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UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

MINDY BARLOW and **DALIA R. SMITH**; Plaintiff, vs. **SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO; MICHAEL RODDY**, individually and in his official capacity as the Executive Officer of the Superior Court of California, County of San Diego; and **DOES 1 through 20** inclusive, Defendants.	Case No.: 07-CV-1926-LAB (LSP) **PLAINTIFFS' OPPOSITION TO DEFENDANTS SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO AND MICHAEL RODDY'S MOTION TO DISMISS FIRST AMENDED COMPLAINT** Date: January 14, 2008 Time: 10:30 a.m. Courtroom: 9 Judge: Larry Allan Burns

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INTRODUCTION

Mindy Barlow and Dalia R. Smith (collectively "Plaintiffs"), brought this lawsuit against Superior Court of California, County of San Diego ("Superior Court") and Michael Roddy (collectively "Defendants") for violating their federal and state constitutional rights by denying them access to court facilities in order to hold a weekly Bible study.

Singling out the Bible study because of its religious nature is blatant viewpoint discrimination, infringing on Plaintiffs' rights to free speech, free exercise of religion, and equal protection under the law. Moreover, by targeting religious groups, the Superior Court is demonstrating brazen hostility toward religion in violation of the Establishment Clause. The Constitution cannot tolerate the Superior Court's actions. Plaintiffs sufficiently allege facts to state a claim for each cause of action. Therefore, Plaintiffs respectfully request that this Court deny Defendants' Motion to Dismiss for failure to state a claim.

STATEMENT OF FACTS

Initial Use of Courthouse Facilities for a Bible Study

Sometime during the year 2000, Steve Thunberg, then Executive Director of the Superior Court, gave permission to Dodie Sandoval, a clerk to Judge LaVoy, to hold a Bible study over the lunch hour in an available jury room or courtroom. This Bible study met regularly in an available jury room during the lunch hour each week between the years 2000 and April of 2006. For years, Plaintiffs have been participants of this Bible study. Sometime in the month of April, 2006, a Deputy Sheriff informed Ms. Barlow that individuals without keycard access were not allowed entrance to the back hallways where the jury rooms are located. Members of the Bible study then inquired about the use of a courtroom and were informed by Court administration that Court policy did not allow Bible studies in courthouse facilities because of a concern regarding the "separation of church and state." The Bible study has not reconvened in any jury or courtroom since.

The Development of the Court's "Policy"

In May, 2006, Ms. Barlow received an email from then Assistant Executive Officer, Ray Sorensen ("Sorenson"), again informing her that having the Bible study meet in any courtroom was contrary to "Court Policy." Upon a search of the Personnel Rules of the Superior Court, Ms.

Barlow found no policy prohibiting the Bible study from meeting as of May 30, 2006. On June 2, 2006, Sorensen approached Plaintiff Barlow in her courtroom and informed her that the Legal Department was looking into the issue in depth.

Several months later, on September 29, 2006, Sorensen emailed Ms. Barlow to let her know that the Court was in the process of writing a policy that would cover the issue of "nonbusiness use" of the court facilities. On November 13, 2006, the Superior Court adopted Administrative Policy, Use of Court Facilities ("A.P.") 4.6. (Exhibits to First Amended Complaint, Exhibit "A".)[1]

Under AP 4.6.II.B, court employees are permitted to use "court facilities" (including "any open room, chambers, or area within a building in which court business is conducted") for celebrations of "personal milestones commonly celebrated in the workplace such as birthday parties, baby or wedding showers, and retirement celebrations. . . ."

Furthermore, under A.P. 4.6.II.C, anyone seeking to use a "court facility" for any other purpose must be granted permission after submitting a written request. All such requests are then evaluated by the Assistant Executive Officer according to the following factors:

> (a) Protection of the integrity of the judicial process, including public trust and confidence in the impartiality, lack of bias or discrimination, and fairness of the judicial system;
>
> (b) Safety and security of the people and property within the courthouse and its perimeters;
>
> (c) Whether the program or service advances the administration of justice and is useful to a significant number of litigants;
>
> (d) Whether the program imposes any potential costs or liability on the court;
>
> (e) Whether the program or service offered is conducted for profit; and
>
> (f) Whether constitutional, statutory, or other legal requirements prohibit the court from granting use of its facilities.

[1] All references to "Exhibit" refer to the Exhibits to First Amended Complaint.

1 Nothing in A.P. 4.6 actually circumscribes the absolutely "discretionary" (according to
2 4.6.II.A) approval of the Assistant Executive Officer, as nothing in the evaluative factors will
3 disqualify (or allow) a request of its own accord.

4 **The Court Prohibits the Bible Study under Its Discretionary Policy**

5 On or around November 13, 2006, Ms. Barlow submitted a written request to hold the
6 Bible study during her lunch hour in an open jury room. On January 25, 2007, the then new
7 Assistant Executive Officer, Stephen Cascioppo, summoned Ms. Barlow into his office and told
8 her that her request had been denied on the grounds of separation of church and state and A.P.
9 4.6.II.C.1(f). Former Assistant Executive Officer, Stephen Cascioppo, followed up with a written
10 denial letter dated February 1, 2007, that gave no specific reason, but generally referenced A.P.
11 4.6. (Exhibit "B").

12 On February 26, 2007, Plaintiff Barlow wrote a letter to Stephen Cascioppo requesting
13 reconsideration of the Administration's position. (Exhibit "C"). Stephen Cascioppo responded in
14 a letter dated March 14, 2007, in which he changed his reasoning as of January 25, 2007, and
15 stated that the reasons for denying the Bible Study use of any courthouse facility (and the reasons
16 against permitting any "religious use of court premises" whatsoever, for that matter) were as
17 follows:

18 First, the premises of the court are not public, and the court does not wish to open them up generally to public activities. This would be required in order to ensure
19 public trust and confidence in the impartiality, lack of bias or discrimination and fairness of the judicial system. Second, the proposed use does not advance the
20 administration of justice, and is not useful to a significant number of litigants. The premises are better preserved for the uses for which the property has been
21 lawfully dedicated.

22 (Exhibit "D".)

23 **ARGUMENT**

24
25 The Federal Rules of Civil Procedure only require a "short and plain statement of the claim
26 showing that the pleader is entitled to relief." FED. R. CIV. P. 8(a)(2). Given this liberal Rule 8
27 pleading standard, there is a "powerful presumption against rejecting pleadings for failure to state
28 a claim." *Gilligan v. Jamco Dev. Corp.*, 108 F.3d 246, 249 (9th Cir. 1997), (quoting *Auster Oil &*

Gas Inc. v. Stream, 764 F.2d 381, 386 (5th Cir. 1985)). The Rule 8 standard does not require the Plaintiff to set forth in detail all the facts that make up the claim, but rather all that it requires of the Plaintiff is that the Defendant receive fair notice of the claim and its grounds. *Leatherman v. Tarrant County Narcotics Intell & Coord Unit*, 507 U.S. 163, 168 (1993).

In considering a motion to dismiss for failure to state a claim under Rule 12(b)(6), the district court must treat all plaintiff's allegations of material fact as true, and must construe them in the light most favorable to the plaintiff. *Maduka v. Sunrise Hosp.*, 375 F.3d 909, 911 (9th Cir. 2004). A complaint must not be dismissed under Rule 12(b)(6) unless it appears "beyond doubt that the plaintiff can prove no set of facts in support of [her] claim which would entitle [her] to relief." *Haines v. Kerner*, 404 U.S. 519, 520 (1972). The issue on a motion to dismiss for failure to state a claim is not whether the plaintiff will ultimately prevail or is even likely to prevail; it is instead whether the plaintiff is entitled to offer evidence to support the claims asserted. *Gilligan*, 108 F.3d at 249.

I. PLAINTIFFS SUFFICIENTLY STATE A CLAIM FOR VIOLATION OF THE FIRST AMENDMENT'S FREE SPEECH CLAUSE.

Defendant's Motion to Dismiss argues that Plaintiffs failed to state a claim for violation of the First Amendment's Free Speech Clause despite Plaintiffs' more than sufficient allegations to the contrary in their First Amended Complaint for Declaratory and Injunctive Relief and Nominal Damages ("First Amended Complaint"). (*See* Defendants' Memorandum of Points and Authorities in Support of Motion to Dismiss First Amendment Complaint ("Motion to Dismiss"), p. 4.) Defendants first argue that the *Pickering* balancing test is applicable in this context – despite recent Ninth Circuit authority to the contrary – and, accordingly, argue that the forum analysis typically applied in this context should not be applied here. (*See id.*) Defendants' second argument is that the "Superior Court building is a nonpublic forum" and that Defendants' actions therefore need only be reasonable and viewpoint neutral. (*See id.*) Plaintiffs' First Amended Complaint includes allegations of material fact that, when taken as true, establish that Plaintiffs are

1 entitled "to offer evidence to support the claims asserted" with regard to whether Defendants'
2 actions are viewpoint neutral and whether Defendants have created a designated public forum.
3 *Gilligan*, 108 F.3d at 249. Plaintiffs have additionally asserted sufficient facts to state a claim for
4 facial invalidity of the A.P. 4.6. As a result, this Court should deny Defendants' Motion to
5 Dismiss for failure to state a claim for violation of the First Amendment's Free Speech Clause.

6 **A. The *Pickering* Balancing Test Is Inapplicable in This Context.**

7 Defendants are able to cite only one published district court opinion in support of their
8 contention that the "*Pickering* balancing test supplants the traditional 'forum analysis' to free
9 speech issues." (See Motion to Dismiss, p. 5.) While the *Pickering* balancing test does apply to
10 some government employee First Amendment challenges, it does not apply in all circumstances
11 and, most significantly, has not been applied by the Ninth Circuit in this context. Therefore, the
12 Defendants' arguments regarding the application of the *Pickering* balancing test and the Superior
13 Court's interests in that regard are irrelevant. The Ninth Circuit was clear when it applied the
14 traditional forum analysis in the context seen here in *Berry v. Dep't of Social Services*, 447 F.3d
15 642 (9th Cir. 2006).

16 In *Pickering v. Bd. of Educ*., 391 U.S. 563 (1968), the Supreme Court considered a First
17 Amendment challenge by a teacher who was dismissed after sending a letter to a local newsletter
18 critical of proposals offered to raise new revenue for the schools. *Id*. at 564. Here, the Court
19 applied a balancing test that weighed the government employee's free speech interests and the
20 various interests of the state at issue. *Id*. at 569-572; *see also Waters v. Churchill*, 511 U.S. 661,
21 668 (1994). Importantly, the factual distinctions between *Pickering* and the case at issue before
22 this Court are not addressed by Defendants, nor is any attempt made to provide reasoning for why
23 the application of *Pickering* is appropriate in this context. (*See* Defendants' Motion to Dismiss pp.
24 4-5.) Instead, Defendants use general statements regarding the application of the *Pickering*
25 balancing test in government employee free speech challenges to argue that the test applies. (*See*
26 *id*.)

27

28

While the *Pickering* balancing test has been applied in other circumstances beyond statements made by government employees to the public or co-workers, it does not supplant traditional forum analysis in this context. A recent Ninth Circuit decision addressed the application of *Pickering* in two contexts, and then applied traditional forum analysis to the government employee's Free Speech challenge concerning the use of a conference room for religious purposes. *Berry*, 447 F.3d at 648-55. In *Berry*, a government employee asserted a First Amendment Free Speech challenge to county rules restricting him from discussing religion with clients, displaying religious items in his cubicle, and using a conference room for prayer meetings. *Id*. The Ninth Circuit applied the *Pickering* balancing test to the county's "limitation of Mr. Berry's speech with clients" and the county's "restrictions on the display of religious items." Id. at 648-52. Notably, however, when considering the use of the conference room for prayers, the Ninth Circuit applied traditional forum analysis. *Id*. at 652.

The only case Defendants cite in support of their contention that the *Pickering* balancing test applies to this case is an unpublished district court opinion, and it stands in stark contrast to the recent decision of the Ninth Circuit in *Berry*. Accordingly, Defendants' arguments and analysis supporting the application of the *Pickering* balancing test is irrelevant in this context. Traditional forum analysis applies.

B. Plaintiffs Sufficiently State a Claim for Viewpoint Discrimination and Content-Based Discrimination.

There is no question that, as a general matter, the Plaintiffs' religious speech is protected by the First Amendment. *See Widmar v. Vincent*, 454 U.S. 263, 269 (1981) ("religious worship and discussion . . . are forms of speech and association protected by the First Amendment"). In fact, the Supreme Court has emphasized that the First Amendment is particularly protective of religious speech:

> Our precedent establishes that private religious speech, far from being a First Amendment orphan, is as fully protected under the Free Speech Clause as secular private expression. . . . Indeed, in Anglo-American history, at least, government

> suppression of speech has so commonly been directed *precisely* at religious speech that a free-speech clause without religion would be *Hamlet* without the prince.

Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 760 (1995) (emphasis in original) (citations omitted).

1. By discriminating against religious gatherings, the Superior Court is engaging in viewpoint discrimination.

At its core, the First Amendment forbids the government from regulating speech "in ways that favor some viewpoints or ideas at the expense of others." *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.,* 508 U.S. 384, 394 (1993). Accordingly, viewpoint discrimination is presumptively unconstitutional:

> When the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant. Viewpoint discrimination is thus an egregious form of content discrimination. The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction.

Rosenberger v. Rector and Visitors of the Univ. of Virginia, 515 U.S. 819, 829 (1995) (citations omitted).

Additionally, the Supreme Court has consistently said that targeting religious speech for unfavorable treatment is viewpoint discrimination: "Religion is the viewpoint from which ideas are conveyed. . . . [W]e see no reason to treat the Club's use of religion as something other than a viewpoint merely because of any evangelical message it conveys." *Good News Club v. Milford Central Sch.*, 533 U.S. 98, 112 (2001). Thus, the Superior Court is engaging in viewpoint discrimination by prohibiting religious gatherings and meetings solely because they have "religious purposes."

Good News Club is dispositive on this issue. There, a school district's community-use policy allowed residents to use school facilities for "social, civic and recreational meetings and entertainment events, and other uses pertaining to the welfare of the community. . . ." 533 U.S. at 102. But it prohibited use "by any individual or organization for religious purposes." *Id.* at 103. As a result, the school denied the Good News Club's request to hold in the school's

1 cafeteria weekly after-school meetings that involved singing songs, playing games, memorizing
2 Bible verses, praying, and learning how the Bible applies to Club members' lives. *Id.* at 103-04.
3 The Court said it was "quite clear that [the school district] engaged in viewpoint
4 discrimination when it excluded the Club from the afterschool forum." *Id.* at 109. The Court
5 found that "any group that promotes the moral and character development of children is eligible
6 to use the school building." *Id.* at 108 (citation and quotation marks omitted). It was "clear that
7 the Club t[aught] morals and character development to children." *Id.* But the Club had been
8 denied equal access to the facilities solely because its activities were religious in nature – a
9 denial which constituted blatant viewpoint discrimination. *Id.* at 108-09.
10 Plaintiffs have sufficiently pled facts to state a claim that the same is true here. Plaintiffs'
11 First Amended Complaint states that "[w]hen gathering together, the participants of the Bible
12 study, who gather together of their own volition and without solicitation or advertisement, discuss
13 social, cultural, and political issues from a biblical perspective. Additionally, the participants
14 discuss healthy living, lifestyle choices, and physical, mental, and spiritual health from a biblical
15 perspective." (First Amended Complaint, ¶ 30.) Plaintiffs additionally allege that, during the time
16 relevant to this action, the Defendants have allowed Weight Watchers and the Boy Scouts of
17 America to meet in court facilities. (*Id*. at ¶¶ 32-33.) Finally, Plaintiffs allege that "Defendants
18 have allowed other organizations to meet or hold non-court related events within court facilities"
19 and that "Defendants have allowed members of the public, as well as employees, to participate and
20 hold events within the court facilities." (Id. at ¶¶ 34-35.)
21 Plaintiffs have pled sufficient facts to support a claim based on viewpoint discrimination.
22 Because of the variety of topics discussed at Plaintiffs' Bible study and the allegation that other
23 organizations, employees, and members of the public have been allowed to use the court facilities
24 "during the time relevant to this action" – which would include the periods prior to and after the
25 development of A.P. 4.6 – a motion to dismiss for failure to state a claim is inappropriate.
26 Defendants' arguments to the contrary address cases where the use of the forum or location was
27 well established and the Court had determined that the governmental entity was not discriminating
28 based upon viewpoint. (Motion to Dismiss, p. 14.) Here, no such determination can be made or

would even be appropriate at this early state in the litigation. As discussed above, Supreme Court precedent is clear that viewpoint discrimination can and does occur where religious viewpoints are prohibited but other viewpoints on similar topics are permitted.

Plaintiffs allege that the Superior Court refuses to give the Plaintiffs equal access to the court facilities solely because their activities are religious in nature. Applying *Good News Club*, this allegation is unquestionably sufficient to state a claim. The Supreme Court reached the same conclusion in *Lamb's Chapel*, where the Court considered the same school district policy that was challenged in *Good News Club*. The district prohibited a church from using its facilities to present films teaching family values from a Christian perspective. *Lamb's Chapel*, 508 U.S. at 388-89. The Court unanimously held that "it discriminates on the basis of viewpoint to permit school property to be used for the presentation of all views about family issues and childrearing except those dealing with the subject matter from a religious standpoint." *Id.* at 393.

Thus, *Good News Club* and *Lamb's Chapel* establish a foundational constitutional principle: the government engages in unconstitutional viewpoint discrimination whenever it denies access solely because of a religious perspective or purpose. Applying *Good News Club* to the present matter, and in light of the totality of Plaintiffs' allegations in the First Amended Complaint, Defendants' Motion to Dismiss for failure to state a claim should be denied.

2. The Defendants' prohibition on religious gatherings is a content-based restriction in a designated public forum.

Even if this Court were to conclude that the Plaintiffs did not adequately state a claim for a violation of the First Amendment's Free Speech Clause based upon viewpoint discrimination, Plaintiffs sufficiently state a cause of action based upon content-based discrimination. And content-based censorship, like viewpoint discrimination, is presumptively unconstitutional in a public forum:

> [A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content. . . . The essence of this forbidden censorship is content control. . . . *Selective exclusions from a public forum may not be based on content alone, and may not be justified by reference to content alone.*

Police Dep't of City of Chicago v. Mosley, 408 U.S. 92, 95-96 (1972) (citations omitted) (emphasis added).

The extent to which the government may limit access to public property for expressive activity depends on whether the forum is public or non-public. A property may be classified as a public forum in one of two situations. First, a property that has immemorially been used for expressive activity, such as a park or a sidewalk, is considered a traditional public forum. *Perry Educ. Ass'n*, 460 U.S. at 45. Second, a property which the government has designated to allow for "assembly and speech, for use by certain speakers, or for the discussion of certain subjects" is considered a designated public forum. *Cornelius v. NAACP Legal Defense and Educ. Fund*, 473 U.S. 788, 800 (1985). In a public forum, content-based restrictions, such as the one here, are subject to strict scrutiny. *Perry Educ. Ass'n*, 460 U.S. at 46. *See also Jobe v. City of Catlettsburg*, 409 F.3d 261, 266 (6th Cir. 2005) (holding that a "government may not prohibit all communicative activity" and "may only enforce content-based restrictions when it shows that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.")

If a property does not fit into either of these two categories, it is a non-public forum. Government restrictions in a non-public forum must be "reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view." *Id.* Here, Defendants argue that the court facilities are unquestionably a nonpublic forum. (Motion to Dismiss, p. 11.) They do not, however, address why Plaintiffs' factual allegations are insufficient to establish that the court facilities are a designated public forum. Defendants cite cases holding that a courthouse is not a traditional public forum. (*Id*, p. 11.) While this is true, it is not true that Plaintiffs failed to allege material facts that, when assumed to be true and read in the light most favorable to Plaintiffs, would establish that when the Superior Court opened the court facilities to the public, it made said facilities a designated public forum. To the contrary, Plaintiffs allege that "Defendants have allowed other organizations to meet or hold non-court related events within court facilities" and that "Defendants have allowed members of the public, as well as employees, to participate and hold events within the court facilities." (First Amended Complaint, ¶¶ 34-35.)

1 These allegations alone are sufficient to survive a motion to dismiss. In *Berry*, the Ninth
2 Circuit found that "[t]here was no evidence in the record here demonstrating that the [conference
3 room] is used for anything other than official business meetings and business-related social
4 functions…indeed there is no evidence the room has been made publicly accessible at all." *Berry*,
5 437 F.3d at 652. Accordingly, the court found that summary judgment was appropriate because
6 the conference room was not a designated public forum. *Id*. Here, Plaintiffs allege that the room
7 has been opened to the public, and Plaintiffs have therefore sufficiently pled facts to support the
8 court's opening its facilities as a designated public forum. (First Amended Complaint, ¶¶ 34-35.)
9 Assuming the court facilities are determined to be a designated public forum, the unconstitutional
10 content-based restriction on Plaintiffs' religious speech is subject to strict scrutiny.

11 Defendants additionally argue that the court facilities are a nonpublic forum because A.P.
12 4.6 requires everyone to "obtain permission" prior to using the facilities unless it is a specifically
13 delineated employee social event. (Motion to Dismiss, p. 12.) To begin with, the cases cited as
14 authority for this proposition by Defendants are not so broad as to hold that anytime potential
15 users must obtain permission a nonpublic forum exists. *See Cornelius NAACP Legal Defense*
16 *and Educ. Fund*, 473 U.S. 788, 804 (1985); *Perry Educ. Ass'n v. Perry Local Educators Ass'n*,
17 460 U.S. 37, 47 (1983).

18 More importantly, however, Plaintiffs allege that other organizations and groups,
19 including the Boy Scouts of America and Weight Watchers, were allowed to use the facilities
20 during all times relevant to this action. (First Amended Complaint, ¶¶ 32-35.) Discovery is
21 necessary in order to determine whether these organizations and groups were required to obtain
22 permission after the development of A.P. 4.6. If not, then the cases cited by Defendants would
23 be inapplicable, and an as-applied challenge to A.P. 4.6 would certainly exist. Notably,
24 Defendants admit in their Motion to Dismiss that "no Weight Watchers or Boy Scouts meetings
25 in court facilities have been applied for or approved under A.P. 4.6." (Motion to Dismiss, p. 10,
26 fn 4.) Assuming Plaintiffs' allegation to be true that these groups have used the court facilities
27 during "all times relevant to this action", including the period after implementation of A.P. 4.6,
28 then not all groups are required to obtain permission. The Plaintiffs, however, were required to

obtain permission and were denied because of their religious speech.

In light of the foregoing, Plaintiffs have alleged facts sufficient to state a claim that under traditional forum analysis the court facilities are a designated public forum.

C. A.P. 4.6 May Be Facially Invalidated Because It Amounts to a Prior Restraint on Speech That Grants Unbridled Discretion to Governmental Officials.

Defendants erroneously argue that A.P. 4.6 is not subject to facial invalidation. (Motion to Dismiss, p. 14.) Although Defendants rely significantly upon cases addressing the overbreadth doctrine for this proposition, Plaintiffs did not assert their speech claim based upon the overbreadth doctrine. Defendants also blur the distinction between the First Amendment's prior restraint doctrine, the First Amendment's overbreadth doctrine, and the Fourteenth Amendment's vagueness doctrine by interchangeably citing cases that independently discuss these distinct legal doctrines. Plaintiffs, however, have limited their claim for facial invalidity to the prior restraint doctrine.[2] As shown below, Plaintiffs' First Amended Complaint articulates sufficient facts for this Court to facially invalidate A.P. 4.6.

A.P. 4.6 may be declared facially invalid under the First Amendment because "a law subjecting the exercise of First Amendment freedoms to the prior restraint of a license, without narrow, objective, and definite standards to guide the licensing authority, is unconstitutional." *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 553 (1975) (citing *Shuttlesworth v. Birmingham*, 394 U.S. 147, 150-151 (1969)) *see also*, *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 554 (1975) (prior restraint occurred where governmental officials were given authority to determine "whether the applicant should be granted permission-in effect, a license or permit [to use a government operated theater]-on the basis of its review of the content of the proposed production").

Here, a prior restraint exists because A.P. 4.6 states that Plaintiffs must submit a request in writing in order to use meeting rooms or other areas within the courthouse for their Bible study.

[2] Plaintiffs withdraw their Fourth Claim for Vagueness under the Fourteenth Amendment.

(Complaint, Exhibit "A", p. 2.) A.P. 4.6 provides that the Assistant Executive Officer, in approving or denying a request, must consider "[w]hether the program or service advances the administration of justice and is useful to a significant number of litigants." There are no narrow, objective, and definite standards in place to help guide the Assistant Executive Officer. It is left to the unbridled discretion of the Assistant Executive Officer to determine whether the administration of justice would be advanced by allowing his employees to "discuss healthy living, lifestyle choices, and the physical, mental, and spiritual health from a biblical perspective" or whether it would be "useful" under the policy. (First Amended Complaint, p. 6.) Since no objective guidelines exist, the Assistant Executive Officer has the right to exercise unbridled discretion.

Similarly, in *DeBoer v. Village of Oak Park*, 267 F.3d 558, 573-74 (7th Cir. 2001), the petitioners sought approval to use a government-owned conference room for meeting on the National Day of Prayer. The governmental agency, however, had a written policy prohibiting the use of the public facility unless the use "benefit[ed] the public as a whole." The Seventh Circuit found that this policy was unconstitutional in that it granted unbridled discretion to governmental officials in relation to the petitioner's desire to use the facility for participating in the National Day of Prayer. Likewise, A.P. 4.6 should ultimately be declared an unconstitutional prior restraint on protected speech. Accordingly, this Court should deny Defendants' Motion to Dismiss Plaintiffs' Free Speech claim.

II. PLAINTIFFS SUFFICIENTLY STATE A CLAIM FOR VIOLATION OF THE FIRST AMENDMENT'S FREE EXERCISE CLAUSE.

In their attempt to dismiss Plaintiffs' Second Claim, Defendants argue that "Plaintiffs' free exercise claim is subject to the *Pickering* test … and must therefore be dismissed on the same grounds as the free speech claim." (Motion to Dismiss, p. 16.) This argument fails, however, for the same reasons discussed in Section I(A) above. The *Pickering* balancing test does not apply in this context and Defendants have offered no other argument for dismissing this claim. Rather, Plaintiffs sufficiently state a claim for a violation of Plaintiffs' rights under the Free Exercise Clause.

Laws that discriminate on the basis of religion are presumptively invalid and only pass constitutional muster if they survive strict scrutiny. *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993); *Employment Div., Dept. of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990). The government may not impose "special disabilities on the basis of religious views or religious status." *Id.* at 877. The only time the government may justify a law which burdens the free exercise of religion with less than a compelling interest is if the law is generally and neutrally applicable. *Id.* at 879. However, when the government individually assesses the reasons for the relevant conduct, the government must have a compelling interest for denying the use of the facility. *Church of the Lukumi Babalu Aye*, 508 U.S. at 537 (citing *Smith*, 494 U.S. at 884).

A review of the allegations in the light most favorable to Plaintiffs reveals that Defendants' prohibition on Plaintiffs' Bible study is not generally and neutrally applicable because Defendants singled out the Bible study for disparate treatment. The discriminatory actions of the Defendants are presumptively invalid because they have completely banned the Bible study while at the same time allowing a myriad of other meetings and events. Further, A.P. 4.6 amounts to an individualized assessment of the proposed use by governmental officials. Defendants will be unable to advance a compelling interest to justify such discrimination. Plaintiffs have clearly pled sufficient facts to state a claim for a violation of the Free Exercise Clause.

III. PLAINTIFFS SUFFICIENTLY STATE A CLAIM FOR VIOLATION OF EQUAL PROTECTION.

Defendants again argue that the *Pickering* balancing test applies, causing Plaintiffs' Equal Protection claim to fail "for the same reasons as the Free Speech claim." (Motion to Dismiss, p. 16.) Defendants' attempt to apply the *Pickering* balancing test fails because it does not apply in this context. (*See*, Section I(A) *supra*). Defendants have proffered no other basis for dismissing this claim. Plaintiffs sufficiently state a claim for a violation of Plaintiffs' rights under the Free Exercise Clause.

"The Equal Protection Clause of the Fourteenth Amendment commands that no State shall 'deny to any person within its jurisdiction the equal protection of the laws,' which is essentially a direction that all persons similarly situated should be treated alike." *Serrano v. Francis*, 345 F.3d 1071, 1081 (9th Cir. 2003) (citing *City of Cleburne v. Cleburne Living Ctr*., 473 U.S. 432, 439 (1985)). Equal protection analysis requires strict scrutiny when the classification impermissibly interferes with the exercise of a fundamental right. *Mass. Bd. of Retirement v. Murgia*, 427 U.S. 307, 312 (1976). Because A.P. 4.6 interferes with the Plaintiffs' freedom of speech (*See* Section I, *supra*) and free exercise of religion (*See* Section II, *supra*), strict scrutiny is appropriate.

IV. PLAINTIFFS WITHDRAW THEIR CLAIM FOR A VIOLATION OF DUE PROCESS.

Plaintiffs, without prejudice to seeking leave to amend at a future date, hereby withdraw their claim for a violation of the Due Process Clause under the Fourteenth Amendment.

V. PLAINTIFFS SUFFICIENTLY STATE A CLAIM FOR VIOLATION OF THE ESTABLISHMENT CLAUSE.

The Establishment Clause "requires the state to be neutral in its relations with groups of religious believers and non-believers." *Everson v. Bd. of Educ*., 330 U.S. 1, 18 (1947). "[I]t is clear that 'the First Amendment forbids an official purpose to disapprove of a particular religion or of religion in general.'" *Vernon v. City of Los Angeles*, 27 F.3d 1385, 1396 (9th Cir. 1994) (citing *Church of the Lukumi*, 508 U.S. at 532). "The government neutrality required under the Establishment Clause is thus violated as much by government disapproval of religion as it is by government approval of religion." *Id*. The government acts in accordance with the Establishment Clause when its conduct (1) has a secular purpose, (2) does not have as its principal or primary effect of advancing or inhibiting religion, and (3) does not foster an excessive government entanglement with religion. *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971); *see also Vernon*, 27 F.3d at 1396-97 ("the challenged practice must survive all three prongs of the *Lemon* analysis in order to be held constitutional"). Defendants' decision to single

1 out religious organizations fails the second and third prongs of the *Lemon* test, falling far outside
2 the boundaries of neutrality set by the Supreme Court.

3 Focusing on the first prong of *Lemon*, Defendants argue that it is appropriate for the court
4 to deny access to the Bible study in order to avoid a potential establishment clause violation.
5 (Motion to Dismiss, p. 18-19.) Defendants' reliance on *Vasquez v. Los Angeles County*, 487
6 F.3d 1246 (9th Cir. 2007), however, is misplaced. *Vasquez* is distinguishable because it does not
7 concern access to a forum as is the case currently before this Court. Rather, in *Vasquez*, the
8 County of Los Angeles had removed the cross from its county seal, and no forum analysis was at
9 issue. Here, Defendants show hostility toward religion by their disparate treatment of religion in
10 a forum they have created. Further, they have caused excessive entanglement by their scrutiny
11 of the Plaintiffs' proposed use of the forum.

12 The second prong of the *Lemon* test mandates that the "principal or primary effect" of
13 government conduct must "neither advance[] nor inhibit[] religion." 403 U.S. at 612. Under this
14 prong, the test is "whether it would be objectively reasonable for the government action to be
15 construed as sending primarily a message of either endorsement *or disapproval* of religion."
16 *Vernon*, 27 F.3d at 1398. And the Ninth Circuit assumes that the reasonable observer is
17 "familiar with the government practice at issue, as well as with the general contours of the Free
18 Speech Clause and public forum doctrine." *Kreisner v. City of San Diego*, 1 F.3d 775, 784 (9th
19 Cir. 1993). In this case, then, the Court should assume that the reasonable observer is aware of
20 the Superior Court's policy, including the broad range of organizations and groups that use these
21 facilities throughout the year.

22 Burdening religious groups in a forum "otherwise open to all would demonstrate
23 government hostility to religion rather than neutrality contemplated by the Establishment
24 Clause." *Id.* at 785. Here, the court facilities are open to other organizations and groups, but
25 religious groups are not permitted. Thus, a reasonable observer would understand that the
26 purpose of the Defendants' discriminatory treatment was to make it more difficult for a religious
27 organization to use the court facilities than for anyone else to use them. Therefore, A.P. 4.6 has
28 the "primary effect" of inhibiting religion – failing *Lemon*'s second prong.

A.P. 4.6 also fails the third prong of the *Lemon* test because it requires the Superior Court to scrutinize the content of the speech for religious expression, fostering "an excessive government entanglement with religion." *Lemon*, 403 U.S. at 613. The Supreme Court has consistently said that government scrutiny of speech based on its religious content risks Establishment Clause violations due to hostility and entanglement problems. *See Rosenberger*, 515 U.S. at 844-45 (University's policy requiring public officials to scan and interpret student publications based on the religious content "risk[s] fostering a pervasive bias or hostility to religion"); *Murgia*, 496 U.S. at 253 ("a denial of equal access to religious speech might well create greater entanglement problems in the form of invasive monitoring to prevent religious speech at meetings at which such speech might occur."); *Widmar*, 454 U.S. at 272 n.11 (policy requiring scrutiny of religious speech risked entanglement).

The Ninth Circuit and other federal courts have also recognized entanglement problems with policies that require speech to be scrutinized based on its religious content. *See Kreisner,* 1 F.3d at 789 ("In fact, the danger of entanglement would be considerably greater if the City screened the religious motives of speakers before allowing them access to Balboa Park."); *Gentala v. City of Tucson*, 325 F.Supp.2d 1012, 1020 (9th Cir. 2003); (policy requiring the city to scrutinize applicants' speech to decide whether an event directly supports a religious organization and then exclude such an event "fosters, rather than avoids, entanglement").

In *Widmar*, the Supreme Court struck down a policy that prohibited the use of University buildings or grounds "for purposes of religious worship or religious teaching." 454 U.S. at 265, 267. The Supreme Court said the policy was unconstitutional because it required University officials to draw a distinction concerning religious speech. *Id*. at 272 n.11. The *Widmar* Court "agree[d] with the Court of Appeals that the University would risk greater 'entanglement' by attempting to enforce its exclusion of 'religious worship' and 'religious speech.'" *Id*. (citation omitted). The Court predicted the entanglement would be both substantial and continuous:

> Initially, the University would need to determine which words and activities fall within "religious worship and religious teaching." This alone could prove "an impossible task in an age where many and various beliefs meet the constitutional

> definition of religion." There would also be a continuing need to monitor group meetings to ensure compliance with the rule.

Id. (citations omitted).

Here, A.P. 4.6 violates the excessive entanglement prong under the Establishment Clause for the same reason: it forces the Defendants to scrutinize and continually monitor the speech that is taking place at its facilities.

VI. PLAINTIFFS SUFFICIENTLY STATE CLAIMS IN THEIR SIXTH, SEVENTH, AND EIGHTH CLAIMS FOR VIOLATIONS OF THE CALIFORNIA CONSTITUTION.

Defendants generally argue that the California Constitution merely implements the United States Constitution in relation to speech, free exercise, and equal protection. With the exception of equal protection, this proposition is not supported by legal precedent. As previously addressed, Plaintiffs have pled sufficient facts to overcome Defendants' Motion to Dismiss as to each of the federal causes of action. Even assuming Defendants' analysis regarding parallel protection for each of the claims under both constitutions is correct, the Motion to Dismiss should be denied. Additionally, however, California's speech and free exercise provisions are more protective than their federal counterpart. In each of these claims, Plaintiffs' factual allegations are adequate to state a claim.

A. California's Free Speech Clause Is More Protective Than the Federal Free Speech Clause

As a general matter, the California Free Speech clause is more broad and more protective than the Free Speech Clause of the First Amendment. *See, e.g., Los Angeles Alliance for Survival v. City of Los Angeles*, 22 Cal.4th 352, 366-67 (2000); *Robins v. Pruneyard Shopping Center*, 23 Cal.3d 899 (1979). But California courts rely on First Amendment jurisprudence to determine the scope of the liberty of speech under the California Constitution. *See, e.g., Los Angeles Alliance for Survival*, 22 Cal.4th at 379 (holding that regulations on solicitations should be treated the same under the California Constitution as under the First Amendment); *Savage v. Trammell Crow Co.*, 223 Cal.App.3d 1562, 1574 (1990) (applying federal time, place, manner

jurisprudence to a claim under the California Constitution). Thus, First Amendment jurisprudence supports Plaintiffs' claims under both Constitutions, and the *Pickering* balancing test would not apply in this context under the California Constitution just as it is inapplicable under the First Amendment.

Defendants fail to cite a case that applies the *Pickering* balancing test under the California Constitution in this context. (*See* Motion to Dismiss, p. 19-20.) Furthermore, as addressed previously, Plaintiffs sufficiently state a cause of action for Free Speech under federal forum analysis. Plaintiffs' allegations, when taken as true, establish that Defendants' actions constitute viewpoint discrimination and open up a designated public forum where content-based discrimination has occurred. Plaintiffs' allegations are well within the scope of the Free Speech Clause of the First Amendment, and the California Constitution is generally more broad and more protective. Therefore, based on the facts pled, Plaintiffs sufficiently state a claim for free speech under the California constitution.

B. The California Constitution's Guarantee of Free Exercise of Religion Is More Protective Than the Federal Clause and Triggers Strict Scrutiny

The California Supreme Court has applied strict scrutiny when a regulation imposes a substantial burden on free exercise. *See, e.g.*, *People v. Woody,* 61 Cal.2d 716, 718 (Cal. Sup. Ct. 1964), citing *Sherbert v. Verner,* 374 U.S. 398 (1963); *See also*, *Catholic Charities of Sacramento, Inc. v. Superior Court*, 32 Cal.4th 527, 562 (Cal. Sup. Ct. 2004). Defendants' reliance on *Brunson v. Dep't of Motor Vehicles*, 72 Cal.App.4th 1251 (Cal. Ct. App. 1999), is misplaced.

In *Brunson*, the court of appeals applied the rational basis test articulated in *Employment Div., Dept. of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990), to the free exercise clause of the California Constitution. (*Id.* at 1255.) In *Catholic Charities*, the California Supreme Court expressly overruled the application of *Smith*, saying it "was erroneous." *Catholic Charities,* 32 Cal.4th at 560. The California Constitution "is not dependent on the meaning of any provision of the federal Constitution." *Id.* at 561. The Court went on to explain that it would apply strict scrutiny and leave open the question of whether *Smith* should be applied to the California

Constitution. *Id.* at 562. Therefore, in the absence of any clear authority to do otherwise, this Court should also apply strict scrutiny. This would be consistent not only with *Catholic Charities*, but also with the United States Supreme Court's holdings in *Sherbert*, 374 U.S. 398 and *Wisconsin v. Yoder,* 406 U.S. 204 (1972).

C. Plaintiff Sufficiently Stated a Claim for Equal Protection Under the California Constitution

Defendants assert that Plaintiffs' claim for equal protection under the California constitution fails for the same reason Defendants believe Plaintiffs' claim for equal protection should fail under the Federal Constitution. While Plaintiffs agree that the state equal protection clause is to be interpreted in substantially the same manner as its federal counterpart, *In Re Evans*, 49 Cal. App. 4th 1263, 1270 (Cal. Ct. App. 1996), this is no bar to the claim. As discussed in Section III *supra*, Plaintiffs have sufficiently stated a claim for equal protection under the federal constitution.

CONCLUSION

Defendants' Motion to Dismiss should be denied in its entirety. In the event that this Court finds merit in any of Defendants' arguments, Plaintiffs respectfully request that this Court grant Plaintiffs leave to amend the First Amended Complaint.

DATED: December 31, 2007 ADVOCATES FOR FAITH AND FREEDOM

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