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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

COLLEGE REPUBLICANS AT  
SAN FRANCISCO STATE  
UNIVERSITY., et al.,

Plaintiffs

v.

CHARLES B. REED, et al.

Defendants.

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No. C 07-3542WDB

OPINION AND ORDER  
GRANTING IN PART AND  
DENYING IN PART PLAINTIFFS'  
MOTION FOR PRELIMINARY  
INJUNCTION

The central issues that we address in the pages that follow are these: does a public university violate the First Amendment<sup>1</sup> if its regulations purport to empower it to punish students (1) on the undifferentiated ground that their behavior was "inconsistent with [the university's] goals, principles, and policies," or (2) for engaging in conduct that is not "civil." We also consider whether the First Amendment permits a university to proscribe "intimidation" or "harassment" that appears to threaten or endanger another person's safety.

Plaintiffs are an organization, College Republicans at San Francisco State University ("SFSU"), and two of the organization's members. Defendants are

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<sup>1</sup> The First Amendment is applicable to the individual States through the Fourteenth Amendment.

1 administrators with either the California State University System (“CSU”) or with  
2 SFSU. Plaintiffs have filed a motion asking the court to issue a preliminary  
3 injunction that would prohibit the defendants from enforcing two provisions of the  
4 Student Conduct Code and one provision in the SFSU Student Organization  
5 Handbook. In support of their request, plaintiffs contend that each of the  
6 provisions they challenge is unconstitutionally overbroad and vague.<sup>2</sup>

7 For the reasons set forth below, the Court GRANTS in part and DENIES in  
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23 <sup>2</sup> Plaintiffs challenge two sections of CSU’s Standards for Student Conduct Code, Cal. Code  
24 Regs. tit. 5, §§ 41301(a) & (b)(7)(2007) (the "Code"), and a provision on "Collective Responsibility"  
in the section on Student Group Misconduct in SFSU’s Student Organization Handbook (the "Collective  
Responsibility provision").

25 The challenges that plaintiffs press in the motion on which we rule in these pages are facial and  
26 are based on two theoretically independent First Amendment norms: overbreadth and vagueness. We  
have concluded that our disposition of the claims based on the theory of overbreadth make it  
unnecessary, at this stage in the proceedings, to address the overlapping claims based on the theory of  
27 vagueness.

28 The plaintiffs' challenge to these provisions "as applied" is not ripe for disposition through this  
motion.

1 how properly to respond to these groups. The rally took place at mid-day at the  
2 Malcolm X Plaza on the SFSU campus and consisted of visual displays, speeches

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1 complaint against the College Republicans for their actions during the rally.  
2 Among other things, Mr. Gallagher decried the fact that members of the  
3 organization "very evidently walked over and trekked over a banner with Arabic  
4 script . . . [that] represented the word

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<sup>3</sup> The full text of this provision and the other provisions at issue in the Motion are set forth below in Section I.B.

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1 referred to the Student Organization Hearing Panel for formal disciplinary  
2 proceedings (an investigation and hearing). That Panel, composed of two students,  
3 two members of the faculty, and one member of the campus staff, received  
4 Director Greenwell's formal referral on December 5, 2006. It is not clear what  
5 further investigation (if any) that Pane

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1 the possibility of irreparable injury or that serious questions are raised and the  
2 balance of hardships tips sharply in his favor.” *The Freecycle Network, Inc. v.*  
3 *Oey*, \_\_\_ F.3d \_\_\_, 2007 WL 2781902, at \*2 (9<sup>th</sup> Cir. Sept. 26, 2007).

4 In a case like the one at bar, where the First Amendment is implicated, “[t]he  
5 Supreme Court has made clear that ‘[t]he loss of First Amendment freedoms, for  
6 even minimal periods of time, unquestionably constitutes irreparable injury’ for  
7 purposes of the issuance of a preliminary injunction.” *Sammartano v. First Jud.*  
8 *Dist. Ct.*, 303 F.3d 959, 973-74 (9<sup>th</sup> Cir. 2002) (quoting and citing *Elrod v. Burns*,  
9 427 U.S. 347, 373 (1976)). In other words, the requirement that a party who is  
10 seeking a preliminary injunction show "irreparable injury" is deemed fully satisfied  
11 if the party shows that, without the injunction, First Amendment freedoms would  
12 be lost, even for a short period.

13 In cases like this the "balancing of the hardships" also tends to turn on  
14 whether the challengers can show that the regulations they attack are substantially  
15 overbroad. A party who proves that a regulation is substantially overbroad  
16 necessarily (as we shall explain) has shown that leaving the regulation on the  
17 books would substantially chill the exercise of fragile and constitutionally  
18 fundamental rights. In sharp contrast, defendants who are temporarily enjoined  
19 from enforcing a regulation because it is overbroad often are in a position to adopt,  
20 at least on an interim basis, a more narrowly crafted set of provisions that enable  
21 the defendants to achieve their legitimate ends without unjustifiably invading First  
22 Amendment freedoms. Similarly, the requirement that issuance of a preliminary  
23 injunction be in the "public interest" usually is deemed satisfied when it is clear  
24 that core constitutional rights would remain in jeopardy unless the court  
25 intervened.

26 Given this precedential backdrop, whether we grant plaintiffs' motion to  
27 issue a preliminary injunction in this case turns, for all practical purposes, on  
28 whether plaintiffs can persuade us, with respect to any or all of the provisions they

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After having identified the narrowest reasonable construction of the regulation, we determine whether, so

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While the need to accommodate important competing interests makes it difficult to draw bright line distinctions in much First Amendment jurisprudence, there are some clearly established propositions to which we must attend while we are determining the size of the two spheres of activity that the regulations in issue in this case seem to reach. One such proposition is that the state cannot proscribe speech or conduct that is merely "offensive to good taste." *Papish v. the Bd. of Curators of the Univ. of Mo.*, 410 U.S. 667, 670-71 (1973); *see also Doe v. Univ. of Mich.* di[

1 First Amendment jurisprudence is quite context-sensitive. How much protection  
2 the Amendment offers, and what analytical route the courts must follow to make  
3 that determination, can vary dramatically with the specific characteristics of the  
4 environment or setting in which the challenges are made. The same type of  
5 regulation might survive First Amendment challenge in one context but fail to  
6 survive it in another. This follows in

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1 reasonably understood as providing a basis for disciplinary action. For several  
2 reasons, we find this argument unpersuasive. First, we note that this provision  
3 appears within a set of pronouncements that are entitled "Standards for Student  
4 Conduct." The provision that plaintiffs challenge is preceded immediately by a  
5 broadly cast paragraph that clearly is intended to set forth general principles that  
6 inform and are incorporated into to all of the passages that follow it.

7 This first, encompassing paragraph declares that "[e]ach student must choose  
8 behaviors that contribute toward" the goal of "maintaining a safe and healthy living  
9 and learning environment for students, faculty, and staff." Cal. Code Regs. tit. 5,  
10 § 41301 (emphasis added). Immediately after announcing that students "must"  
11 choose such behaviors, this initial paragraph declares that "[s]tudent behavior that  
12 is not consistent with the Student Conduct Code is addressed through an  
13 educational process that is designed to promote safety and good citizenship  
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1 This is a significant point because there is a much greater risk that  
2 expressing new, unpopular or controversial ideas will trigger retaliatory action than  
3 expressing popular ideas would. Understanding that greater risk, it is the people  
4 who want to express unpopular, controversial ideas who are more likely to be  
5 deterred by the possibility of punishment. It follows that the First Amendment  
6 must be less tolerant of restrictive intrusions into spheres of unpopular thought  
7 than into spheres of popular thought. So the likelihood that the First Amendment  
8 will be offended increases with increases in the proportion of the expressive  
9 activity that is captured only in the outer sphere that is controversial or unpopular.

10 Plaintiffs' challenge to the University's requirement that students "be civil to  
11 one another" also brings another element of the freedom of expression equation  
12 into play. "Expression" takes many forms — and the capacity of any given  
13 expression to attract attention or to convey its message can turn on its uniqueness  
14 or the play between it and the environment or context in which it occurs. These  
15 facts of our socio-psychological life can mean that the likelihood that any given  
16 'expression' will reach and be understood by its intended audience can depend on  
17 how obviously or how cleverly that expression varies from oft-used means or  
18 commonly occurring forms of communication.<sup>7</sup> Being civil, in contrast, suggests  
19 conforming to widely accepted norms and forms. Thus, requiring students to be  
20 civil might well require students to forsake the means of communication that are  
21 most likely to be effective.

22 There also is an emotional dimension to the effectiveness of  
23 communication. Speakers, especially speakers on significant or controversial

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25 <sup>7</sup> "Anti-illegal immigration bake sales" that the College Republicans sponsored on two other  
26 occasions provide a perfect illustration of this concept. *See* Declaration of Joey Greenwell in  
27 Opposition to Plaintiffs' Motion for Preliminary Injunction at p. 6. At these events, the College  
28 Republicans set up tables displaying the cakes that were for sale. But these tables did not stand alone  
on the plaza. Instead, the College Republicans erected fences around them — fences in which holes or  
openings had been cut. People who wanted to buy cakes had to climb or reach through the holes in the  
fence to acquire the food. While this form or means of making a political point predictably would  
offend many people and be considered disrespectful, its ability to attract attention and to deliver its  
message is based almost entirely on its creativity in bucking norms of political correctness.



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mandating civility could deprive speakers of the tools they most need to connect emotionally with their audience, to move their audience to share their passion.

In sum, there is a substantial risk that the civility requirement will inhibit or deter use of the forms and means of communication that, to many speakers in circumstances of the greatest First Ame

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1 An additional ambiguity infects the sentence that speaks of jurisdiction. In  
2 part because of its structure, and in part because of its omission of the word "only"  
3 (or some equivalent concept), there is at least some possibility that students who  
4 read this sentence would infer that its purpose was not to limit the kind of conduct  
5 that could be sanctioned, but, instead, to make sure that students understood that  
6 they could be punished for "off campus" violations of the substantive prohibitions  
7 of the Code.

8 In short, we cannot conclude, on this record, that this ambiguous sentence  
9 'saves' the civility mandate. We are not persuaded that it is sufficiently likely that  
10 students would consult this sentence and understand that its effect is to modify,  
11 clarify, and limit all the substantive proscriptions that preceded it.

12 The sentence that announces that nothing in this Code "may conflict" with  
13 the Education Code's prohibition on punishing students for behavior that is  
14 protected by the First Amendment appears to have even less 'saving' power. This  
15 sentence communicates virtually nothing. How are college students to be able to  
16 determine (when judges have so much difficulty doing so) whether any particular  
17 speech or expressive conduct will be deemed (after the fact) to fall within the  
18 protections of the First Amendment? We must assess regulatory language in the  
19 real world context in which the persons being regulated will encounter that  
20 language. The persons being regulated here are college students, not scholars of  
21 First Amendment law. What does a college student see when he or she encounters  
22 section 41301? That student sees a long list of mandates and proscriptions, most of  
23 which seem to describe, in terms relatively familiar to the student and with a fair  
24 amount of particularity, various forms of "Unacceptable Student Behaviors."  
25 After seeing all these prohibitions, a student who is particularly thorough and  
26 patient also could read that nothing in the Code "may conflict" with a cited state  
27 statute that prohibits universities from violating students' First Amendment rights.  
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1           What path is a college student who faces this regulatory situation most likely  
2 to follow? Is she more likely to feel that she should heed the relatively specific  
3 proscriptions of the Code that are set forth in words she thinks she understands, or  
4 is she more likely to feel that she can engage in conduct that violates those  
5 proscriptions (and thus is risky and likely controversial) in the hope that the  
6 powers-that-be will agree, after the fact, that the course of action she chose was  
7 protected by the First Amendment? To us, this question is self-answering — and  
8 the answer condemns to valuelessness the allegedly 'saving' provision in the last  
9 paragraph of the Code that prohibits violations of the First Amendment.

10           For all the reasons discussed above, we conclude that there is a strong  
11 likelihood that plaintiffs will prevail on the merits of their overbreadth challenge to  
12 the provision in the Student Conduct Code that calls for students "to be civil to one  
13 another and to others in the campus community."

14           Because the plaintiffs have met their burden with respect to this provision,  
15 we PRELIMINARILY ENJOIN the defendants from attempting to apply or  
16 enforce the civility requirement.

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(b) **Standards for Student Conduct,**  
**Cal. Code Regs. Title 5, § 41301(b)(7)**

The second provision in the Standards for Student Conduct that plaintiffs contend is overbroad and in violation of the First Amendment prohibits "[c]onduct that threatens or endangers the health or safety of any person within or related to the University community, including physical abuse, threats, intimidation, harassment

1 lines. First, in its lead and central clause, it identifies the category of conduct that  
2 it proscribes: "[c]onduct that threatens or endangers the health or safety of any  
3 person ." Cal. Code Regs. tit. 5, § 41301(b)(7). Then, in its secondary and  
4 dependent clause, it lists examples of kinds of conduct that it proscribes when the  
5 specific form they take involves a threat to or endangerment of "the health or  
6 safety of any person within or related to the University community." *Id.* In other  
7 words, the structure of the challenged provision, viewed as a whole, suggests that it  
8 was not intended to proscribe "intimidation" or "harassment" in whatever form  
9 "intimidation" or "harassment" might take, but only the sub-category of  
10 intimidation or harassment that "threatens or endangers the health or safety of any  
11 person."

12 There are additional considerations that support this interpretation of the  
13 challenged provision. First, it likely was clear to the drafters of this provision that  
14 the words "intimidation" and "harassment" are not self-defining and could be  
15 understood to encompass a wide range of kinds of conduct. The full reach of the  
16 concept of "harassment," for example, certainly is not clear. The drafters of this  
17 provision likely knew, moreover, that what constitutes "harassment" can be very  
18 context specific: one type of conduct could be completely innocuous (even  
19 constructive) in one setting but, in a different context, that same conduct could be  
20 considered "harassing." Because such considerations might well have occurred to  
21 rational drafters of a provision like this, it is certainly not unlikely that they would  
22 have seen the importance of giving these elastic terms some limits, some  
23 meaningful content, when including them in what was clearly intended to be a  
24 proscriptive pronouncement.

25 Another consideration offers stronger support for the view that the  
26 challenged provision was intended to proscribe only a specified sub-category of  
27 intimidating or harassing conduct. If the true intent of the authors of this provision  
28 had been to prohibit all forms of intimidation and harassment, it would have been

1 obvious how to do so. They could have included in their long list of "unacceptable  
2 student behaviors" a simple, straightforward proscription of "intimidation or  
3 harassment" — unaccompanied by any complicating adjectives or limiting clauses.  
4 That the drafters chose not to follow this obvious course strongly suggests that they  
5 did not intend the provision they adopted to proscribe all forms of intimidation or  
6 harassment — but only those that threatened or endangered the health or safety of  
7 any person.

8 For all the reasons just discussed, plaintiffs have failed to persuade us that it  
9 is likely that they will be able to prove that this challenged provision of the  
10 Standards for Student Conduct was intended to proscribe all forms of  
11 "intimidation" or "harassment." Instead, we think it more likely than not that, after  
12 a full trial on the merits, the finder of fact would conclude that this provision was  
13 intended to condemn only those forms of intimidation or harassment that threaten  
14 or endanger the health or safety of any person.

15 Nor have plaintiffs persuaded us that this construction of the challenged  
16 provision is so subtle or unforeseeable that students are unlikely to come to it on  
17 their own. Rather, we believe that the limiting interpretation that we have  
18 articulated represents the most natural and likely reading of this provision — and  
19 that most college students who have occasion to consider the matter would  
20 understand that what is proscribed is intimidation or harassment that threatens or  
21 endangers health or safety.

22 These preliminary findings frame the issue to which we now turn: is it likely  
23 that plaintiffs will succeed in proving that a provision that bars only those forms of  
24 intimidation or harassment that threaten or endanger health or safety is facially  
25 overbroad in violation of the First Amendment? We have little difficulty  
26 answering this question in the negative. The arguments plaintiffs have presented  
27 thus far do not address the challenged provision as we have construed it; rather, the  
28 attacks that plaintiffs have mounted assume that the provision in question prohibits

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all forms of intimidation and harassment. Having proceeded on that assumption, plaintiffs' submissions are off legal target — and thus cannot be persuasive. We cannot conclude that plaintiffs have met the burdens that they must meet in order to



1 organizations whose members offend any of these "policies" will chill to a  
2 substantial extent the exercise of expressive rights that students enjoy under our  
3 Constitution. The real prospect of such a substantial chill of First Amendment  
4 rights compels the Court to PRELIMINARILY ENJOIN the defendants from  
5 basing disciplinary proceedings on these provisions at least until this litigation is  
6 concluded.<sup>9</sup>

7  
8 III. SUMMARY OF RULINGS

9 Plaintiffs' Motion for a Preliminary Injunction is GRANTED in part and  
10 DENIED in part.

11 1. Defendants ARE PRELIMINARILY ENJOINED from basing any  
12 disciplinary proceedings on the ground that the conduct in issue was not "civil."<sup>10</sup>

13 2. Defendants also ARE PRELIMINARILY ENJOINED from basing any  
14 disciplinary proceedings on the undifferentiated ground that the conduct in issue  
15 was "inconsistent with SF State goals, principles and policies."

16 3. Defendants are NOT PRELIMINARILY ENJOINED from initiating  
17 disciplinary proceedings on the ground that the conduct in question constituted a  
18 form of "intimidation" or "harassment" that threatened or endangered the health or  
19 safety of any person within or related to the university community. So construed,

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25 <sup>9</sup> For obvious reasons, it follows that our Order also must temporarily enjoin the defendants  
26 from purporting to base any disciplinary action on subsection (b)(16) of section 41301, which prohibits  
27 "[v]iolation of any published University policy, rule, regulation or presidential order." Cal. Code Regs.  
28 tit. 5, § 41301(b)(16).

<sup>10</sup> This preliminary injunction does not prohibit the University from disciplining students for  
engaging in conduct that clearly would be considered "uncivil" if that conduct also violated a more  
specific proscription that was tailored in conformity with the First Amendment. The authority to impose  
discipline in any such circumstance would be rooted only in the more specific proscription.



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sub-section (b)(7) of the Standards of Student Conduct, section 41301 of Title 5,  
may serve as the basis for initiating disciplinary proceedings and for imposing  
sanctions.

IT IS SO ORDERED.

Dated: November 19, 2007

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WAYNE D. BRAZIL  
United States Magistrate Judge