UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

EVERY NATION CAMPUS MINISTRIES AT SAN DIEGO STATE UNIVERSITY, a student organization at San Diego State University, *et al.*

Plaintiffs,

vs.

ACHTENBERG, et al.

Defendants.

CASE NO. 05CV2186-LAB (AJB)

ORDER GRANTING MOTION TO DISMISS COUNT V AND DENYING MOTION TO DISMISS COUNT IV OF THE FIRST AMENDED COMPLAINT

[Dkt No. 21]

Individual defendants, all affiliated with the California State University system (collectively "CSU" or "Defendants"), bring their FED. R. CIV. P. 12(b)(6) Motion To Dismiss Count IV (Equal Protection) and Count V (Due Process) of the First Amended Verified Complaint ("Motion"). Plaintiff student groups and members (collectively "Plaintiffs") filed an Opposition, and Defendants filed a Reply. The court finds the issues appropriate for decision on the papers and without oral argument, pursuant to Civil Local Rule 7.1(d)(1). For the reasons discussed below, the Motion is **GRANTED IN PART** and **DENIED IN PART**.

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I. BACKGROUND

The 42 U.S.C. § 1983[1] First Amended Verified Complaint ("FAC") alleges Plaintiffs are four Christian student groups and certain of their members at two CSU campuses (CSU Long Beach ("CSULB") and San Diego State University ("SDSU"). Plaintiffs seek to enjoin CSU from denying them official recognition as student organizations and declaratory relief that Defendants' reason (*i.e.*, failure to abide by institutional non-discrimination policies) purportedly relies on policies that are unconstitutional, on their face and as applied. FAC ¶¶ 1-2. The Trustees charged with the administration of CSU have implemented a nondiscrimination policy requiring that any student organization desiring "recognized" status must not discriminate in their membership or leadership decisions based on any of specifically enumerated criteria. Plaintiffs bring five claims: a violation of the First Amendment right to expressive association; a violation of the First Amendment free speech clause; a violation of the First Amendment free exercise clause; a violation of Fourteenth Amendment equal protection; and a Fifth and Fourteenth Amendment due process violation. Defendants now move to dismiss the equal protection and due process causes of action for failure to state a claim.

II. DISCUSSION

A. Legal Standards

A motion to dismiss under FED.R.CIV.PROC. ("Rule") 12(b)(6) tests the sufficiency of the complaint. Navarro v. Block, 250 F.3d 729, 732 (9th Cir. 2001). A Rule 12(b)(6) dismissal is appropriate only where "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957). Dismissal is warranted where the complaint lacks a cognizable legal theory. Robertson v. Dean Witter Reynolds, Inc., 749 F.2d 530, 534 (9th Cir. 1984); *see* Neitzke v. Williams, 490 U.S. 319, 326 (1989) ("Rule 12(b)(6) authorizes a court to dismiss a claim on the basis of a dispositive issue of law"). Alternatively, a complaint may be dismissed when it presents a cognizable legal theory yet fails to plead essential facts under that theory. Robertson, 749 F.2d at 534.

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[1] Section 1983 is not itself a source of substantive rights, but merely provides a method for vindicating federal rights elsewhere conferred. To state a 42 U.S.C. § 1983 civil rights claim, a plaintiff must allege deprivation of federal rights secured by the United States Constitution and laws caused by a person acting under color of state law. Graham v. Connor, 490 U.S. 386, 393-94 (1989).

In deciding a Rule 12(b)(6) motion, the court must assume the truth of all factual allegations and must construe them in the light most favorable to the nonmoving party, including all reasonable inferences to be drawn from those facts. Cahill v. Liberty Mut. Ins. Co., 80 F.3d 336, 337-38 (9th Cir. 1996). Legal conclusions cast in the form of factual allegations need not be taken as true. Roberts v. Corrothers, 812 F.2d 1173, 1177 (9th Cir. 1987); Western Mining Council v. Watt, 643 F.2d 618, 624 (9th Cir. 1981). The court may consider the facts alleged in the complaint, documents attached to the complaint, documents relied upon but not attached to the complaint when authenticity is not contested, and matters of which the court takes judicial notice, without converting the motion to dismiss into a motion for summary judgment. Parrino v. FHP, Inc., 146 F.3d 699, 705-706 (9th Cir. 1998); Hal Roach Studios, Inc. v. Richard Feiner & Co., 896 F.2d 1542, 1555 n. 19 (9th Cir.1989).

B. CSU's Non-Discrimination Rules

CSU is a state agency acting in a public education capacity. There is no dispute CSU officially recognizes scores of on-campus student groups, including religious groups, and accords them accompanying benefits and subsidies.[2] The benefits Plaintiffs identify as available only to recognized groups include, among other things, reservation of meeting rooms on campus, participation in university-sponsored events, funding, and listing on the university's official websites. FAC ¶¶ 37, 59. Plaintiffs allege Defendants have deprived them of rights under the First, Fifth, and Fourteenth Amendments on various theories associated with CSU's enforcement of its nondiscrimination policy requirement as applied to them.

The CSU policy prohibits recognized student groups from considering, *inter alia*, religion, sexual orientation, or marital status in the selection of members and officers. Defendants extract the pertinent regulations from Article 4, Subchapter 4, Chapter 1, Division 5 of Title 5 of the California Code of Regulations. CAL.CODE REGS., tit. 5, §§ 41500-41505. *See* Mot. 3:17-5:2.

> [Withholding of Recognition]
> No campus shall recognize any fraternity, sorority, living group, honor society, or other student organization which discriminates on the basis of race, religion, national origin, ethnicity, color, age, gender, marital status, citizenship, sexual orientation, or disability. . . . (5 C.C.R.§ 41500)

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[2] San Diego State has recognized approximately 150 student organizations, and Long Beach State has recognized approximately 100 student organizations. FAC ¶¶ 36, 58.

> [Definition of Recognition]
> Recognition as used in this article shall include, but not be limited to, the granting by a campus of any benefit, resource, or privilege whatsoever, or allowing the use of campus facilities, to any such student organization described in Section 41500 of this article. (5 C.C.R. § 41501)
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> [Filing Requisites]
> Each student organization shall deposit with the Vice President of Student Affairs or equivalent officer of the campus copies of all constitutions, charters or other documents relating to its policies. The student organizations shall also deliver to . . . a statement signed by the president or similar officer of the local student organization attesting that the organization has no rules or policies which discriminate on the basis of race, religion, national origin, ethnicity, color, age, gender, marital status, citizenship, sexual orientation, or disability . . . . (5 C.C.R. § 41503)

The SDSU policy states:

> On-campus status will not be granted to any student organization [that] restricts membership or eligibility to hold appointed or elected student officer positions in the campus-recognized chapter or group on the basis of race, sex, color, age, religion, national origin, marital status, sexual orientation, physical or mental handicap, ancestry, or medical condition, except as explicitly exempted under federal law.

The CSULB policy states:

> Prohibited Discrimination is treatment of an individual or class of individuals which denies opportunity, participation or benefit on any of the following grounds: age, ancestry, color, covered U.S. military service, ethnicity, gender, marital status, medical condition, national origin, physical or mental disability, pregnancy, race, religion, [and] sexual orientation.

C. Plaintiffs' Status

Every Nation Campus Ministries ("ENCM") is an unincorporated student organization with a local chapter on each of those campuses. For six years prior to August 2005, ENCM-SDSU enjoyed university recognition by complying with CSU's non-discrimination policy. FAC ¶ 98. In August 2005, ENCM submitted a new constitution as part of its recognition application. FAC ¶¶ 67-72. The new constitution states: "members must be Christians who have professed their faith in the Lord Jesus Christ;" each officer and member must sign an oath stating they have read, agree with, and believe to be true the Statement of Faith of ENCM; and individuals who believe they are innately homosexual, or advocate the viewpoint that homosexuality is a natural part of God's created order, are not permitted to be members or officers. FAC ¶¶ 79, 81, 90. SDSU denied ENCM recognized student

organization status in October 2005, explaining that the requirement that members and officers be Christians and the complete exclusion of homosexuals from membership violate the institution's anti-discrimination policy conditioning recognition on the group's nondiscrimination on any of the enumerated bases, which include religion and sexual orientation. FAC ¶¶ 105-110.

Similarly, ENCM-CSULB operated as a fully recognized student organization for some time (under the name Victory Campus Fellowship), complying with the CSU non-discrimination requirements. FAC ¶ 210. As at SDSU, the group submitted a new constitution in August 2005 as part of its recognition application. CSULB denied ENCM recognition because its constitution and bylaws violated the CSU non-discrimination policy. FAC ¶ 214.

Alpha Delta Chi-Delta Chapter is a Christian sorority at SDSU. Also in August 2005, the sorority plaintiff submitted its application for on-campus recognition, along with its constitution and bylaws detailing several membership requirements, including: "personal acceptance of Jesus Christ as Savior and Lord; active participation in Christian service; regular attendance or membership in an evangelical church; and interest in leading others to Christ." FAC ¶ 123. Eligibility for an elective office required that candidates have "an active commitment to Jesus Christ as Lord and Savior." FAC ¶ 124. The group excludes from membership any individual "who unrepentantly believes they [*sic*] were created homosexual, or unrepentantly advocates the viewpoint that homosexuality is a natural part of God's created order." FAC ¶ 137. SDSU denied the sorority's application for official recognition in September 2005,citing the requirement that "on-campus organizations not discriminate in membership or membership privileges on the basis of religion." FAC ¶ 141.

Alpha Gamma Omega-Epsilon Chapter is a Christian fraternity at SDSU. The fraternity plaintiff last applied for recognition as an on-campus student organization in September 2004. The bylaws and constitution submitted along with that application reflected the group's requirement that all officers submit a written statement of their Christian beliefs and experiences and sign a Statement of Faith that publicly confesses "a belief in the Lord and Savior Jesus Christ as God and only Savior and give witness to the regenerating power of the Holy Spirit," and that members live according to Christian standards of conduct. FAC ¶¶ 155, 160. The fraternity also acknowledges it would exclude from membership, or revoke the membership or leadership position of, any individuals who

unrepentantly believe they were created homosexual, or unrepentantly advocate the viewpoint that homosexuality is a natural part of God's created order. FAC ¶ 171. University recognition was denied on grounds the fraternity requirements violate the CSU policy prohibiting discrimination in student organizations based on religion. FAC ¶ 176.

D. Due Process Claim

Defendants move to dismiss the Count V due process claim on grounds the policy is clear and gives fair notice of the conduct prohibited. If challenged regulations are clear on their face, a due process claim for unconstitutional vagueness cannot be stated. *See* Hills v. Scottsdale Unified Sch. Dist., 329 F.3d 1044, 1046, 1056 (9th Cir. 2003) (school district's policy prohibiting distribution of any flyers of a "commercial, political or religious nature" was not unconstitutionally vague so as to implicate the Due Process Clause "because the regulations are sufficiently clear that persons of ordinary intelligence can determine what is prohibited").

"[L]aws must provide explicit standards for those who apply them" in order to satisfy constitutional due process. Grayned v. City of Rockford, 408 U.S. 104, 108 (1972).

> A statute is void for vagueness when it does not sufficiently identify the conduct that is prohibited. Thus, the Fifth Amendment due process clause requires a statute to be sufficiently clear so as not to cause persons "of common intelligence ... necessarily [to] guess at its meaning and 'to differ as to its application.' . . . [¶] Therefore, **we must determine whether [the statute or regulation] fails "to give adequate notice to people of ordinary intelligence of what conduct is prohibited, or if it invites arbitrary and discriminatory enforcement."**

United States v. Makowski, 120 F.3d 1078, 1080-81 (9th Cir. 1997) (citations omitted) (emphasis added) (upholding a criminal statute prohibiting willful injury, intimidation, or interference with any person because of that person's race, color, religion, or national origin as not void for vagueness).

Plaintiffs' due process claim alleges that CSU's nondiscrimination policy is unconstitutionally vague and gives inadequate notice of what conduct is prohibited because the terms "sexual orientation" and "marital status" are capable of "multiple definitions."[3] Opp. 12:18-20. Plaintiffs argue that the

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[3] Plaintiffs also oppose dismissal of their due process claim on grounds *the FAC gives defendants* "fair notice of the due process claim and the grounds on which it rests." Opp. 12:14-16. However, they appear to confuse Rule 8 pleading requirements with the standards to assess the alleged unconstitutional vagueness of a regulation. The only relevant "notice" for purposes of deciding whether Plaintiffs state a due process

policy statements purportedly leave "student groups guessing at *what conduct the Defendants' policies prohibit*, which is precisely what the vagueness doctrine forbids." Opp. 15:2-4 (emphasis added).

> The Complaint alleges that the Defendants' nondiscrimination policies fail to provide sufficient notice of what conduct is prohibited to persons of ordinary intelligence (Compl. ¶ 281); that the terms "sexual orientation" and "marital status" are inherently vague and capable of multiple definitions, and thus fail to give notice of what conduct the policies prohibit (*Id.* ¶ 282); and that the policies permit arbitrary and discriminatory enforcement (Compl. ¶ 281).

Opp. 12:17-23.

Contrary to Plaintiffs' arguments, the meaning of CSU's nondiscrimination policy requires no parsing or pondering of the various permutations of "sexual orientation" or "marital status." The court will not embark on a quest for ambiguity. The policies on their face state the CSU campuses will not recognize (with two gender discrimination exceptions for living groups and athletics) any "student organization which discriminates on the basis of race, religion, national origin, ethnicity, color, age, gender, marital status, citizenship, sexual orientation, or disability" in the organization's affiliation decisions. *See* FAC ¶ 26. The court rejects Plaintiffs' argument that a fatal "uncertainty" is inherent in the terms "sexual orientation" or "marital status" due to the various potential states of being associated with those terms.[4] The contention "the Defendants' policies do not clarify which of these 'orientations' they protect" (Opp. 14:21-22) misses the point.[5] The policies "protect" or "prohibit" no

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cause of action is the notice communicated by Defendants' policies to persons of ordinary intelligence of what conduct the policies prohibit, or whether they invite arbitrary and discriminatory enforcement. *See* Hills, 329 F.3d at 1046; Makowski, 120 F.3d at 1080-81; Grayned, 408 U.S. at 108.

[4] For example, in reliance on Compl. ¶¶ 92, 137, 172, 204, Plaintiffs argue: "Moreover, the term 'sexual orientation' may encompass numerous 'orientations,' including heterosexual, homosexual, bisexual, and transsexual, and Defendants' policies do not clarify which of these orientations they protect. Similarly, 'marital status' could include married (i.e., a marriage between a man and a woman), single, divorced, and widowed. It could also contemplate other relationships, like cohabitating couples of the opposite sex, cohabitating couples of the same sex, and same-sex couples that have entered into a domestic partnership, civil union, or 'marriage.'" Opp. 14:20-28.

[5] Plaintiffs' additional argument that the policies are confusing for failure to refine the definitions of "sexual orientation" and "marital status" to clarify whether they target a person's conduct or a person's beliefs or both is not material for the same reasons. Opp. 14:8-11; *see* Opp. 14:15-19 ("Thus, student groups do not know if the Defendants' policies prohibit discrimination based on a person's sexual conduct, or on a person's belief about their sexual orientation, or on both. This ambiguity is constitutionally problematic when First Amendment rights are implicated, as here").

conduct by persons who may seek to affiliate with the organizations.[6] The "conduct" at issue is not any person's particular proclivities but rather a student group's *consideration of any* sexual orientation or marital status as exclusionary criteria.

The CSU nondiscrimination policy and each campus' articulation of the policy on their face identify the subject matters student groups may not consider in making membership decisions, if they want institutional recognition. It prohibits discrimination based on any of the listed characteristics as an exclusionary criterion.[7] As urged by Defendants, the court finds: "The language is plain and easily understood: student organizations that engage in discrimination on any of these bases shall not be recognized by CSU." Reply 8:7-9.

Moreover, the FAC allegations demonstrate Plaintiffs actually understand the policy. Their lawsuit is founded on an acknowledgment the membership restrictions they want to maintain violate the CSU nondiscrimination policy. They "object[] to the nondiscrimination policies of the Board of Trustees of the California State University and San Diego State, which . . . require [the Plaintiffs] to open [their] membership and leadership to all students **regardless of** religion, sexual orientation, and [or] marital status." FAC ¶¶ 95, 131, 164, 207 (emphasis added). Such a concern does not raise a due process issue, no trap for the unwary, no showing of unconstitutional ambiguity or confusion over what conduct is prohibited.

From the face of the FAC and the language of the nondiscrimination policy, and construing the facts alleged along with all *reasonable* inferences in Plaintiffs' favor, the court finds Plaintiffs have failed to state a Due Process claim and can prove no set of facts upon which they could prevail under a theory that the policy is unconstitutionally vague. Accordingly, the Motion to dismiss Count V is **GRANTED**.

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[6] Logically extending Plaintiffs' due process argument would require the policy to state *which* race(s) or *which* disabilities or *which* religion and the like may not be singled out for exclusion.

[7] "Discriminate" fundamentally means only: "to mark or perceive the distinguishing or peculiar features of;" "differentiate;" "to distinguish by discerning or exposing differences;" "the act, practice, or instance of discriminating categorically rather than individually." Webster's Collegiate Dictionary, Tenth Ed., p. 332. Exclusions based on any of the prohibited categories is the only "conduct" the policy prohibits.

E. **Equal Protection Claim**

1. **Legal Standards**

The constitutional guarantee of equal protection of the laws operates independently of any particular substantive law. "The Equal Protection Clause 'is essentially a direction that all persons similarly situated should be treated alike.'" Green v. Tucson, 340 F.3d 891, 896 (9th Cir. 2003), *quoting* City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 439 (1985); *see* Silveira v. Lockyer, 312 F.3d 1052, 1088 (9th Cir. 2002), *cert. den.*, 540 U.S. 1046 (2003) ("in order for a state action to trigger equal protection review at all, that action must treat similarly situated persons disparately"). To state a claim for equal protection violations, Plaintiffs must allege: they were treated differently from others similarly situated; the disparate treatment was based on their membership in a protected class or their exercise of a fundamental right; and CSU acted with an intent to discriminate against them. *See, e.g.*, Village of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 265 (1977). *See* Barren v. Harrington, 152 F.3d 1193, 1194 (9th Cir. 1998) ("To state a claim under 42 U.S.C. § 1983 for a violation of the Equal Protection Clause of the Fourteenth Amendment a plaintiff must show that the defendants acted with an intent or purpose to discriminate against the plaintiff based upon membership in a protected class"). As Plaintiffs note, "[u]nder equal protection analysis, 'fundamental rights' are those rights 'explicitly or implicitly protected by the Constitution.'" Opp. 9:16-17, *quoting* San Antonio Indep. Sch. Dist. v Rodriguez, 411 U.S. 1, 17 (1973); Plyler v. Doe, 457 U.S. 202, 218, n. 15 (1982).

"Equal protection analysis turns on the intended consequences of government classifications. Unless the government actor adopted a criterion with the intent of causing the impact asserted, that impact itself does not violate the principle of . . . neutrality." Hernandez v. New York, 500 U.S. 352, 362 (1991) (race-neutral explanation for the striking of prospective jurors was adequate to overcome allegation of race discrimination), *citing* Personnel Administrator of Mass. v. Feeney, 442 U.S. 256, 279, 274 (1979) ("purposeful discrimination is 'the condition that offends the Constitution") (citation omitted); *see* Harris v. McRae, 448 U.S. 297, 323 n. 26 (1980) ("The equal protection component of the Fifth Amendment prohibits only purposeful discrimination"), *citing* Washington v. Davis, 426 U.S. 229 (1976). "[I]t is incumbent on the challenger . . . to prove the [government actor] 'selected or

reaffirmed a particular course of action at least in part "because of," not merely "in spite of" its adverse effects upon an identifiable group.'" Id., *quoting* Feeney, 442 U.S. 279.

The First Amendment issues are not before the court on this Motion. Resolution of those issues will affect the standard of review[8] and the ultimate outcome of the equal protection claim, and cannot be decided without the type of evidentiary showing anticipated to be before the court on the parties' cross-motions for summary judgment. Nevertheless, to help focus the parties' summary judgment presentations, the court addresses two elements of the equal protection claim, based on the FAC allegations and the text of the CSU nondiscrimination policy: facial neutrality of the regulation, and "similarly situated" definitions.

2. The Equal Protection Claim

Plaintiffs argue "[n]o less than three fundamental rights are infringed here by the Defendants' policies that intentionally disadvantage private religious association and speech." Opp. 2:22-24.

> The Complaint alleges that the Defendants created public fora at San Diego State and Long Beach State universities for expression by student groups (Compl. ¶¶ 33-37, 55-58, 59); that the Defendants grant access to these fora to similarly situated student groups (*Id.* ¶¶ 33, 34, 37, 55, 56, 58, 273); that the Defendants denied Plaintiffs access to the forum at their respective universities based on their religious speech, beliefs, and practices (*Id.* ¶¶ 105, 110, 141-42, 176, 222, 272); that in so doing the Defendants treated the Plaintiffs differently than similarly situated student groups (*Id.* ¶¶ 273, 274); and that the Defendants' denial infringes the exercise of the Plaintiffs' fundamental rights (*Id.* ¶ 276). Thus, the Complaint sufficiently alleges an equal protection claim.

Opp. 2:25-3:7.

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[8] When a regulation does not *classify by* race, alienage, or national origin, the state need only have a legitimate state interest related to the classification drawn. *See* City of Cleburne, 473 U.S. at 440-41; *see also* Washington v. Seattle School Dist., 458 U.S. 457, 485-86 (1982). "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. . . . [T]he courts have themselves devised standards for determining the validity of state legislation or other official action that is challenged as denying equal protection. **The general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest**. When social or economic legislation is at issue, the Equal Protection Clause allows the States wide latitude . . . . **The general rule gives way, however, when a statute *classifies by* race, alienage, or national origin.**" City of Cleburne, 473 U.S. at 440 (citations omitted) (emphasis added).

Plaintiffs contend enforcement of the CSU nondiscrimination policy actionably singles them out for disparate treatment by denying them recognized status based on their requirement conditioning membership on an affirmation of Christian faith, with associated commitments.

The FAC Count IV alleges:

> Defendants denied recognized status to the plaintiff student groups, and the rights, benefits, and privileges attendant thereto, **based upon** the plaintiff student organizations' requirement that their members and/or officers be Christians who affirm **their Christian tenets of belief** and endeavor to live according to their Christian standards of conduct. (FAC ¶ 272.)
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> Defendants grant recognized status to **similarly-situated non religious student groups** without regard to whether they require their members and/or officers to affirm the group's beliefs and purposes, or abide by the group's standards of conduct. (FAC ¶ 273.)
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> In doing so, the Defendants have treated the plaintiff student group differently than similarly-situated student groups. (FAC ¶ 274.)

Mot. 9:4-15 (emphasis added).

Plaintiffs argue the campus policies are not neutral because: they "expressly classify on the basis of 'religion,' and thus impose special disadvantages on religious student groups that are not imposed on other, similarly-situated student groups" (Opp. 5:2-6); "the Plaintiffs in this case have identified a similarly-situated group -- the class of student groups that do not invidiously discriminate" -- and "have alleged that these similarly-situated groups may restrict membership and leadership to those students who share their beliefs and viewpoints [and still be recognized], while the Plaintiffs cannot" (Opp. 5:15-19); the "Complaint alleges that [Plaintiffs] cannot associate in the same manner as similarly situated student groups" (Opp. 6:13-15); the court must presume discriminatory intent when a classification is based on a suspect class or affects a fundamental right, which Plaintiffs allege exists in this case because CSU's nondiscrimination policies involve both "a government regulation [that] (1) includes an explicit classification based on a suspect class" and "(2) includes classifications that implicate fundamental rights, such as free speech, free association, or the free exercise of religion." Opp. 7:14-20 (emphasis added). Defendants contend CSU has not treated Plaintiffs differently from any other student organization. They also argue Plaintiffs fail to plead the intent element required to state an equal protection claim.

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3. Facial Neutrality

Assuming for purposes of this Motion, without deciding, a cognizable fundamental right is impinged by the CSU nondiscrimination policy, the court addresses the facial neutrality question.

> The guarantee of equal protection under the Fifth Amendment is not a source of substantive rights or liberties, but rather a right to be free from invidious discrimination in statutory classifications and other governmental activity. It is well settled that **where a statutory classification does not itself impinge on a right or liberty protected by the Constitution, the validity of classification must be sustained unless "the classification rests on grounds wholly irrelevant to the achievement of [any legitimate governmental] objective**." [Citation omitted.] This presumption of constitutional validity, however, disappears if a statutory classification is predicated on criteria that are, in a constitutional sense, "suspect," the principal example of which is a classification based on race, *e.g.*, Brown v. Board of Education, 347 U.S. 483.

Harris, 448 U.S. at 321 (footnote and parallel citation omitted) (emphasis added).

Plaintiffs rely on a reading of the CSU nondiscrimination policy as "creating" by reference to "religion," a "classification" they contend qualifies as a "suspect class." They argue the policy functions to deny them recognition in a manner that impermissibly treats them differently from other types of student groups based on their protected class status requiring heightened scrutiny review. Opp. 8:25-26.

The primary CSU policy lists eleven considerations student groups may not use to discriminate in their membership and leadership decisions, of which religion is only one: "race, religion, national origin, ethnicity, color, age, gender, marital status, citizenship, sexual orientation, or disability," with two express, gender-based exceptions (athletics and university living groups).[9] 5 C.C.R.§ 41500.

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[9] The court rejects Plaintiffs' characterization of those exemptions as further support for their equal protection claim. They argue that even if the court were to accept Defendants' contention that Plaintiffs' complaint seeks not equal treatment, but special treatment, they still state an Equal Protection claim because the policy expressly "exempts intercollegiate athletic teams, facilities, competitions, and social fraternities or sororities or other university living groups from the prohibition on gender-based discrimination." Opp. 6:18-7:3, *citing* FAC ¶ 32. "By granting an exemption from their nondiscrimination policy to numerous gender-based student groups, and not granting a similar exemption to religious student groups, the Defendants are treating the Plaintiffs differently than those **similarly situated student groups**." Opp. 7:3-7 (emphasis added). However, those exemptions are not disparate applications of the same policy provisions, but rather express terms excluding particular applications. Moreover, as Defendants point out, the gender-based athletic exceptions are federally mandated. In addition, exceptions to gender blindness in "fraternities or sororities or other university *living groups*" facially implicate wholly distinguishable considerations. Plaintiffs' argument on this point also serves to further confuse their premises regarding the student groups they contend they must be compared to for purposes of analyzing the "similarly situated" element of their equal protection claim.

There appears to be no dispute CSU uniformly enforces its nondiscrimination policy in the process of according or withholding recognized status, and does not differentiate among religions, races, sexual orientations, marital status, or any permutation of any of the other listed considerations.

Plaintiffs state their challenge to the policy's facial neutrality in two ways. First, the policies purportedly "expressly discriminate[s] ***against*** religion," and "[i]t is indisputable that religion is a suspect class."[10] Opp. 7:21-25 (emphasis added). They then rephrase their argument in a manner that exposes the very distinction crucial to the facial neutrality finding by stating the policies are objectionable because they "expressly prohibit discrimination ***based on*** 'religion." Opp. 8:17. Nevertheless, they argue:

> The discriminatory **effect** of these provisions is obvious: by their very terms, religious student organizations, like the Plaintiffs, that require their members and officers to adhere to their statements of faith and codes of conduct will never be granted access to the Defendants' student organization speech fora, while all other similarly situated student groups can require adherence to their beliefs and yet access the fora. The Defendants' nondiscrimination policies are not facially neutral and no further inquiry into discriminatory intent is necessary.

Opp. 8:17-24 (emphasis added).

The policy on its face prohibits recognition of any student organization that ***itself*** "classifies" by discriminating on any of the enumerated bases in the process of segregating its accepted and rejected members and leaders. The prohibition attaches to the *group's consideration* of any of those characteristics. Viewed in that light, the mere listing of the prohibited criteria no more "creates" a "suspect class" based on religion than it "creates" a "suspect class" based on race. On its face, the policy encompasses any and all permutations within each listed criterion irrespective of, for example, the particular race, the particular religion, or the particular disability a potential affiliate may manifest. The policy denies official recognition to all student organizations conditioning affiliation in consideration of any of the enumerated criteria.

The FAC pleads no facts to support the allegation the CSU policy "intentionally" discriminates against them. However, the "based on" language of FAC ¶ 272 could be construed as an allegation

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[10] Whether CSU's selection of the particular prohibited criteria infringe the First Amendment and whether Plaintiffs are part of a First Amendment "suspect class" in these circumstances for equal protection standard of review purposes are questions for future proceedings.

of intentional conduct.[11] The inference is tenuous, but not so unreasonable as to warrant dismissal at this stage for failure to state an equal protection claim, particularly as the disparate treatment issue is intertwined with the underlying First Amendment claims not presently before the court.

Drawing all inferences from the facts alleged in the light most favorable to Plaintiffs, while expressing no opinion on the merits of the claim, the court finds Plaintiffs' statement of an equal protection claim is adequate to survive dismissal. First, the language "based upon" Plaintiffs' "Christian beliefs" (FAC ¶ 272) can be construed to infer a discriminatory purpose impacting a First Amendment fundamental right, albeit with no evidentiary support at this point in the proceedings. Second, even if the policy is facially neutral, that same language can be construed to allege an identifiable group of religious student organizations who affiliate for the exercise of their First Amendment rights are disparately impacted by the nondiscrimination policy when compared to student organizations CSU recognizes. The court is accordingly unwilling to conclude under Rule 12(b)(6) standards Plaintiffs could prove no set of facts entitling them to prevail on their equal protection claim.

Defendants acknowledge: "Where the challenged governmental policy is 'facially neutral,' proof of its disproportionate impact on an identifiable group can satisfy the intent requirement" but "only if it tends to show that some invidious or discriminatory purpose underlies the policy."[12] Mot. 11:20-23, *quoting* Lee v. Los Angeles, 250 F.3d 668, 686 (9th Cir. 2001); *see* Barren, 152 F.3d at 1194; Village of Arlington Heights, 429 U.S. at 264-65. For purposes of narrowing the issues to be decided on summary judgment and of crystalizing the standards of review, the court holds the CSU nondiscrimination policy is facially neutral. Only an actionable disparate impact evidentiary showing will save the claim.

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[11] Plaintiffs also urge an inference of intent to discriminate in reliance on FAC allegations associated with what Defendants told each of the Plaintiffs in denying recognized status, *i.e.*, that their requirements, *inter alia*, that members pledge allegiance to Jesus Christ and not acknowledge homosexuality as natural or part of God's plan, violated CSU's nondiscrimination policy. Opp. pp. 10-11; *see* FAC ¶¶ 110, 141-142, 176, 214, 222. However, such statements merely communicate an explanation for denial of recognized status in reliance on the policy.

[12] "'Discriminatory purpose' . . . implies more than intent as volition or intent as awareness of consequences. It implies that the decision maker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely in spite of, its adverse effects upon an identifiable group." Lee, 250 F.3d at 687 (citations omitted) (failure "to allege that defendants' acts or omissions were motivated by discriminatory animus toward the mentally disabled as a protected class" was fatal to the statement of an equal protection claim).

4. **Identification Of Persons "Similarly Situated"**

Plaintiffs admit they discriminate on the basis of religion and of sexual orientation in the selection of members and officers, two of the criteria expressly prohibited by CSU policy. They characterize Defendants' conduct as intentional discrimination against them because they are religious groups, "as compared to similarly-situated, non-religious groups." Opp. pp. 11-12. They have pled facts alleging "that the Defendants denied official recognition to the Plaintiffs because they require their members and officers to agree with their Christian beliefs and standards of conduct." Id.; FAC ¶¶ 110, 141-142, 176, 214, 222. On that basis, they attempt to carve out a "class" subset for purposes of their disparate treatment argument: those religious groups whose organizing principles require members to affirm and adhere to Christian principles as a condition of membership. On the strength of that distinction from student groups formed around other kinds of organizing principles, Plaintiffs argue the CSU policy as applied impermissibly treats them disparately due to their "protected class" status as Christians. Plaintiffs conclude: "discriminatory intent is presumed to exist when a government regulation (1) includes an explicit classification based on a suspect class; or (2) includes classifications that implicate fundamental rights, such as free speech, free association, or the free exercise of religion." Opp. 7:14-18. They argue "Defendants' nondiscrimination policies expressly discriminate on both grounds" because student groups formed around other kinds of organizing principles can require their members to affirm and adhere to their organizing principles and still enjoy recognized status. Opp. 7:19-20.

Defendants frame the equal protection claim starting from the perspective of the institutional policy rather than of any particular group. They insist the CSU policy in no way requires, promotes, or discourages "*any* student organization to have its members affirm their beliefs or abide by the group's standard of conduct." Mot. 10:26-28. "Unlike equal protection cases involving laws that draw explicit classifications on the basis of race, religion or other protected categories, CSU's Policy draws no such distinctions: it applies equally to *all* student groups regardless of the content or viewpoint of their speech." Mot. 10:4-7. That argument essentially asserts Plaintiffs are not excluded *by the policy* from acquiring the benefits associated with recognized student organization status. The institution's policy does not "classify" them based on their religion, then on that basis deny them recognized status.

Rather, the exclusion arises from the groups' own decision to themselves reject members based on religious or sexual orientation principles incompatible with their own, in violation of the policy.

The parties variously define the "similarly situated" persons against whom Plaintiffs' equal protection claim should be measured. "[T]he Plaintiffs in this case have identified **a similarly-situated group -- the class of student groups that do not invidiously discriminate"** -- and "have alleged that these similarly-situated groups may restrict membership and leadership to those students who share their beliefs and viewpoints [and still be recognized], while the Plaintiffs cannot." Opp. 5:15-19 (emphasis added). They also identify "similarly situated" groups as: "**similarly-situated non religious student groups**" who are granted recognition without regard to whether they require their members or officers "to affirm the group's beliefs and purposes, or abide by the group's standards of conduct."[13] FAC ¶ 273 (emphasis added).

Defendants identify as the relevant "similarly situated." persons all student organizations seeking recognized status. Defendants criticize: "far from pleading that CSU treated them *differently* from other similarly situated student groups, Plaintiffs' real complaint is that they were *not* treated differently," through *exemption* from the restriction applicable to every other student organization desiring recognition that they must not discriminate on the basis of, *inter alia*, religion.

The two "classifications" that clearly result from implementation of the policy are all student organizations who choose to adhere to CSU's nondiscrimination policy and all student organizations who choose not to do so. The former group obtains the benefits of recognized status. The latter group does not. The Equal Protection issue in this light compels the result that on its face, Defendants treat Plaintiffs no differently than any other student group that chooses not to abide by the policy.

The FAC does not allege Plaintiffs are treated differently from any other group that declines to forego *all* of the proscribed discrimination in the selection of their members and officers. Plaintiffs too idiosyncratically define the "similarly situated" class for equal protection claim purposes. Religion is only of the prohibited considerations. They fall in the class of "unrecognized" student groups. "Recognized" student groups are "similarly situated" as among themselves, and as distinct

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[13] It might also be posited that a "similarly situated" subgroup would be all other religious student groups. The court notes from the pleading no religious groups are alleged to be exempted from compliance with the policy and yet CSU recognizes a number of religious organizations.

from "unrecognized" student groups, in that they choose to observe the nondiscrimination policy and enjoy the benefits accompanying that choice. There is no allegation that any student group choosing to adhere to the CSU nondiscrimination policy is not granted recognized status. The particular organizing principles, beliefs, purposes, or advocacy is not alleged to play any role in the recognition process. The FAC acknowledges CSU has recognized other religious groups.

In summary, the CSU policy by its terms is an *anti*discrimination policy extending to student organizations desiring recognized status an institutional commitment that the enumerated characteristics not be used as exclusionary criteria. The regulation *prohibits* membership exclusion based on any of those considerations. It *creates* no "regulatory classifications" predicated on the race, religion, gender, sexual orientation, etc., of any students. *See* City of Cleburne, 473 U.S. at 439. Considering the facts alleged and all reasonable inferences, the common denominator of recognized student groups is that each agrees to adhere to the CSU nondiscrimination policy. The common denominator of groups seeking but denied official recognition is that each chooses not to adhere to the CSU nondiscrimination policy. For purposes of equal protection analysis, the court finds the appropriate "similarly situated" group comparable to Plaintiffs is those student organizations denied recognized status because they choose not to abide by the nondiscrimination policy -- *i.e.*, those who restrict membership by discrimination in consideration of *any* of the enumerated criteria.[14]

F. Additional Considerations

While this Motion was under submission, the United States District Court for the Northern District of California issued the opinion in Christian Legal Society Chapter of University of California v. Kane, 2006 WL 997217 (N.D.Cal. Apr. 17, 2006) ("Kane"). The Kane court decided issues remarkably similar to those presented by these parties holding, among other things, that plaintiffs' equal protection claim failed first, because plaintiffs presented no evidence they were treated differently from other student groups, and second, because they submitted no evidence of

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[14] Even crediting, *arguendo*, Plaintiffs' argument that of the eleven prohibited considerations, the mention of "religion" creates a suspect class, the "similarly situated" group would be all "religious" groups. Plaintiffs would need to demonstrate differential treatment within that "similarly situated" class group. The common denominator from the face of the policy, however, would likely remain religious groups who choose to adhere to the nondiscrimination policy in their membership decisions and those religious groups who do not.

discriminatory intent as the institution exempted no other registered student organizations from complying with its nondiscrimination policy.

The Kane court was deciding a Motion For Summary Judgment, whereas this matter is before the court on a Motion To Dismiss. The Kane procedural posture permitted the court to reach the merits not only of the equal protection claim, but also of the First Amendment free speech, expressive association, and free exercise claims underlying the equal protection claim. The latter analyses affect the "level of scrutiny" determinations and the like applicable to an equal protection ruling, because an equal protection question only arises if a law or regulation "impinges upon a fundamental right explicitly or implicitly secured by the Constitution . . . ." Harris, 448 U.S. at 312 (citation omitted). Nevertheless, the statement of the ultimate question to be decided here appears to be identical to the ultimate question decided in Kane: "whether a religious student organization may compel a public university . . . 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," in violation of the institution's nondiscrimination policy requiring that all student organizations desiring to be recognized or "registered," with the benefits attendant on that status, shall not discriminate "on the basis of race, color, religion, national origin, ancestry, disability, age, sex or sexual orientation." Kane at *1,2.

Considerations likely to arise in connection with the First Amendment claims are thoughtfully explored in the California Supreme Court case Evans v. City of Berkeley, 40 Cal.Rptr.3d 205 (2006) (a case that has been briefed and argued in this action) and in Kane. Neither case is authority binding on this court. Without prejudging the eventual evidence or result in this case, the court finds both those cases persuasive, and observes the United State Supreme Court and Ninth Circuit authority these cases rely on is binding on this court. The parties should address the reasoning and authority of Kane and Evans in their summary judgment motions.

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III. CONCLUSION AND ORDER

For the foregoing reasons, **IT IS HEREBY ORDERED** the Motion To Dismiss is **GRANTED** with respect to the Count V Due Process claim and is **DENIED** with respect to the Count IV Equal Protection claim. The Count V Due Process claim (only) is **DISMISSED**.

IT IS SO ORDERED.

DATED: 5-1-06

Larry A. Burns

HONORABLE LARRY ALAN BURNS
United States District Judge

cc: MAGISTRATE JUDGE ANTHONY J. BATTAGLIA
ALL COUNSEL OF RECORD