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.
_____/

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[1] 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

[1] The First Amendment is applicable to the individual States through the Fourteenth Amendment.

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

For the reasons set forth below, the Court GRANTS in part and DENIES in

[2] Plaintiffs challenge two sections of CSU's Standards for Student Conduct Code, Cal. Code 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").

The challenges that plaintiffs press in the motion on which we rule in these pages are facial and 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 vagueness.

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

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

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

[3] The full text of this provision and the other provisions at issue in the Motion are set forth below in Section I.B.

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

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

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

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

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

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

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[

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

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

This first, encompassing paragraph declares that "[e]ach student must choose behaviors that contribute toward" the goal of "maintaining a safe and healthy living and learning environment for students, faculty, and staff." Cal. Code Regs. tit. 5, § 41301 (emphasis added). Immediately after announcing that students "must" choose such behaviors, this initial paragraph declares that "[s]tudent behavior that is not consistent with the Student Conduct Code is addressed through an educational process that is designed to promote safety and good citizenship

This is a significant point because there is a much greater risk that expressing new, unpopular or controversial ideas will trigger retaliatory action than expressing popular ideas would. Understanding that greater risk, it is the people who want to express unpopular, controversial ideas who are more likely to be deterred by the possibility of punishment. It follows that the First Amendment must be less tolerant of restrictive intrusions into spheres of unpopular thought than into spheres of popular thought. So the likelihood that the First Amendment will be offended increases with increases in the proportion of the expressive activity that is captured only in the outer sphere that is controversial or unpopular.

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

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

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[7] "Anti-illegal immigration bake sales" that the College Republicans sponsored on two other occasions provide a perfect illustration of this concept. *See* Declaration of Joey Greenwell in Opposition to Plaintiffs' Motion for Preliminary Injunction at p. 6. At these events, the College 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

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

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

The sentence that announces that nothing in this Code "may conflict" with the Education Code's prohibition on punishing students for behavior that is protected by the First Amendment appears to have even less 'saving' power. This sentence communicates virtually nothing. How are college students to be able to determine (when judges have so much difficulty doing so) whether any particular speech or expressive conduct will be deemed (after the fact) to fall within the protections of the First Amendment? We must assess regulatory language in the real world context in which the persons being regulated will encounter that language. The persons being regulated here are college students, not scholars of First Amendment law. What does a college student see when he or she encounters section 41301? That student sees a long list of mandates and proscriptions, most of which seem to describe, in terms relatively familiar to the student and with a fair amount of particularity, various forms of "Unacceptable Student Behaviors." After seeing all these prohibitions, a student who is particularly thorough and patient also could read that nothing in the Code "may conflict" with a cited state statute that prohibits universities from violating students' First Amendment rights.

What path is a college student who faces this regulatory situation most likely to follow? Is she more likely to feel that she should heed the relatively specific proscriptions of the Code that are set forth in words she thinks she understands, or is she more likely to feel that she can engage in conduct that violates those proscriptions (and thus is risky and likely controversial) in the hope that the powers-that-be will agree, after the fact, that the course of action she chose was protected by the First Amendment? To us, this question is self-answering — and the answer condemns to valuelessness the allegedly 'saving' provision in the last paragraph of the Code that prohibits violations of the First Amendment.

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

Because the plaintiffs have met their burden with respect to this provision, we PRELIMINARILY ENJOIN the defendants from attempting to apply or 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

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

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

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

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

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

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

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

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

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

III. SUMMARY OF RULINGS

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

1. Defendants ARE PRELIMINARILY ENJOINED from basing any disciplinary proceedings on the ground that the conduct in issue was not "civil."[10]

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

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

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

[10] 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.

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

WAYNE D. BRAZIL
United States Magistrate Judge