 147 L.Ed.2d 554 (2000). The freedom of association may be unconstitutionally burdened in several different ways. For example, the "government may seek to impose penalties or withhold benefits from individuals because of their membership in a disfavored group, ... it may attempt to require disclosure of the fact of membership in a group seeking anonymity, ... and it may try to interfere with the internal organization or affairs of the group."*Roberts,* 468 U.S. at 622-23 (internal citations omitted).

***15** CLS argues that its right to expressive association has been infringed. It is undisputed that CLS is being denied the right to official recognition by Hastings and that it is being denied access to particular areas of the campus and some avenues of communicating with its members and other students. What is disputed is the legal and practical effect of these limitations.

First, it is important to note what this case is not about. Although CLS relies heavily on *Dale*[FN4] and *Roberts,* these cases are inapplicable. *Dale* stands for the proposition that "forced inclusion of an unwanted person in a group infringes on the groups's freedom of expressive association if the presence of that person affects in a significant way the group's ability to advocate public or private viewpoints."*Dale,* 530 U.S. at 649. Similarly, the Court in *Roberts* addressed the validity of forcing a group to accept members it did not desire. *Roberts,* 468 U.S. at 623. Here, CLS is not being forced, as a private entity, to include certain members or officers. *See Wyman,* 335 F.3d at 91 (finding *Dale* inapplicable because the conditioned exclusion of organization from a particular forum did not rise to the level of compulsive membership); *see also Pi Lambda Phi Fraternity, Inc. v. Univ. of Pittsburgh,* 229 F.3d 435, 445-46 (3d Cir.2000) (upholding university's withdrawal of recognition of a fraternity that violated campus rules on drug use and distinguishing *Dale* and *Roberts* because those cases involved state laws mandating that groups accept members with whom the groups did not want to associate).

> FN4. In *Dale,* the Boy Scouts, a private organization, that "engage [s] in instilling a system of values in young people," revoked the adult membership of James Dale when it learned that he was "an avowed homosexual and gay rights activist."*Dale,* 530 U.S. at 643. The Supreme Court held that applying New Jersey's public accommodations law to require the Boy Scouts to readmit Dale as a scout in a leadership position violated the Boy Scout's right of expressive association. *Id.* The Court found that Dale's presence in a leadership position in the Boy Scouts would "force the organization to send a message, both to the youth members and the world, that the Boy Scouts accepts homosexual conduct as a legitimate form of behavior."*Id.* at 653.

In *Wyman,* a state committee refused to allow a local chapter of the Boy Scouts to participate in the state's charitable contribution campaign because the Boy Scouts excluded gays and lesbians from employment and membership positions in violation of a state law prohibiting discrimination on the basis of sexual orientation. The Boy Scouts argued that "by conditioning its participation in the Campaign on a change in its membership policies, the defendants

official recognition affirm in advance its willingness to adhere to reasonable campus law. Such a requirement does not impose an impermissible condition on the students' associational rights."*Id.* at 193.The Court concluded "that the benefits of participation in the internal life of the college community may be denied to any group that reserves the right to violate any valid campus rules with which it disagrees."*Id.* at 193-94;*see also Evans,* 40 Cal.Rptr.3d at 217-19, 129 P.3d 394 (applying *Healy* to find an organization's refusal to confirm it would comply with a nondiscrimination resolution justified city's withdrawal of a subsidy to the organization).

As discussed above, Hastings has denied CLS official recognition based on CLS's conduct-its refusal to comply with Hastings' Nondiscrimination Policy-not because of CLS's philosophies or beliefs. Thus, in accordance with the Supreme Court's analysis in *Healy,* this Court must evaluate whether Hastings' enforcement of its Nondiscrimination Policy against CLS unconstitutionally infringes CLS's right of expressive association pursuant to the test set forth in *O'Brien, i.e.,* whether the Nondiscrimination Policy is within the state's constitutional power, the policy furthers an important or substantial government interest that is unrelated to the suppression of expression, and the incidental restriction on the alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest. *See O'Brien,* 391 U.S. at 377. This Court has already found that Hastings' enforcement of its Nondiscrimination Policy passes constitutional muster under the *O'Brien* test.

In the context of CLS's claim of infringement of its associational rights, it is also significant that while CLS was denied the use of the Hastings logo, eligibility for funds, the use of certain bulletin boards, eligibility for a Hastings organization email address, and eligibility to send out mass emails through the Associated Students of the University of California at Hastings, the ability to place announcements in a weekly newsletter, and the ability to participate in the annual student organizations faire, CLS was not prohibited from meeting on campus. (Joint Stip, ¶¶ 9, 10, 62.) In fact, CLS was permitted to use campus facilities to meet and its members were permitted to communicate amongst themselves and with other students. (*Id.,* ¶¶ 10, 58.)As a non-registered group, CLS still had access to bulletin boards and chalk boards on campus to make announcements. (Joint Stip, ¶ 11.) Such evidence further demonstrates that Hastings' incidental restriction on CLS's alleged First Amendment freedoms was no greater than necessary. *See O'Brien,* 391 U.S. at 377 (holding that incidental restriction on alleged First Amendment freedoms must be no greater than necessary to the furtherance of an important governmental interest unrelated to the suppression of expression). Therefore, according to the analysis required by *Healy* and *O'Brien,* Hastings does not unconstitutionally infringe on CLS's associational rights.

ii. Under *Healy,* Denying Recognition to Student Organizations Must be Justified Sufficiently.

***18** Alternatively, even assuming *arguendo O'Brien* is not the appropriate test, it is important to note that *Healy* merely held that denying official recognition to student organizations, *without justification,* burdens or abridges students' right to associate to further their personal beliefs. *See Healy,* 408 U.S. at 181. In determining whether a school's reason for denying recognition provides sufficient justification, the Court examined both whether the reason was directed at the organization's activities or philosophies and the practical impact nonrecognition had on the students' ability to meet as a group and communicate. *Id.* at 184, 188 ("We are not free to disregard the practical realities."); *see also Gay Students Org. of Univ. of New Hampshire v. Bonner,* 509 F.2d 652, 658-59 (1st Cir.1974) (noting that "the Court's analysis in *Healy* focused not on the technical point of recognition or nonrecognition, but on the practical realities of human interaction.... The ultimate issue at which inquiry must be directed is the effect which a regulation has on organizational and associational activity, not the isolated and for the most part irrelevant issue of recognition per se.").

The Court in *Healy* found that the "primary impediment to free association flowing from nonrecognition [was] the denial of use of campus facilities for meetings and other appropriate purposes."*Healy,* 408 U.S. at 181. Most importantly, the organization was barred from using *any* campus facilities to hold meetings. *Id.* at 176.When the students attempted to meet a coffee shop on campus, they were disbanded and informed that they could not meet anywhere on college property as a group. *Id.* Students in the group were not allowed to place announcements regarding meetings, rallies or other activities in the student newspaper or on the campus bulletin boards. The students were not provided any

opportunity to communicate with each other or other students on campus. *Id.* at 182-83.Unremarkably, the Court found that "[i]f an organization is to remain a viable entity in a campus community ..., it must possess the means of communicating with [other] students."*Id.* at 181.In light of these circumstances, the Court found that "[d]enial of official recognition posed serious problems for the organization's existence and growth" and that these impediments were not insubstantial. *Id.* at 177, 182.Nevertheless, despite these substantial impediments, the Court remanded the matter for consideration of whether the students were willing to abide by reasonable campus rules and regulations, which, if they were not, would justify the denial of recognition. *Id.* at 194.

Here, in contrast to *Healy,* it is undisputed that despite Hastings' refusal to grant CLS recognized status, the group continued to meet and hold activities throughout the 2004-2005 academic year. (Joint Stip., ¶¶ 44, 48.) The record demonstrates that CLS's efforts at recruiting members and attendees were not hampered by the denial of recognition. Throughout the 2004-2005 academic year, nine to fifteen students regularly attended CLS meetings and activities.(*Id.,* ¶ 48.)There is no evidence that CLS considered this a small group or that it was smaller than when the group met during the previous ten years as a recognized student group. In fact, during the prior academic year, when the predecessor to CLS met as a recognized student group, fewer students regularly attended the meetings and events. (*Id.,* ¶ 26:"During the 2003-2004 academic year .... [a]pproximately five (5) to seven (7) students attended ... meetings and events.") Moreover, there is no evidence that the restrictions to certain forms of communication at Hastings, such as through the Law School newsletter, hindered CLS's ability to communicate with other students. The president of CLS maintained a Yahoo! group for all members and attendees and communicated information relating to CLS's activities to them on this group. (Declaration of Stephen Aden ("Aden Decl."), Ex. B at 44.) Furthermore, even though CLS was not a recognized student organization at Hastings, Hastings still provided access to bulletin and chalk boards to make announcements, allowed CLS to meet on campus as an organization, and offered CLS use of Hastings' rooms and audio-visual equipment for such meetings and activities. (Joint Stip., ¶¶ 10, 11, 58, 61, Ex. H.) [FN5] Thus, the Court finds that Hastings' denial of official recognition was not a substantial impediment to CLS's ability to meet and communicate as a group. In light of the fact that Hastings' reason for denying recognition was not directed at CLS's philosophies, the Court concludes that Hastings' denial of recognition was justified and thus does not unconstitutionally infringe CLS's members' right of expressive association. *See Healy,* 408 U.S. at 181.

> FN5. CLS argues that its access to such space and forms of communication are at Hastings' discretion and thus that Hastings could decide at any point to withdraw such access. (CLS Mot. at 13.) On the record before the Court, CLS is allowed access to facilities and certain forms of communication at Hastings. Even if CLS has not taken full advantage of the access, it is undisputed that it was made available to the group. CLS's claim regarding what Hastings may do in the future is not yet ripe. If circumstances change, and CLS believes that under the new circumstances, CLS's constitutional rights are being infringed, CLS may challenge the new conduct and conditions at that time.

iii. Denial of Recognition is Not Per Se Unconstitutional.

***19** CLS's reliance on the cases cited in its reply brief to demonstrate the denial of recognition is a per se unconstitutional infringement of its members' associational rights under *Healy* is misplaced. (CLS's Reply at 7.) The courts in *Gay and Lesbian Students Ass'n v. Gohn,* 850 F.2d 361 (8th Cir.1988), *Gay Alliance of Students v. Matthews,* 544 F.2d 162 (4th Cir.1976), *Gay Students Org.,* 509 F.2d 652, and *American Civil Liberties Union of Virginia, Inc. v. Radford College,* 315 F.Supp. 893 (W.D.Va.1970), each made explicit findings that the that the colleges or universities refused to grant recognition to these student organizations *because* of the organizations' beliefs or views.

In *Gay and Lesbian Students,* the university refused to provide the student group funds, which the group sought to support showing two films and holding a panel discussion. *Gay and Lesbian Students,* 850 F.2d at 363. The court found that the record was "replete" with evidence that the university's decision to deny funds was based on viewpoint discrimination. *Id.* at 366.The evidence included the following statement from one of the student senators voting to deny funding: "This is a group that supports gay and

lesbian homosexuality. We cannot use state money to support a homosexual group."*Id.* at 363.Moreover, the court noted the pressure university officials received from state legislators not to fund the group or "to allow in any way the dissemination of opinions tolerant toward homosexuals."*Id.* at 367.Thus, the court concluded that the group was improperly denied funds "because of the views it espoused."*Id.* Accordingly, the court found the denial unconstitutionally infringed the students' First Amendment rights.

In *Gay Alliance of Students,* the university refused to grant the group's application to become a recognized student group because the university feared granting recognition would increase the number of students who might join, would harm students affiliated with a "homosexual activist organization," and would increase the opportunity for "homosexual contacts." *Gay Alliance of Students,* 544 F.2d at 165-66. Thus, the court found that the university targeted the group because of the content of the message it sought to convey. Accordingly, the court held that the university had to demonstrate its refusal to recognize the group was "tailored to serve a substantial governmental interest," and that it failed to do so. *Id.*

In *Gay Students Organization,* the student group was not allowed to sponsor any social functions. *Gay Students Org.,* 509 F.2d at 654. The university's prohibition on any social functions was triggered by the distribution of what the university characterized as " 'extremist' homosexual publications" at an event sponsored by the group. *Id.* Thus, the court found that the university's prohibition was unconstitutional under the *O'Brien* test because it was content-related. *Id.* at 662 ("[T]he curtailing of expression which they find abhorrent or offensive cannot provide the important governmental interest upon which impairment of First Amendment freedoms must be predicated.").

***20** Finally, in *American Civil Liberties Union,* the college did not grant the organization recognition because it felt the "role and purpose of the American Civil Liberties Union" lay outside of the school's scope and objectives. *American Civil Liberties Union,* 315 F.Supp. at 895. The court noted that the school did not define what the objectives of the school were and expressed doubt that the administration and faculty could reach agreement as to what specific objectives the institution was dedicated. *Id.* at 898.Notably, the college recognized the Young Republican Club and Young Democratic Club. The court found it inconsistent to claim these political clubs were within the school's objectives, but not the ACLU. *Id.* at 898-99.Thus, the court held the denial of recognition violated the First Amendment. *Id.*

In contrast here, as noted above, Hastings did not withhold recognition of CLS because of CLS's views, but because CLS refused to comply with the Nondiscrimination Policy. Thus, *Gay and Lesbian Students, Gay Alliance of Students, Gay Students Organization,* and *American Civil Liberties Union of Virginia* do not support a finding that CLS's right to expressive association has been unconstitutionally fringed.

b. Analysis Pursuant to *Dale* and *Roberts.*

Even assuming *arguendo* that *Roberts* and *Dale* were applicable to CLS's expressive association claim, and this Court finds they are not, the holding of these cases do not support a finding that Hastings' denial of recognition was unconstitutional. Pursuant to *Dale,* courts apply a three-part test to determine whether the right of expressive association has been violated.*Dale,* 530 U.S. at 648-49. First, an organization must engage in expressive association. Second, the state action must significantly affect the group's ability to advocate its viewpoints. Third, the Court must determine if the state's interest justifies the infringement on the right to expressive association. *Id.* Although not as explicit, the Court in *Roberts* follows a similar analysis. *Roberts,* 468 U.S. at 622-28.

i. First Prong: Organization Engages in Expressive Association.

To bring an expressive association claim, CLS "must engage in some form of expression, whether it be public or private."*Dale,* 530 U.S. at 549. Hastings does not dispute that CLS engages in expressive association. (Hastings Mot. at 16.) Therefore, the Court will assume for purposes of these motions that CLS engages in expressive association.

ii. Second Prong: Ability to Advocate Viewpoints Significantly Affected.

Next, the Court must determine whether Hastings' denial of recognition significantly affect CLS's ability

to advocate its viewpoints. *Dale,* 530 U.S. at 650;*Roberts,* 468 U.S. at 626-28. In *Roberts,* the Court held that a regulation that forces a group to accept members it does not desire is a clear intrusion into the internal structure or affairs of the organization.*Roberts,* 468 U.S. at 623 ("Such a regulation may impair the ability of the original members to express only those views that brought them together.... Freedom of association plainly presupposes a freedom not to associate."); *see also Dale,* 530 U .S. at 648 ("The forced inclusion of an unwanted person in a group infringes the group's freedom of expressive association if the presence of that person affects in a significant way the group's ability to advocate public or private viewpoints."). However, here, Hastings is not ordering CLS to admit certain members, regardless of where it meets. Rather, Hastings is merely imposing a condition of participation in certain aspects of the forum on campus. *See Evans,* 40 Cal.Rptr.3d at 213, 129 P.3d 394 (noting that to the extent an organization objected to compliance with a nondiscrimination policy as a condition of receiving a city subsidy, the organization was free to terminate its participation in the program and thus avoid the requirements of the nondiscrimination provision). Moreover, even assuming *arguendo* that Hastings' condition for participation could be viewed as requiring CLS to admit gay, lesbian, and non-Christian students, CLS has not demonstrated that its ability to express its views would be significantly impaired by complying with such a requirement.

***21** In *Dale,* the Court found that the Boy Scouts's general mission was to instill values in young people, including being "morally straight." *Dale,* 530 U.S. at 649-50. The Boy Scouts sought to instill these values by having its adult leaders spend time with the youth members. During the time spent together, scoutmasters and assistant scoutmasters were tasked with inculcating the youth members with the Boy Scouts' values, both expressly and by example.*Id.* at 649-50.The Court further found that the Boy Scouts sincerely believed that "homosexual conduct [was] not morally straight" and did "not want to promote homosexual conduct as a legitimate form of behavior."*Id.* at 651.Although the Court stated that an association's assertions regarding the nature of its expression and its view of what would impair its expression is owed deference, the Court examined the evidence on these points and did not blindly accept the Boy Scouts' arguments. *Id.* at 651-56.Moreover, the Court expressly noted that the group engaged in expressive association could not "erect a shield against antidiscrimination laws simply by asserting that mere acceptance of a member from a particular group would impair its message."*Id.* at 653;*see also Rumsfeld,* 126 S.Ct. at 1312-13 (rejecting the groups' argument that providing access to military recruiters would impair their own expression merely because they *said* it would and citing *Dale* for the proposition that "a speaker cannot erect a shield against laws requiring access simply by asserting that mere association would impair its message") (internal quotations omitted).

In determining whether admitting Dale would significantly impair the Boy Scouts' message, the Court reasoned that Dale was "one of a group of gay Scouts who have become leaders in their community and are open and honest about their sexual orientation.... Dale was copresident of a gay and lesbian organization at college and remains a gay rights activist."*Dale,* 530 U.S. at 653. In light of these facts, the Court found that Dale's presence in a leadership position in the Boy Scouts would "force the organization to send a message, both to the youth members and the world, that the Boy Scouts accepts homosexual conduct as a legitimate form of behavior."*Id.* Significantly, the Court found *Hurley* illustrative of this point and noted that in *Hurley*"the parade organizers did not wish to exclude the GLIB members because of their sexual orientation, but because they wanted to march behind a GLIB banner [ ]" and thus would force the parade organizers to send a message they did not want to propound. *Id.* at 653-54 (citing *Hurley,* 515 U.S. at 574-75.)

The broad class of students CLS seeks to exclude significantly differs from the Boy Scouts' conduct in *Dale.*CLS does not confine its desired discrimination to students who are open and honest about being gay, lesbian, or non-orthodox Christian, let alone leaders on campus advocating for gay rights or non-Christian faiths. Rather, CLS seeks to exclude *all* lesbian, gay, bisexual or non-orthodox Christian students. *See Dale,* 530 U.S. at 653 (finding that because Dale was open and honest about his sexual orientation and was a gay rights activist, his presence would force the Boy Scouts to send a message to its youth members and the world regarding homosexuality); *see also Hurley,* 515 U.S. at 572 (noting that the parade organizers disclaimed any intent to exclude gay, lesbian or bisexual individuals from participating generally, but rather, sought to a group from marching behind a particular banner).

*22 Moreover, CLS does not demonstrate how admitting lesbian, gay, bisexual or non-orthodox Christian students would impair its mission. Significantly, unlike the Boy Scouts in *Dale,* CLS has not submitted any evidence demonstrating that teaching certain values to other students is part of the organization's mission or purpose, or that it seeks to do so by example, such that the mere presence of someone who does not fully comply with the prescribed code of conduct would force CLS to send a message contrary to its mission. According to CLS, its mission is "to maintain a vibrant Christian Law Fellowship on the School's campus which enables its members, individually and as a group, to love the Lord with their whole beings-hearts, souls, and minds-and to love their neighbors as themselves."(Joint Stip., Ex. E.)

CLS now argues that it "seeks to affirm and encourage certain values in its members" and that its officers "serve as role models to the voting members and attendees," but the evidence it cites does not support these assertions. (CLS Mot. at 10, *citing* Joint Stip., ¶ 33; CLS Reply at 2, 8, *citing* Joint Stip., Ex. E at 2.) Paragraph 33 of the Joint Stipulation merely states that CLS's bylaws require all members and officers to sign the Statement of Faith and sets forth the substance of the Statement of Faith. (Joint Stip., ¶ 33.) Exhibit E to the Joint Stipulation is CLS's Constitution. The Constitution pronounces a "code of conduct" for officers which provides that officers "must exemplify the highest standards of morality as set forth in Scripture."(*Id.,* Ex. E at 2.) While CLS's members and officers may be instructed to abide by a code of conduct, CLS does not demonstrate how it portrays what the conduct is or who follows this code to the greater community at Hastings. In other words, it is not clear how anyone at Hastings, other than the individual members and officers, would even be aware that CLS's members and officers are living their private lives in accordance with a certain code of conduct.

CLS also argues that if it complied with the Nondiscrimination Policy, it would be stripped of its Christian beliefs and cease to exist. (CLS Mot. at 11.) Because officers and members have the authority to elect officers, and to amend the group's bylaws and constitution, and officers lead bible studies, CLS argues that opening up these functions to all students would lead CLS to cease being a vibrant Christian organization. (CLS Mot. at 12.) However, the evidence in the record does not support CLS's argument. For the previous ten years, a predecessor organization to CLS was on campus as a recognized student organization. (Joint Stip., ¶ 22.) The predecessor organization did not exclude openly gay and lesbian students or non-Orthodox Christians. (*Id.,* ¶¶ 25, 27, 28, Exs. C, D.) In fact, during the 2003-2004 academic year, one student who was openly lesbian and at least two students who held beliefs inconsistent with what CLS considers to be orthodox Christianity participated in the group's meetings. (*Id.,* ¶¶ 27, 28.)Yet, there is no indication that the participation of such students made the organization any less Christian or hampered the organization's ability to express any particular message or belief. Nor is there any evidence that during those ten years students hostile to CLS's beliefs tried to overtake the organization or alter its views.

*23 Even now, when CLS insists on having members sign the Statement of Faith, CLS allows non-members to attend and participate in all meetings and events, including leading prayers. Again, there is no evidence that allowing such participation has made CLS less Christian, or less able to express its views on what it means to be a Christian. Moreover, there is also no indication that any student who is open and honest about being a non-orthodox Christian, gay, lesbian, or bisexual, and a leader in the community on these issues, is seeking to join CLS. In fact, during the 2004-2005 academic year, CLS stipulated that no known gay, lesbian, bisexual or non-Christian student sought to join CLS as a member or officer, or even attended any of its meetings. (Joint Stip. at ¶¶ 50, 54.)

Thus, there is no evidence that complying with the Nondiscrimination Policy, and taking the risk that a non-orthodox Christian, gay, lesbian, or bisexual student become a member or officer, and thus, by their presence alone, would impair CLS's ability to convey its beliefs. Accordingly, the Court concludes that requiring CLS to comply with the Nondiscrimination Policy does not significantly affect CLS's ability to advocate its viewpoints.

iii. Third Prong: Justification of Infringement.

Because the Court concludes that there is no significant impact on CLS's ability to express itself, the Court need not address the third prong of the *Dale* test. However, even if there was some infringement, Hastings' interest in protecting its students from discrimination provides sufficient

justification. In *Roberts,* the Supreme Court found that the state had a compelling interest in eliminating discrimination and that the state public accommodations laws at issue served that interest unrelated to the expression of ideas. *Roberts,* 468 U.S. at 624. The Court in *Roberts* reasoned that:
[o]n its face, the [state public accommodations law] does not aim at the suppression of speech, does not distinguish between prohibited and permitted activity on the basis of viewpoint, and does not license enforcement authorities to administer the statute on the basis of such constitutionally impermissible criteria.... Instead, ... the Act reflects the State's strong historical commitment to eliminating discrimination and assuring its citizens equal access to publicly available goods and services.... That goal, which is unrelated to the suppression of expression, plainly serves compelling state interests of the highest order.

Roberts, 468 U.S. at 623-24. Accordingly, the Court in *Roberts* found that requiring the organizations to admit women did not violate their members' right of expressive association. *Id* . at 628-29;*see also Duarte,* 481 U.S. at 549 (applying similar reasoning to uphold state public accommodations law banning discrimination and requiring the group to admit women).

In contrast, the Court in *Dale* found that the interests of the state in its public accommodations law did not justify a "severe intrusion" on the organization's associational rights. *Dale,* 530 U.S. at 659. However, in balancing of the State's interest against the organization's, the Court found the State's claim of compelling interest attenuated because the State's public accommodations law extended its anti-discrimination requirements to private groups whose activities fell well beyond those usually involved in providing public accommodations. *Dale,* 530 U.S. at 657 n. 3 (questioning the validity of applying a state public accommodations law to a private entity); *see also Thomas v. Anchorage Equal Rights Comm'n,* 102 P.3d 937, 946 (Ala.2004) (commenting that *Dale*"did not broadly rule ... that First Amendment rights should generally be deemed more compelling than laws barring ... discrimination; instead, the Court expressly found [the State's] claim of compelling interest attenuated in the particular situation at issue."). Thus, the Court concluded that the State's interest did not justify the severe intrusion.

***24** Here, CLS is not being forced to include certain members or officers, let alone individuals who are outspoken advocates for gay rights or non-Christian ideals. Moreover, Hastings has a compelling interest in prohibiting discrimination on its campus, and, in contrast to *Dale,* there is no reason to find such interest is attenuated. *See Jews for Jesus,* 968 F.2d at 297 (state has a compelling interest in prohibiting religious and racial discrimination in public accommodations); *see also Presbytery of New Jersey,* 902 F.Supp. at 521 (state interest in eliminating discrimination on the basis of, *inter alia,* sexual orientation was compelling); *Gay Rights Coal.,* 536 A.2d at 38 ("The eradication of sexual orientation discrimination is a compelling governmental interest."). In balancing Hastings' compelling interest to protect its students from discrimination against any infringement on CLS's members' expressive association, the Court concludes that Hastings' conduct is justified and, thus, does not unconstitutionally infringe CLS members' right to expressive association.

3. First Amendment: Free Exercise.

The Free Exercise Clause of the First Amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."U.S. Const. amend. 1. In *Employment Division, Oregon Department of Human Resources v. Smith,* 494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990), the Supreme Court made clear that a neutral law of general application could prohibit conduct that was prescribed by an individual's religion and such law did not have to be supported by a compelling interest.*Smith,* 494 U.S. at 885;*see also Church of Lukumi Babalu Aye, Inc. v. City of Hialeah,* 508 U.S. 520, 531, 113 S.Ct. 2217, 124 L.Ed.2d 472 (1993) ("A law that is neutral and of general applicability need not be justified by a compelling government interest, even if the law has the incidental effect of burdening a particular religious practice."). The Supreme Court also made clear that the government need not demonstrate a compelling interest even when the burden on religion by a neutral law of general applicability was substantial.*San Jose Christian College v. City of Morgan Hill,* 360 F.3d 1024, 1030 (9th Cir.2004) (citing *Smith,* 494 U.S. at 883-84)."A law is one of neutrality and general applicability if it does not aim to 'infringe upon or restrict practices because of their religious motivation,' and if it does not 'in a selective manner impose burdens only on conduct motivated by religious belief [.]" ' *Id.* at 1031 (quoting *Lukumi*

Babalu Aye, 508 U.S. at 533, 543).

CLS argues that strict scrutiny still applies to its free exercise claim because laws targeting or imposing special burdens on religious beliefs are presumptively invalid, and that here, prohibiting discrimination on the basis of religion improperly targets religious beliefs. (CLS Mot. at 17.) However, the Nondiscrimination Policy does not target or single out religious beliefs, but rather, is a policy that is neutral and of general applicability. The Policy prohibits discrimination on the basis of protected categories, including religion and sexual orientation, irrespective of the motivation for such discrimination. *Cf. Vigars v. Valley Christian Ctr.,* 805 F.Supp. 802, 809 (N.D.Cal.1992) (finding that Title VII of the Civil Rights Act, which prohibits, among other things, employment discrimination on the basis of religion, "neither regulates religious beliefs, nor burdens religious acts, because of their religious motivation. On the contrary, it is clear that Title VII is a secular, neutral statute which, in this case, incidentally has a profound impact on defendants' free exercise of their religion.") Contrary to CLS's contention, regulating the conduct of discrimination on the basis, *inter alia,* of religion is not equivalent to regulating religious beliefs. CLS may be motivated by its religious beliefs to exclude students based on their religion or sexual orientation, but that does not convert the reason for Hastings' policy prohibiting the discrimination to be one that is religiously-based.

***25** Next, CLS cites *Smith* for the proposition that "where the state has in place a system of individual exemptions, it may not refuse to extend that system to cases of 'religious hardship' without compelling reasons."(CLS Mot. at 18, citing *Smith,* 494 U.S. at 884.) In the portion of *Smith* to which CLS cites, the Court was explaining that the test set forth in *Sherbet v. Verner,* 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963), requiring governmental actions that substantially burden a religious practice to be justified by a compelling governmental interest, has only been applied in the unemployment compensation field. *Smith,* 494 U.S. at 883-84. The Court explained that "if [it] were inclined to breathe into *Sherbert* some life beyond the unemployment compensation field, [it] would not apply it to require exemptions from a generally applicable ... law."*Id.* at 884.Even if the test in *Sherbert* were applicable here, CLS has not demonstrated that Hastings has provided exemptions to the Nondiscrimination Policy to other student organizations while refusing to grant CLS an exemption. CLS submits the bylaws of two registered student organizations at Hastings, the Vietnamese American Law Society and La Raza. (Aden Decl., Exs. I, O.)

The Vietnamese American Law Society's bylaws provide that "any full-time student at Hastings may become a member ... so long as they do not exhibit a consistent disregard and lack of respect for the objective of the organization," but specifically declares that its "[m]embership rules shall not violate the Nondiscrimination Compliance Code of Hastings."(Aden Decl., Ex. I.) Defendant Chapman, the Director of Student Services at the Law School, explains that:

Simply because a student organization makes reference in its bylaws to interests or objectives of the organization does not violate the Nondiscrimination Policy. Student organizations' bylaws will sometimes make reference in their sections on membership to members' interests and state that any student who holds interests or goals similar to an organization are eligible to become members. [She does] not interpret such references to members' interests as an attempt to establish a test or criteria for membership in any way. Other than [CLS] during the 2004-2005 and 2005-2006 academic years, [she is] aware of no registered student organization at Hastings that has ever attempted to restrict its membership based on either students' beliefs or agreement with the group's objectives. If [she] were to become aware that any group was doing so, [she] would inform the group that they were in violation of Hastings' Nondiscrimination Policy.

(Declaration of Judy Hansen Chapman ("Chapman Decl."), ¶ 8.)

La Raza's bylaws provide that it is the organization's policy "not to discriminate on the basis of race, sex, color, creed, national origin, ancestry, age, sexual orientation, or disability."(Aden Decl., Ex. O.) However, other portions of its bylaws could be read to restrict membership to students of "Raza" background. (*Id.*) During the course of the instant litigation, the bylaws of La Raza were brought to Chapman's attention, and she realized that its bylaws during the 2004-2005 academic year "could be interpreted as requiring voting members of the group to be of Hispanic descent."(Chapman Decl., ¶ 10.) If this were a requirement of La Raza's, it would violate Hastings' requirement that registered student organizations allow all Hastings student to become

members. (*Id.*) Chapman had previously interpreted La Raza's bylaws as allowing all students to join the organization and become voting members. In the summer of 2005, Chapman raised this issue with La Raza's officers who confirmed that any Hastings student may become a voting member of La Raza. (*Id.*) Hastings allowed La Raza to register as a student organization during the 2005-2006 academic year only with the understanding that it is in the process of revising its bylaws to make clear that all Hastings students are welcome to become voting members. (*Id.*, ¶¶ 10-11, Ex. A.) Accordingly, the Court concludes that the evidence fails to demonstrate that Hastings exempted other organizations from complying with the Nondiscrimination Policy.

***26** Finally, CLS contends that pursuant to the "hybrid rights" doctrine, the Court should apply strict scrutiny to its free exercise claim. *Smith* may be read to impose strict scrutiny in "hybrid situation[s]" in which a law "involve[s] not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections."*Smith,* 494 U.S. at 881-82. However, regardless of whether the "hybrid rights" doctrine is even viable, the Ninth Circuit has made clear that "to assert a hybrid-rights claim, a free exercise plaintiff must make out a colorable claim that a companion right has been violated-that is, a fair probability or a likelihood, but not a certitude, of success on the merits."*Miller v. Reed,* 176 F.3d 1202, 1207 (9th Cir.1999) (citation and internal quotations omitted); *see also San Jose Christian College,* 360 F.3d at 1032. Because the Court finds that none of CLS's claims for violations of their constitutional rights have merit, there is no basis for their alleged "hybrid-rights" claim. Thus, strict scrutiny does not apply to CLS's free exercise claim. Pursuant to the applicable rational basis test, the Court concludes that CLS's right to free exercise of religion has not been unconstitutionally infringed.[FN6]

> FN6. CLS also appears to argue that an exemption analogous to the "ministerial exception" to Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e, *et seq.,* should apply here. (CLS Mot. at 19.) Courts apply a "ministerial exception" to Title VII because "the ministerial relationship lies so close to the heart of the church that it would offend the Free Exercise Clause simply to require the church to articulate a religious justification for its personnel decisions."*Bolland v. California Province of the Society of Jesus,* 196 F.3d 940, 946 (9th Cir.1999). The "ministerial exception" is limited to clergy and does not apply to lay personnel. *Id.* at 947.The "ministerial exception" is clearly inapplicable here. This matter does not involve an employment dispute. CLS is not a church, and its members and officers are not clergy. CLS has not provided any authority demonstrating the ministerial exception has been or should be extended beyond Title VII claims. Accordingly, the Court declines to require Hastings to apply an analogous exception to its requirement that registered student organizations comply with the Nondiscrimination Policy.

4. Equal Protection Clause.

"The Equal Protection Clause of the Fourteenth Amendment commands that no State shall 'deny to any person within its jurisdiction the equal protection of the laws,' which is essentially a direction that all persons similarly situated should be treated alike."*Serrano v. Francis,* 345 F.3d 1071, 1081 (9th Cir.2003) (*quoting Cleburne v. Cleburne Living Center, Inc.,* 473 U.S. 432, 439, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985)). To bring a successful equal protection claim, a plaintiff must demonstrate that he or she was treated differently from similarly situated persons. *Dillingham v. I.N.S.,* 267 F.3d 996, 1007 (9th Cir.2001). Additionally, a plaintiff must allege that the defendant acted with the intent or purpose to discriminate against him or her based upon membership in a protected class. *Serrano,* 345 F.3d at 1082;*Barren v. Harrington,* 152 F.3d 1193, 1194 (9th Cir.2001)."Where the challenged governmental policy is 'facially neutral,' proof of its disproportionate impact on an identifiable group can satisfy the intent requirement only if it tends to show that some invidious or discriminatory purpose underlies the policy."*Lee v. City of Los Angeles,* 250 F.3d 668, 686 (9th Cir.2001).

CLS's equal protection claim fails for two independent reasons. First, it has not presented any evidence that it has been treated differently from other student groups. Second, CLS has not submitted any evidence of discriminatory intent.

CLS argues that Hastings' application of the

Nondiscrimination Policy to it is arbitrary because Hastings permits numerous other groups to choose members and/or officers dedicated to their organizations' cause. As set forth above, CLS has not presented any evidence demonstrating that Hastings exempts other registered student organizations from complying with the Nondiscrimination Policy.

***27** CLS also argues that the treatment of CLS was intentional and argues that CLS may rely on evidence of the circumstances surrounding the passage of the policy to demonstrate intentional discrimination against it. (CLS Mot. at 20.) Yet, CLS does not submit any evidence with respect to the passage of the Nondiscrimination Policy. Nor does CLS present any other evidence demonstrating any discriminatory intent by Hastings. Accordingly, CLS's equal protection claim fails as a matter of law.[FN7]

> FN7. In its reply brief, CLS contends for the first time that Hastings' enforcement of its Nondiscrimination Policy violates the doctrine of unconstitutional conditions. (CLS Reply at 26.) Pursuant to the doctrine of unconstitutional conditions, "the government may not require a person to give up a constitutional right ... in exchange for a discretionary benefit conferred by the government."*Dolan v. City of Tigard,* 512 U.S. 374, 385, 114 S.Ct. 2309, 129 L.Ed.2d 304 (1994). Because the Court finds that the enforcement of the Nondiscrimination Policy does not unconstitutionally infringe any of CLS's asserted constitutional claims, the doctrine of unconstitutional conditions is inapplicable.

CONCLUSION

For the foregoing reasons, the Court DENIES CLS's motion for summary judgment and GRANTS Hastings and Outlaw's cross-motions for summary judgment on of all CLS's claims.

IT IS SO ORDERED.

N.D.Cal.,2006.
Christian Legal Soc. Chapter of University of California v. Kane
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