

1                   IN THE NORTHERN DISTRICT OF CALIFORNIA  
2                   OAKLAND, CALIFORNIA; DEPT 2;  
3                   D. WAYNE BRAZIL, MAGISTRATE JUDGE  
4 COLLEGE REPUBLICANS AT SAN        ) C-07-3542 WDB  
5 FRANCISCO STATE UNIVERSITY, ET) WEDNESDAY, 10/31/07  
6 AL.,                                 )  
7                   PLAINTIFF,         )  
8 V.                                     )  
9 CHARLES B. REED, ET AL,         )  
10                  DEFENDANT.        )  
11 \_\_\_\_\_)

12                   REPORTER'S TRANSCRIPT OF PROCEEDINGS

13 APPEARANCES:

14 FOR THE PLAINTIFF:

15 ALLIANCE DEFENSE FUND  
16 101 PARKSHORE DRIVE, SUITE 100  
17 FOLSOM, CALIFORNIA 95630  
18 TEL (916) 932-2850 FAX (916) 932-2851  
19 DHACKER@TELLADF.ORG  
20 BY: HEATHER GEBELIN HACKER,  
21 DAVID J. HACKER, ATTORNEYS AT LAW

19 FOR THE DEFENDANT:

20 CALIFORNIA STATE UNIVERSITY  
21 OFFICE OF GENERAL COUNSEL  
22 401 GOLDEN SHORE, FOURTH FLOOR  
23 LONG BEACH, CALIFORNIA 90802-4210  
24 BY: ANDREA M. GUNN, ATTORNEY AT LAW

25 REPORTED BY: STARR A. WILSON, CSR 2462

1 OAKLAND, CALIFORNIA; WEDNESDAY, OCTOBER 31, 2007; 1:36 P.M.,

2 DEPARTMENT TWO; D. WAYNE BRAZIL, JUDGE

3 -000-

4 THE CLERK: ALL RISE.

5 THE COURT: GOOD AFTERNOON, FOLKS.

6 PLEASE BE SEATED.

7 SO IF THE ELECTRONICS ARE READY, I'LL CALL THE

8 CASE AND ASK YOU TO ANNOUNCE YOUR APPEARANCES, PLEASE.

9 AND CAN YOU DO THAT, SARAH?

10 THE CLERK: YES.

11 THE COURT: THE CASE SHORT STYLE IS COLLEGE

12 REPUBLICANS VERSUS CHARLES REED, ET AL, CIVIL ACTION NUMBER

13 07-3542 WDB.

14 STARTING WITH COUNSEL FOR THE COLLEGE REPUBLICANS,

15 PLEASE ANNOUNCE YOUR APPEARANCES FOR THE RECORD.

16 MR. HACKER: GOOD AFTERNOON, YOUR HONOR. MY NAME  
17 IS DAVID HACKER AND WITH ME TODAY IS HEATHER GEBELIN HACKER.

18 THE COURT: OKAY. THANK YOU.

19 AND THESE FOLKS ARE THE -- ARE THEY THE

20 PLAINTIFFS?

21 MR. HACKER: YEAH. THIS IS -- WITH ME IS LEIGH  
22 WOLF AND TRENT DOWNES, PLAINTIFFS IN THE MATTER.

23 THE COURT: GOOD AFTERNOON.

24 AND FOR THE UNIVERSITY?

25 MS. GUNN: GOOD AFTERNOON, YOUR HONOR. ANDREA

1 GUNN ON BEHALF OF DEFENDANTS.

2 THE COURT: OKAY. THANK YOU.

3 OKAY. WELL, THIS IS AN INTERESTING MATTER. I  
4 MEAN THAT QUITE SERIOUSLY. UM, WHAT I'D LIKE TO DO IS TALK  
5 ABOUT THE MOTION THAT'S PENDING FIRST AND THEN TALK ABOUT  
6 THE CASE MANAGEMENT ISSUES THAT WILL REMAIN.

7 UM, LET ME -- LET ME START BY ASKING ALL OF YOU.  
8 I HAVE SOME IDEAS ABOUT SOME THINGS HERE. BUT I WANT TO  
9 START BY ASKING WHETHER COUNSEL FOR EITHER SIDE HAS, IN THE  
10 TIME SINCE THEY FILED THEIR LAST PAPERS, HAD ANY IDEAS THAT  
11 THEY WANT, ADDITIONAL IDEAS -- PLEASE DON'T REPEAT WHAT'S IN  
12 YOUR PAPERS -- BUT ADDITIONAL IDEAS ABOUT MATTERS THAT YOU'D  
13 LIKE THE COURT TO TAKE INTO ACCOUNT.

14 MR. HACKER?

15 MR. HACKER: NO, YOUR HONOR. I THINK OUR BRIEFS  
16 FULLY CAPTURE OUR ARGUMENTS.

17 THE COURT: OKAY.

18 MS. GUNN.

19 MS. GUNN: YOUR HONOR, TO THE EXTENT THAT, UM,  
20 THAT IT IS RELEVANT HERE AND I BELIEVE IT IS, I BELIEVE IT  
21 IS IMPORTANT TO NOTE THAT, AND, UM, I SHOULD HAVE DONE A  
22 BETTER JOB OF THIS IN MY PAPERS, THAT THE CASES, THE PRIMARY  
23 CASES CITED BY THE PLAINTIFFS ARE ALL DISTINGUISHABLE FROM  
24 THE FACTS THAT ARE AT ISSUE HERE. AND, IN PARTICULAR,  
25 THEY'RE DISTINGUISHABLE FROM THE POLICY THAT IS AT ISSUE

1     HERE, TITLE 5, SECTION A(7) IS THE PRIMARY POLICY THAT THEY  
2     DISPUTE.

3             THE COURT:   I'M SORRY.  I -- THE TITLE FIVE  
4     SECTION A(7) PARAGRAPH?

5             MS. GUNN:   IT IS TITLE FIVE, SECTION 41301,  
6     SECTION A(7).

7             THE COURT:   THAT'S OF --

8             MS. GUNN:   AND THAT IS -- THAT'S THE STUDENT  
9     CONDUCT CODE PROVISION THAT THEY DISPUTE THE PRIMARY CODE  
10    VERSION THEY DISPUTE.

11            THE COURT:   MY IMPRESSION IS THAT THAT IS, THAT  
12    THOSE, THAT THE WORDS THAT MAKE UP THE SECTION YOU JUST  
13    DESCRIBED ARE CRAFTED FOR, AND SPECIFICALLY BY FOLKS AT SAN  
14    FRANCISCO STATE.  AND THEY'RE NOT A STATE-WIDE CRAFTED  
15    PROVISION; IS THAT RIGHT?

16            MS. GUNN:   NO.  ACTUALLY, UM, THEY -- THIS IS A  
17    STATE.  IT'S TITLE FIVE.  IT THE REGULATIONS RELATED.  THE  
18    BOARD OF TRUSTEES DO, IN FACT, PROMULGATE THESE REGULATIONS  
19    THAT APPLY THAT ARE APPLICABLE TO ALL 23 INSTITUTIONS.

20            THE COURT:   OKAY.  SO JUST -- JUST SO I'M CLEAR IN  
21    MY OWN HEAD ABOUT THIS BECAUSE I WASN'T.

22            MS. GUNN:   BUT I DO NEED TO PUT -- ADD A LITTLE  
23    BIT MORE CLARIFICATION.

24            THE COURT:   OKAY.

25            MS. GUNN:   THAT APPLIES SECTION 41301(A), WHICH

1 INCLUDES THE DISPUTED WORD "CIVIL: AND B(7) WHICH INCLUDES  
2 THE DISPUTED WORD "INTIMIDATION"AND "HARASSMENT", BUT NOT  
3 THE GOALS AND PRINCIPLES LANGUAGE OF THE STUDENT MISCONDUCT  
4 POLICY. THAT IS, IN FACT, SPECIFIC TO THE SAN FRANCISCO  
5 STATE CAMPUS.

6 THE COURT: OKAY. THAT'S WHAT I WAS GOING TO ASK  
7 YOU.

8 THE STUDENT ORGANIZATION HANDBOOK, I ASSUME, IS  
9 SPECIFIC TO SAN FRANCISCO STATE?

10 MS. GUNN: THAT'S CORRECT.

11 THE COURT: AND THAT THE WORDS AND POLICIES AND  
12 ASPIRATIONS SET FORTH THERE WERE WRITTEN BY FOLKS FOR SAN  
13 FRANCISCO STATE AND ARE NOT, BY VIRTUE OF THEIR APPEARANCE,  
14 AT LEAST IN THIS PARTICULAR HANDBOOK, THEY'RE NOT BINDING ON  
15 OR APPLICABLE TO ANYBODY ELSE?

16 MS. GUNN: THAT IS CORRECT.

17 THE COURT: OKAY.

18 ALL RIGHT. WELL, LET ME -- LET ME -- LET ME TELL  
19 YOU SOME THINGS THAT I'VE BEEN THINKING ABOUT THIS. UM, I  
20 THINK I'LL START WITH THE -- WELL, ACTUALLY NO. I'LL START  
21 WHERE I WAS. I'LL START WITH THE STUDENT ORGANIZATION  
22 HANDBOOK. AND I REALIZE THAT WHERE WE ARE HERE IS A  
23 PRELIMINARY INJUNCTION HEARING. AND -- AND JUST SO THE  
24 UNIVERSITY UNDERSTANDS, IT SEEMS TO ME THE CASE LAW MAKES IT  
25 PRETTY CLEAR THAT IRREPARABLE HARM IS ASSUMED WHEN THERE IS

1 A FINDING OF OVERBREADTH AND/OR VAGUENESS AND THAT THERE'S  
2 NO BURDEN BEYOND THE ESTABLISHING THE FUNDAMENTALS OF THE  
3 OVERBREADTH OF THE VAGUENESS.

4 THERE IS NO ADDITIONAL BURDEN ON A PARTICULAR  
5 PLAINTIFF AS LONG AS THAT PLAINTIFF IS IN THE UNIVERSE OF  
6 PEOPLE WHO MIGHT BE ADVERSELY AFFECTED BY A PROVISION THAT  
7 WAS OVERBROAD. AND, BY THE WAY, WHEN I'M USING THE WORD  
8 OVERBROAD HERE, I'M BEING VERY SELF CONSCIOUS ABOUT THE  
9 FIRST AMENDMENT. I'M NOT TALKING ABOUT OVERBROAD WITH  
10 RESPECT TO ANYTHING ELSE BUT WITH RESPECT TO EXPRESSION BY  
11 WORDS OR CONDUCT.

12 MS. GUNN: I THINK THAT'S -- THAT IS CORRECT AS TO  
13 A FACIAL CHALLENGE --

14 THE COURT: RIGHT.

15 MS. GUNN: -- BUT NOT AS TO AN APPLIED CHALLENGE  
16 WHICH IS --

17 THE COURT: I'M GLAD YOU SAID THAT. BECAUSE WHAT  
18 I PERCEIVED TO BE BEFORE ME NOW, THROUGH THE MOTION,  
19 ESPECIALLY THE MOTION AS CLARIFIED IN THE REPLY, IS ONLY A  
20 FACIAL CHALLENGE BASED ON OVERBREADTH AND VAGUENESS TO THE  
21 VARIOUS PROVISIONS WE'LL TALK ABOUT TODAY. BUT IT'S NOT AN  
22 AS APPLIED CHALLENGE; CORRECT?

23 MR. HACKER: YOUR HONOR --

24 THE COURT: EXCUSE ME. LET ME CLARIFY --

25 MR. HACKER: I'M SORRY.

1 THE COURT: -- JUST SO YOU DON'T GET TOO NERVOUS.  
2 I DON'T MEAN TO SUGGEST ANYTHING ABOUT THE  
3 PLAINTIFFS' WAIVING THEIR ENTITLEMENTS TO PURSUE AS APPLIED.  
4 AND TO PURSUE OTHER THINGS, PERHAPS EVEN THROUGH SUMMARY  
5 JUDGMENT OR SOME OTHER MOTION LATER ON, BUT WHAT'S KEYED UP  
6 FOR ME TODAY IS THE -- IS A FACIAL CHALLENGE TO THESE  
7 REGULATIONS AND POLICY STATEMENTS.

8 MR. HACKER: YOUR HONOR, WE MOVED FACIALLY AND AS  
9 APPLIED, AND I CLARIFIED IN THE REPLY BRIEF THAT THIS COURT  
10 CAN ENJOIN THE POLICIES FACIALLY. WE DON'T NEED TO EVEN GET  
11 INTO THE AS APPLIED CHALLENGE AT THIS TIME. UM, BUT WE HAVE  
12 MOVED IN BOTH RESPECTS.

13 THE COURT: WELL, YOUR REPLY PAPERS DID NOT MAKE  
14 THAT SUFFICIENTLY CLEAR. I'M GOING TO DENY THE AS APPLIED.  
15 THERE ARE WAY TOO MANY, I THINK, POTENTIALLY FACTUAL MATTERS  
16 THAT WOULD NEED TO BE ADDRESSED. I NEED TO HAVE A LOT MORE  
17 CONFIDENCE THAN I CAN HAVE IN THIS SETTING WITHOUT A CLEAR,  
18 UM, MEETING OF EVIDENTIARY MINDS ABOUT WHAT THE FACTS ARE TO  
19 DO AN AS APPLIED ANALYSIS.

20 I DO THINK THERE'S SOME CONCERN, JUST SO THAT YOU  
21 ALL HEAR THIS, I DO THINK THERE IS SOME CONCERN ABOUT THE --  
22 ABOUT WHAT WAS PASSED ALONG TO THE STUDENT ENFORCEMENT BY  
23 THESE -- THESE ACRONYMS YOU FOLKS HAVE MAKE THE FEDERAL  
24 GOVERNMENT LOOK LIKE A BIKER. BUT I DO THINK THERE ARE  
25 SOME -- SOME REAL QUESTIONS ABOUT THE APPLICATION. BUT --

1 BUT I'M NOT GOING TO ADDRESS THOSE TODAY. THOSE AREN'T  
2 BEFORE US.

3 WHAT IS BEFORE ME IS THE FACIAL CHALLENGE. AND  
4 THE FACIAL CHALLENGE HAS SEVERAL TARGETS SO I WANT TO TAKE  
5 THEM ONE AT A TIME BECAUSE I HAVE DIFFERENT THINKING ABOUT  
6 DIFFERENT TARGETS.

7 THE FIRST, AND THIS IS SORT OF IN REVERSE SEQUENCE  
8 HONESTLY, BUT THIS WAS THE EASIEST FOR ME. THE FIRST IS  
9 THE -- IN THE STUDENT ORGANIZATION HANDBOOK, THE DOCUMENT  
10 THAT I NOW MORE ACCURATELY UNDERSTAND THE SPECIFIC TO SAN  
11 FRANCISCO STATE, UM, AND I'M NOW GOING TO QUOTE VERBATIM  
12 FROM PAGE 12 OF THAT HANDBOOK.

13 THE FIRST SENTENCE I WANT TO QUOTE IS "IN  
14 SITUATIONS OF COLLATERAL RESPONSIBILITY, WHERE ORGANIZATION  
15 MEMBERS BREAK I POLICY AND/OR LAW, THE ORGANIZATION MAY BE  
16 HELD ACCOUNTABLE FOR MEMBERS' ACTIONS."

17 THE FIRST, AND I'M GOING TO DO SOME MORE HERE FROM  
18 THAT SECTION, TOO, BUT THE FIRST SET OF WORDS IN THAT  
19 SENTENCE THAT MAKE ME ANXIOUS AS A FRIEND OF THE FIRST  
20 AMENDMENT, AS I'M REQUIRED BY MY OATH OF OFFICE TO BE, UM,  
21 IS THE UNCERTAINTY IN MY MIND ABOUT SITUATION, WHAT THE  
22 PHRASE "IN SITUATIONS OF COLLECTIVE RESPONSIBILITY MEANS".  
23 AND IT MAY WELL BE THAT THAT IS INTENDED TO BE REFINED BY  
24 SUBSEQUENT PASSAGES WHICH APPEAR TO REQUIRE CONDUCT THAT  
25 VIOLATES SOMETHING BY EITHER TWO OFFICERS OR THREE MEMBERS.

1 UM, BUT IT'S NOT, THIS WOULD BE BETTER DONE, HONESTLY, IF IT  
2 PURPORTED TO SAY VERY EXPLICITLY HERE IS WHAT WE MEAN BY  
3 SITUATIONS OF COLLECTIVE RESPONSIBILITY.

4 UM, ANY WAY, THERE'S CERTAINLY SOME AMBIGUITY  
5 THERE.

6 THE NEXT PART OF THAT SENTENCE THAT CAUSES ME SOME  
7 FIRST AMENDMENT TREPIDATION IS THE SUGGESTION THAT IF  
8 MEMBERS BREAK POLICY AND/OR LAW. LAW, I'M PREPARED TO TAKE  
9 JUDICIAL NOTICE OF, IS SUFFICIENTLY CLEAR. IT'S INTERESTING  
10 THOUGH -- THOUGH, UNFORTUNATELY, FOLKS ARE DEALING WITH A  
11 SUPPOSEDLY RETIRED LAW PROFESSOR. AND SO MY PICKY LITTLE  
12 MIND LANDS ON THESE VARIOUS WORDS.

13 THE WORD LAW, LET'S TAKE FOR A MINUTE. IT DOESN'T  
14 DISTINGUISH BETWEEN CRIMINAL OR CIVIL. AND IT'S NOT OBVIOUS  
15 TO ME THAT EVERY ACTION WHICH ULTIMATELY RESULTED IN CIVIL  
16 LIABILITY BEING IMPOSED ON SOMEBODY WOULD FAIRLY BE  
17 SANCTIONABLE BY THE UNIVERSITY.

18 BUT, ANY WAY, THE THING I'M MOST WORRIED ABOUT  
19 THERE IS THE WORD "POLICY" AND ITS ELASTICITY.

20 THE SECOND SENTENCE ON WHICH I'D LIKE TO FOCUS,  
21 ALSO ON PAGE 12, READS, AND NOW I'M QUOTING, "WHILE MEMBERS  
22 MAY BE HELD ACCOUNTABLE FOR THEIR ACTIONS INDIVIDUALLY,  
23 CORRECTIVE ACTIONS MAY ALSO BE IMPOSED UPON AN ENTIRE  
24 ORGANIZATION FOR INDIVIDUAL MEMBERS' ACTIONS WHEN THE  
25 BEHAVIOR IS INCONSISTENT WITH SAN FRANCISCO STATE GOALS,

1 PRINCIPLES AND POLICIES."

2           OBVIOUSLY, THAT SENTENCE COMMUNICATES TO RATIONAL  
3 READERS WE CAN PUNISH YOU IF MEMBERS, AND, AGAIN, HERE, IT'S  
4 NOT COMPLETELY CLEAR. IT'S ARGUABLY CLEARER LATER ON, BUT  
5 YOU GOT TO HAVE AT LEAST TWO MEMBERS DOING THIS. UM, BUT  
6 THIS IS NOT SO CLEAR. UM, ESPECIALLY IF THE OFFENSIVE  
7 CONDUCT IS DEEMED INCONSISTENT WITH GOALS. AND LET ME BE  
8 MORE SPECIFIC, FIRST AMENDMENT SPECIFIC, PRESUMABLY, IT IS A  
9 GOAL, AND I WAS LITERALLY A PROFESSOR IN AN INSTITUTION AND  
10 I ACTUALLY INTEND TO GOING BACK TO BEING A PROFESSOR IN AN  
11 INSTITUTION. MY BROTHER IS THE PRESIDENT OF A COLLEGE. I  
12 HAVE CONSIDERABLE, UM, PERSONAL EXPERIENCE WITH, AND  
13 SYMPATHY FOR, WHAT I'M ABOUT TO DESCRIBE. BUT I HAVE A  
14 HIGHER OBLIGATION TO THE FIRST AMENDMENT.

15           ACTUALLY, WHAT I JUST SAID IS WRONG. IT IMPLIES  
16 INTENT BETWEEN A UNIVERSITY AND THE FIRST AMENDMENT AND  
17 THERE IS NONE.

18           BUT, ANY WAY, ONE GOAL PRESUMABLY OF ANYTHING THAT  
19 CALLS ITSELF APPROPRIATELY AN UNIVERSITY IS TO PROMOTE  
20 RESPECTFUL AND REASONED DISCOURSE ON ISSUES OF PUBLIC POLICY  
21 ON A SALABLE GOAL, INTELLECTUALLY THAT IS ACADEMICALLY,  
22 ACADEMICALLY ON A SALABLE GOAL RESPECTFUL AND REASONED  
23 DISCOURSE. BUT THE FIRST AMENDMENT PERMITS DISRESPECTFUL  
24 AND TOTALLY EMOTIONAL DISCOURSE OR COMMUNICATION OR  
25 EXPRESSION, TOTALLY EMOTIONAL, UNREASONED, UNEXPLAINED,

1 DISRESPECTFUL COMMUNICATION IS QUITE PROTECTED BY THE FIRST  
2 AMENDMENT, BARRING OTHER TAILS ON THE DOG.

3 SO A PERSON COULD BE BEHAVING IN A WAY THAT IS  
4 QUITE INCONSISTENT WITH SAN FRANCISCO STATE GOALS AND QUITE  
5 CONSISTENT WITH THE FIRST AMENDMENT, THEIR RIGHTS UNDER THE  
6 FIRST AMENDMENT.

7 SO I'M GOING TO RETRACT WHAT I SAID A FEW MINUTES  
8 AGO, THERE IS TENSION. IT'S UNFORTUNATE THAT THERE IS. I  
9 MEAN I WISHED WE LIVED IN A DIFFERENT WORLD WHERE THERE WERE  
10 NO SUCH TENSIONS. BUT I THINK THERE CAN BE, BY VIRTUE OF  
11 THAT EXAMPLE JUST GIVEN, TENSION, SOMETIMES CONSIDERABLE  
12 BETWEEN THE GOALS OF A UNIVERSITY, WHICH SHOULD BE CENTRALLY  
13 ABOUT REASONING, AND THE FIRST AMENDMENT, WHICH IS CENTRALLY  
14 ABOUT EXPRESSION, AND NOT NECESSARILY ABOUT REASONING.

15 LET ME SAY, BY THE WAY, THAT THE CASES ABOUT THE  
16 POWER OF ADMINISTRATORS IN HIGH SCHOOL SETTINGS TO INVADE  
17 WHAT WOULD OTHERWISE BE CONSTITUTIONALLY PROTECTED INTERESTS  
18 ARE NOT AT ALL OBVIOUSLY APPLICABLE TO A UNIVERSITY, UM,  
19 UNIVERSITY STUDENTS, AND I HAVE ONE BY THE WAY, SO I HAVE  
20 SOME IDEA OF THE SPACE BETWEEN WHAT SHOULD BE AND WHAT IS,  
21 BUT UNIVERSITY STUDENTS ARE SUPPOSED TO BE ADULTS. AT LEAST  
22 IN SO FAR AS THEY CAN BE SENT TO IRAQ. AND -- AND THE  
23 MISSION OF A UNIVERSITY IS TO EXPLORE WITH CONSIDERABLE  
24 ASSERTIVENESS, INTELLECTUALLY, AND COMPLETELY UNTRAMMELED  
25 ENERGY, IMPORTANT STUFF. AND THAT'S NOT THE MISSION OF A

1 HIGH SCHOOL. AND THE IN LOCO PARENTIS SPIRIT THAT INFORMS  
2 THE DECISIONS ABOUT WHAT HIGH SCHOOL ADMINISTRATIONS CAN DO  
3 BY THE WAY OF CIRCUMSCRIBING THE FIRST AMENDMENT RIGHTS OF  
4 HIGH SCHOOL STUDENTS ARE ALMOST FLIPPED ON THEIR HEAD WHEN  
5 YOU TALK ABOUT A UNIVERSITY.

6 ANY WAY, THOSE KINDS OF THOUGHTS LEAD ME TO  
7 BELIEVE THAT THE PLAINTIFFS HAVE A VERY SUBSTANTIAL  
8 LIKELIHOOD OF PREVAILING ON THEIR FACIAL CHALLENGE TO THOSE  
9 ASPECTS OF THE HANDBOOK THAT I JUST READ. SO IT WILL BE MY  
10 INCLINATION TO PROHIBIT THE APPLICATION OF THOSE ASPECTS OF  
11 THE HANDBOOK TO EXPRESSIVE STUDENT CONDUCT UNTIL THIS MATTER  
12 IS RESOLVED.

13 NOW, LET'S TALK ABOUT SOME THINGS THAT ARE  
14 SOMEWHAT MORE CHALLENGING INTELLECTUALLY. I'M TURNING TO  
15 THE SAN FRANCISCO STATE UNIVERSITY BULLETIN, MORE  
16 SPECIFICALLY, UNIVERSITY POLICIES AND PROCEDURES IN THAT  
17 BULLETIN. AND, MORE SPECIFICALLY STILL, THE STUDENT CONDUCT  
18 STANDARDS.

19 AND I HONESTLY COULDN'T TELL FROM WHAT YOU FOLKS  
20 GAVE ME AND IT'S -- THAT IS A FUNCTION OF ME NOT TRYING HARD  
21 ENOUGH, NOT A FUNCTION OF ANY DEFECT IN YOUR PAPERS, BUT I  
22 DIDN'T REALIZE THAT THIS WAS PARROTING STATE-WIDE STATUTORY  
23 LANGUAGE.

24 ANY WAY, WHAT'S BEFORE THE COURT INITIALLY IN THIS  
25 SECTION IS 41301 STANDARDS FOR CONDUCT. AND THE PREPARATORY

1 PHRASE THERE IS THE UNIVERSITY -- I'M QUOTING NOW -- "THE  
2 UNIVERSITY IS COMMITTED TO MAINTAINING A SAFE AND HEALTHY  
3 LIVING AND LEARNING ENVIRONMENT FOR STUDENTS, FACULTY AND  
4 STAFF. EACH MEMBER OF THE CAMPUS COMMUNITY MUST" -- THAT'S  
5 A FAIRLY STRONG WORD -- "MUST CHOOSE BEHAVIORS THAT  
6 CONTRIBUTE TOWARD THIS END. STUDENT BEHAVIOR THAT IS NOT  
7 CONSISTENT WITH THE STUDENT CODE IS ADDRESSED THROUGH AN  
8 EDUCATIONAL PROCESS THAT IS DESIGNED TO PROMOTE SAFETY AND  
9 GOOD CITIZENSHIP. AND, WHEN NECESSARY, IMPOSE APPROPRIATE  
10 CONSEQUENCES".

11 SO THERE'S SOME UNCERTAINTY OBVIOUSLY. AND THIS,  
12 BY THE WAY, I HOPE THE UNIVERSITY UNDERSTANDS, UM, NOT ONLY  
13 MY RESPECT FOR ITS MISSION AND ITS GOALS, UM, BUT ALSO MY  
14 UNDERSTANDING THAT LIFE IS NOT EASILY DIVISIBLE BY  
15 CATEGORIES, THAT IT'S VERY DIFFICULT TO FIND WORDS THAT --  
16 THAT ADEQUATELY TEACH ALL OF US AND ADEQUATELY EXPRESS FOR  
17 ALL OF US WHERE WE ARE DRAWING LINES IN A VERY -- IN A WORLD  
18 THAT'S FULL OF MIXED MOTIVES AND COMPLICATED CONDUCT AND SO  
19 FORTH. SO A PERFECT SYMMETRY BETWEEN WORDS AND THE REAL  
20 WORLD IS IMPOSSIBLE. EXHIBIT ONE IS ARISTOTLE. IT'S  
21 IMPOSSIBLE. SO THAT'S NOT THE STANDARD. THE STANDARD IS  
22 NOT PERFECTION. THE STANDARD IS SOMETHING THAT TEACHES US  
23 WITHIN THE BOUNDS OF THE CONSTITUTION.

24 ANY WAY, HAVING SAID THAT, WE, THE COURT, HAS A --  
25 HAVE A LINE DRAWING RESPONSIBILITY TO GET, UM, AS CLOSE AS

1 WE CAN TO COMMUNICATING AS FAIRLY AS POSSIBLE.

2 THE AMBIGUITY THAT I FIRST NOTE IN THAT PARAGRAPH  
3 THAT I JUST READ IS ABOUT MAINTAINING A SAFE AND HEALTHY  
4 LEARNING ENVIRONMENT. IF YOU FOCUS ON THE WORDS "SAFE AND  
5 HEALTHY", I THINK YOU'RE A LOT CLOSER TO "SAFE" IN THE FIRST  
6 AMENDMENT CONTEXT.

7 BUT WHAT'S A HEALTHY LEARNING ENVIRONMENT GETS A  
8 LITTLE FUZZIER. IT PROBABLY DOES NOT INCLUDE SHOUTING BY  
9 EITHER REPUBLICANS OR DEMOCRATS.

10 ANY WAY, THE NEXT SENTENCE REQUIRES MEMBERS OF THE  
11 CAMPUS COMMUNITY TO CHOOSE, REQUIRES YOU TO CHOOSE BEHAVIORS  
12 THAT CONTRIBUTE TOWARD THAT END, AGAIN, A HEALTHY LEARNING  
13 ENVIRONMENT NOT BEING SO CLEARLY DEFINED.

14 BUT MORE TROUBLESOME TO ME IS THE NOTION THAT, UM,  
15 STUDENTS CAN BE PUNISHED IS WHAT IT SAYS HERE WHEN YOU  
16 TRANSLATE IT INTO ENGLISH. STUDENTS CAN BE PUNISHED IF  
17 THEIR BEHAVIOR IS NOT CONSISTENT WITH THE FOLLOWING, IT  
18 TURNS OUT TO BE, I DON'T KNOW, TWENTY-FIVE PROVISIONS, I  
19 DON'T REMEMBER HOW MANY PROVISIONS THERE ARE. THERE ARE A  
20 WHOLE LOT OF NUMBERED PARAGRAPHS.

21 IF YOUR BEHAVIOR IS NOT CONSISTENT WITH THOSE  
22 PROVISIONS OR GOOD CITIZENSHIP, WOW. IT IS CERTAINLY  
23 ARGUABLY NOT GOOD CITIZENSHIP TO YELL AT OTHER MEMBERS OF  
24 THE STUDENT BODY OR TO DENIGRATE THEIR RELIGION.

25 THAT MAKES ME NERVOUS. AND NOT AS A HUMAN BEING

1 BUT AS A DEFENDER OF THE FIRST AMENDMENT.

2 THE NEXT PARAGRAPH DISCUSSES STUDENTS'  
3 RESPONSIBILITIES. AND, AGAIN, FROM A SORT OF POLITICAL OR I  
4 SHOULDN'T SAY THAT, PEDAGOGICAL THEORY PERSPECTIVE,  
5 CERTAINLY THESE THINGS ARE UNASSAILABLE. BUT IT SAYS  
6 "STUDENTS ARE EXPECTED TO BE GOOD CITIZENS". AND THIS IS IN  
7 A -- THIS IS SUBPARAGRAPH A, SUBPARAGRAPH -- THE PREPARATORY  
8 PARAGRAPH SAYS WE CAN PUNISH YOU IF YOU DO ANYTHING  
9 INCONSISTENT WITH WHAT FOLLOWS. THAT'S WHAT IT SAYS IN  
10 ENGLISH. WE CAN PUNISH YOU IF YOU DO ANYTHING IN -- THAT WE  
11 DEEM, AFTER SOME HOPEFULLY FAIR PROCESS, IS INCONSISTENT  
12 WITH WHAT FOLLOWS.

13 WHAT FOLLOWS FIRST IS THAT YOU'RE SUPPOSED TO BE A  
14 GOOD CITIZEN. AND YOU'RE SUPPOSED TO ENGAGE IN RESPONSIBLE  
15 BEHAVIORS THAT REFLECT WELL UPON THEIR UNIVERSITY. TO BE  
16 CIVIL TO ONE ANOTHER AND TO OTHERS IN THE CAMPUS COMMUNITY  
17 AND CONTRIBUTE POSITIVELY TO STUDENT AND UNIVERSITY LIFE.

18 WELL, BOY, I HOPE THAT SOMEONE WHO JUST COMES TO  
19 SCHOOL AND DOES HIS OR HER HOMEWORK AND CONTRIBUTES NOTHING  
20 OTHER THAN DOING THEIR HOMEWORK AND TAKING THEIR TESTS  
21 DOESN'T GET IN TROUBLE. BUT THAT'S NOT WHAT IS BEFORE US  
22 TODAY. WHAT IS BEFORE US TODAY IS A STUDENT WHO STANDS IN  
23 THE MIDDLE OF THE QUAD AND YELLS NONOBSCENE THINGS ABOUT  
24 GEORGE BUSH OR BILL CLINTON OR ABRAHAM LINCOLN OR ANYBODY.

25 UM, UNACCEPTABLE STUDENT BEHAVIORS ARE LISTED IN

1 THE NUMBERED PARAGRAPHS THAT FOLLOW AND THERE ARE LOTS OF  
2 THEM. I SHOULD GET THIS IN FRONT OF ME. THERE ARE TWENTY  
3 IF YOU DON'T COUNT SUBCATEGORIES. IF WE WERE DOING THIS  
4 LIKE INTERROGATORIES, YOU'D HAVE 35 HERE. BUT, ANY WAY,  
5 THERE ARE A WHOLE BUNCH OF THINGS THAT ARE DEEMED  
6 UNACCEPTABLE STUDENT BEHAVIORS.

7 NOW, ONE OF THEM, OR, ACTUALLY, TWO OF THEM  
8 ESSENTIALLY INVOKE THE SUPREME COURT'S TRADITION OF  
9 PERMITTING SCHOOLS, HIGH SCHOOLS PRIMARILY, BUT -- BUT THIS  
10 PROBABLY WOULD PASS CONSTITUTIONAL MUSTER IN THE UNIVERSITY  
11 SETTING AS WELL.

12 NUMBERS, UM, THREE AND FOUR BASICALLY, AS I READ  
13 THEM, BASICALLY SAY THE STUDENTS, HEY, IF YOU INTENTIONALLY  
14 DISRUPT US IN ANY SUBSTANTIAL WAY, WE CAN PUNISH YOU. OKAY.  
15 PROBABLY FAIR ENOUGH.

16 THE SUPREME COURT LOOKS AT SUBSTANTIAL DISRUPTION  
17 AT LEAST, AS I SAID, IN THE HIGH SCHOOL SETTING. AND I  
18 DON'T KNOW WHY SCHOOLS SHOULD BE REQUIRED TO TOLERATE  
19 SUBSTANTIAL MATERIAL DISRUPTIONS OF THEIR OPERATIONS OF  
20 THEIR LEGITIMATE ACTIVITIES SO THEY PROBABLY AREN'T.

21 ANOTHER PARAGRAPH, UM, I GUESS IT'S SIX, REACHES A  
22 BIT BROADLY. IT'S NOT BEFORE ME. BUT THE CENTER OF IT IS  
23 HEY, DON'T BE OBSCENE. WE'LL PUNISH YOU IF YOU ARE.

24 I'M POINTING THESE TWO THINGS OUT BECAUSE THEY  
25 SUGGEST THAT IN SOMEBODY'S MIND THERE IS SOME DIFFERENCE

1 BETWEEN THOSE THINGS AND NUMBER SEVEN. THAT ISN'T  
2 NECESSARILY THE CASE. BUT IT MIGHT INFORM SOMEWHAT HOW A  
3 REASONABLE PERSON WOULD CONSTRUE THE REACH OF PARAGRAPH  
4 SEVEN.

5 PARAGRAPH SEVEN IS DIRECTLY BEFORE THE COURT AND I  
6 QUOTE IT NOW. "CONDUCT THAT THREATENS OR ENDANGERS THE  
7 HEALTH OR SAFETY OF ANY PERSON WITHIN OR RELATED TO THE  
8 UNIVERSITY COMMUNITY, INCLUDING PHYSICAL ABUSE, THREATS,  
9 INTIMIDATION, HARASSMENT OR SEXUAL MISCONDUCT". END OF  
10 QUOTE.

11 UM, THE WORDS "INTIMIDATION AND HARASSMENT" ARE  
12 THE FOCUS OF ONE OF THE SETS OF ATTACKS BY THE PLAINTIFFS.  
13 AND IT TOOK ME A WHILE TO COME TO THIS VIEW, BUT I'M NOW OF  
14 THE VIEW THAT THOSE WORDS HAVE NO PLAY -- THAT THEY --  
15 THEY -- THEY CARRY NOTHING WITH THEM IN THE ABSTRACT. THIS  
16 PARAGRAPH SEVEN DOES NOT PROSCRIBE INTIMIDATION BY ITSELF.  
17 IT DOES NOT PROSCRIBE HARASSMENT BY ITSELF. INSTEAD, WHAT  
18 IT PROSCRIBES, AS REASONABLY READ, IS A FORM OF INTIMIDATION  
19 AND A FORM OF HARASSMENT. PROSCRIBED IS INTIMIDATION  
20 THROUGH CONDUCT THAT THREATENS OR ENDANGERS THE HEALTH OR  
21 SAFETY OF ANY PERSON.

22 THE PARAGRAPH ALSO PROSCRIBES HARASSMENT THROUGH  
23 CONDUCT. AND, BY THE WAY, CONDUCT OBVIOUSLY CAN, AND OFTEN  
24 IS, EXPRESSIVE. SO I DON'T MEAN TO SAY CONDUCT IS SORT OF  
25 OFF THE FIRST AMENDMENT SHELF. ANY WAY, IT PROSCRIBES

1 HARASSMENT THROUGH CONDUCT THAT THREATENS OR ENDANGERS THE  
2 HEALTH OR SAFETY OF ANY PERSON.

3 SO CONSTRUED, IT STRIKES ME THAT THE CASE HAS NOT  
4 BEEN MADE PRELIMINARILY, AND I DON'T MAKE A FINDING,  
5 OBVIOUSLY, ABOUT WHETHER IT COULD BE MADE. BUT I DO, UM,  
6 HAVE THE VIEW NOW THAT THE CASE HAS NOT BEEN MADE BY THE  
7 PLAINTIFFS THAT THIS PRO SET OF PROSCRIPTIONS IS OVERBROAD  
8 OR VAGUE.

9 NOW, THERE ARE LIKELY EXPRESSIVE CONDUCTS THAT  
10 COULD INTIMIDATE THE SAFETY OF ANY PERSON, AND, AT LEAST,  
11 ARGUABLY GET IN THE ZONE OF PROTECTION BY THE FIRST  
12 AMENDMENT.

13 AND, BY THE WAY, WHEN I SAY PROTECTION, I DON'T  
14 MEAN A CONCLUSION. I MEAN THE BEGINNING OF AN ANALYSIS. IF  
15 SOMETHING IS NOT PROTECTED AT ALL BY THE FIRST AMENDMENT WE  
16 GO HOME. IF IT GETS SOME PROTECTION, WE KEEP THINKING AND  
17 TRY TO FIGURE OUT WHETHER THERE'S BEEN AN INVASION OF A  
18 RIGHT.

19 BUT, ANY WAY, I CAN IMAGINE SOME KINDS OF  
20 INTIMIDATION OR SOME EXAMPLES OF HARASSMENT THAT ENDANGER  
21 THE SAFETY OF A PERSON THAT NONETHELESS WOULD BE WITHIN THE  
22 BROAD AMBIT, AT LEAST, OF FIRST AMENDMENT PROTECTION. BUT I  
23 HAVE TO WORK TO GET TO THAT PLACE IN MY IMAGINATION. AND I  
24 DON'T HAVE TO WORK AT ALL TO GET -- TO GET TO A LOT OF  
25 CONDUCT THAT'S ONLY marginally expressive or maybe

1 SUBSTANTIALLY EXPRESSIVE THAT WOULD ENDANGER OR THREATEN THE  
2 HEALTH OR SAFETY OF ANOTHER PERSON AND BE PROSCRIBED UNDER  
3 PARAGRAPH SEVEN.

4           WHAT I JUST SAID IS I HAVEN'T BEEN PERSUADED OF  
5 OVERBREADTH. BECAUSE TO HAVE OVERBREADTH, IT HAS TO BE  
6 SUBSTANTIAL SO THAT THE PHYSICAL METAPHOR IS A CIRCLE, THE  
7 CENTRAL CIRCLE, LET'S SAY THAT, AND THE CENTRAL CIRCLE IS  
8 FILLED WITH THE STUFF THAT THE CONSTITUTION WOULD PERMIT THE  
9 REGULATION TO PROSCRIBE. AND THE OUTSIDE CIRCLE AND SO NOW  
10 WE HAVE A BIGGER CIRCLE. WE GOT THE CENTER CIRCLE, WHICH IS  
11 FAIR GAME. YOU CAN PUNISH THIS OR YOU CAN REGULATE THIS OR  
12 PROSCRIBE THIS. AND THEN YOU HAVE THE LARGER CIRCLE SAYS  
13 HEY, WAIT A MINUTE, THAT STUFF IN THE LARGER CIRCLE YOU  
14 CAN'T. THE FIRST AMENDMENT WINS THAT LITTLE FIGHT OUT  
15 THERE. THAT LARGER CIRCLE HAS TO BE PRETTY DARN BIG BY  
16 SUPREME COURT PRECEDENT TO FIND OVERBREADTH MEANING THIS  
17 STATUTE FACIALLY HAS GOT TO GO. BOOM, IT'S OUT. AND I  
18 CAN'T FIND IT, HONESTLY, WITH RESPECT TO THIS PRELIMINARILY.  
19 THAT'S WHAT WE'RE HERE FOR. I'M NOT SAYING IT'S IMPOSSIBLE.  
20 THERE ARE OBVIOUSLY QUITE SUBSTANTIAL LIMITATIONS ON MY  
21 IMAGINATION, ESPECIALLY WHEN IT'S EXERCISED OVER A PERIOD OF  
22 A FEW HOURS INSTEAD OF A FEW WEEKS AT A TRIAL OR SOMETHING.  
23 BUT IT SEEMS TO ME WHEN YOU COMPARE THOSE CIRCLES, YOU GOT A  
24 PRETTY GOOD SIZED CHUNK OF CLEARLY REGULABLE STUFF IN THE  
25 CENTER, AND A SMALL AREA OF ADDITIONAL STUFF THAT MIGHT BE

1 REACHED BY PARAGRAPH SEVEN BUT -- BUT PROTECTED BY THE FIRST  
2 AMENDMENT.

3 SO WHAT I INTEND TO DO WITH RESPECT TO PARAGRAPH  
4 SEVEN IS ORDER THE UNIVERSITY TO CONSTRUE IT AS I HAVE. TO  
5 ORDER THE UNIVERSITY THAT PRELIMINARILY, AND THESE THINGS  
6 MAY SHAKE OUT DIFFERENTLY IN THE LONG RUN, TO ORDER THE  
7 UNIVERSITY THAT THEY MAY NOT PURPORT EVEN TO BEGIN AN  
8 INVESTIGATION OF, OR DISCIPLINARY ACTION AGAINST, ANY  
9 INDIVIDUAL OR GROUP UNDER PARAGRAPH SEVEN SIMPLY ON THE  
10 GROUND THAT, OH, WHAT THEY DID WAS REASONABLY VIEWABLE AS  
11 INTIMIDATION, PERIOD. YOU CAN'T DO THAT.

12 ON THE GROUND THAT WHAT THEY DID WAS REASONABLY  
13 VIEWABLE AS HARASSMENT. YOU CAN'T DO THAT. BUT YOU CAN DO  
14 IS, AND THIS REASONABLY VIEWABLE, THAT IS A RATHER INARTFUL  
15 WAY TO SAY IT BUT YOU GET THE IDEA. THAT'S, THE SUPREME  
16 COURT HAS CLEARLY INSERTED THIS AS A MATTER OF LAW. IT'S  
17 GOT TO BE A REASONABLE PERSON OBSERVING THESE CIRCUMSTANCES,  
18 KNOWING WHAT'S AVAILABLE TO A REASONABLE PERSON TO KNOW  
19 WOULD CONCLUDE X. SOME HARE BRAIN CONCLUDES IT. NO. NO.  
20 THAT DOESN'T COUNT. ANY WAY, SO WHAT THE UNIVERSITY CAN  
21 INVOKE PARAGRAPH SEVEN TO JUSTIFY INITIATING DISCIPLINARY  
22 OR -- OR EDUCATIONAL AND COUNSELING PROCEEDINGS COULD BE  
23 INTIMIDATION OR HARASSMENT THAT REASONABLY IS CONCLUDED TO  
24 THREATEN OR ENDANGER THE HEALTH OR SAFETY OF ANY OTHER  
25 PERSON.

1           AND HEALTH OR SAFETY ARE WORDS ABOUT PHYSICAL  
2 STUFF WITH THE ARGUABLE EXCEPTION OF MENTAL HEALTH WHEN THE  
3 MENTAL HEALTH IS NOT THE COMFORT OF A REGULAR OLD STUDENT.  
4 BUT IS, INSTEAD, THE MENTAL HEALTH OF SOMEONE IS -- IT IS  
5 EITHER ALREADY MENTALLY UNHEALTHY OR THE MISCONDUCT OF THE  
6 BEHAVIOR THAT'S BEING TARGETED IS SO BAD THAT IT WOULD MAKE  
7 A HEALTHY PERSON MENTALLY UNHEALTHY.

8           IN OTHER WORDS, THAT IS A REAL TEENY SLICE OF THE  
9 WORLD HERE.

10           WHAT THIS REALLY FOCUSES ON IS HEALTH AND SAFETY  
11 PHYSICALLY DEFINED OF PERSONS. SO IF IT'S INTIMIDATING OR  
12 HARASSING, AND THREATENS OR ENDANGERS THE HEALTH OR SAFETY  
13 OF SOMEONE ELSE, OKAY. IF NOT, NOT OKAY.

14           NOW, PARAGRAPH 16 OF THIS LIST OF TWENTY OR SO  
15 PROSCRIBED STUDENT BEHAVIORS READS "VIOLATION OF ANY  
16 PUBLISHED UNIVERSITY POLICY, RULE, REGULATION OR  
17 PRESIDENTIAL ORDER".

18           I HAVE NO IDEA WHAT PRESIDENTIAL ORDERS REACH.  
19 AND IT'S EXTREMELY UNLIKELY THAT YOUR AVERAGE SOPHOMORE HAS  
20 ANY IDEA WHAT PRESIDENTIAL ORDERS ARE.

21           BUT THE WORD "POLICY" IS TOO ELASTIC AND -- AND  
22 UNCOMMUNICATIVE. AGAIN, IT'S PROBABLY A POLICY OF THE  
23 UNIVERSITY TO CREATE AN ENVIRONMENT IN WHICH EVERYONE CAN  
24 THINK IN A NICE RATIONALE CALM MANNER. AND, CERTAINLY,  
25 THERE ARE FIRST AMENDMENT ACTS THAT WOULD BE INCONSISTENT

1 WITH THAT THAT WOULD BE PROTECTED.

2 SO THE UNIVERSITY WON'T BE ABLE TO ENFORCE THE  
3 WORD "POLICY" AT LEAST IN THAT SENTENCE WITHOUT LIMITING IT  
4 ALONG THE LINES THAT I'VE BEEN TALKING ABOUT.

5 NOW, JUST SO THAT YOU KNOW ANOTHER PIECE OF MY  
6 THINKING ABOUT THIS, I THINK IT'S VERY IMPORTANT, AS A  
7 JUDGE, WHEN I LOOK AT THINGS LIKE THIS TO LOOK AT  
8 JURISDICTIONAL PARAGRAPHS. AND THERE IS ONE HERE.

9 AND THAT THE JURISDICTIONAL PARAGRAPH SUPPORTS MY  
10 READING OF PARAGRAPH SEVEN. AND, MORE IMPORTANTLY, WOULD  
11 ALERT A CAREFUL READER, AND I REALIZE THIS IS A FIGMENT OF  
12 LEGAL IMAGINATION HERE, THIS NOTION OF A CAREFUL READER, BUT  
13 IT WOULD ALERT A CAREFUL READER TO THE PROBABILITY THAT  
14 I'M -- THAT THE CONSTRUCTION THAT I'M GIVING TO PARAGRAPH  
15 SEVEN IS THE INTENDED CONSTRUCTION.

16 PARAGRAPH C, AGAIN, WITHIN THIS UMBRELLA OF THE  
17 STUDENT CODE OF CONDUCT, UM, PARAGRAPH LOWER CASE ARABIC C  
18 SAYS, APP -- IS STYLED "APPLICATION OF THIS CODE". TO A  
19 JUDGE THAT MEANS, OKAY, HERE WE HAVE THE JURISDICTION. HERE  
20 IS WHAT THE JURISDICTION REACHES. WHAT THIS SAYS, AND I'M  
21 GOING TO QUOTE, BUT I'M GOING TO LEAVE SOME THINGS OUT THAT  
22 ARE NOT MATERIAL. "SANCTIONS -- SANCTIONS FOR THE CONDUCT  
23 LISTED ABOVE CAN BE IMPOSED. CONDUCT THAT THREATENS THE  
24 SAFETY OR SECURITY OF THE CAMPUS COMMUNITY OR SUBSTANTIALLY  
25 DISRUPTS THE FUNCTIONS OR OPERATION OF THE UNIVERSITY IS

1 WITHIN THE JURISDICTION OF THIS ARTICLE".

2           AND THEN IT GOES ON TO SAY, HEY, BUT WE'RE NOT  
3 GOING TO VIOLATE THE FIRST AMENDMENT. THAT, BY IMPLICATION,  
4 RELATIVELY CLEARLY SAYS STUFF THAT ISN'T THREATENING TO THE  
5 SAFETY OR SECURITY OF THE CAMPUS COMMUNITY OR THAT ISN'T  
6 SUBSTANTIALLY DISRUPTIVE IS OUTSIDE THE BOUNDS OF THIS  
7 PARTICULAR CODE OF CONDUCT.

8           NOW, YOU MAY ARGUE, WELL, YOU HAVE TO BE A LAW  
9 PROFESSOR TO FIGURE THAT OUT. MAYBE. AND MAYBE IT WOULD BE  
10 WISE, I GUESS I'M TALKING TO THE LEGISLATURE, WHICH DOESN'T  
11 SEEM TO BE HERE, UM, TO MAKE THAT MUCH CLEARER AT THE  
12 BEGINNING OF THIS BUSINESS. IT CERTAINLY WOULD -- IT  
13 CERTAINLY WOULD ADVANCE THIS, UM, ESCAPE CLAUSE BUSINESS A  
14 LOT, ASSUMING THE LEGISLATURE MEANS TO ADVANCE THAT ESCAPE  
15 CLAUSE ABOUT THE FIRST AMENDMENT. IT WOULD ADVANCE THAT  
16 GOAL VERY SUBSTANTIALLY IF THIS JURISDICTION SECTION WERE AT  
17 THE BEGINNING AND IF IT WERE WRITTEN IN ENGLISH FOR LAY  
18 PEOPLE INSTEAD OF IN LAWYEREZE.

19           ANY WAY, THAT -- THAT HELPS SUPPORT MY -- MY VIEW  
20 HERE OF WHAT PARAGRAPH -- OF THE MOST REASONABLE READING OF  
21 PARAGRAPH SEVEN.

22           NOW, LET ME GIVE YOU SOME UNINVITED SUGGESTIONS.  
23 AND, AGAIN, I REALIZE I'M NOT SPEAKING TO THE RIGHT PEOPLE  
24 HERE. UM, BECAUSE I WANT TO SUGGEST SOME THINKING ABOUT  
25 WHAT THE WORDS HARASSMENT AND INTIMIDATION MIGHT BE

1 CONSTRUCTIVELY DEEMED TO MEAN.

2           AND I DON'T KNOW. ACTUALLY, IT'S A NICE QUESTION  
3 TO WHICH I THINK I KNOW THE NEGATIVE ANSWER. I DON'T KNOW  
4 WHETHER SAN FRANCISCO STATE COULD SAY, HAS THE POWER, THE  
5 AUTHORITY TO SAY, OKAY, HERE'S -- WE SEE THE WORD  
6 "INTIMIDATION AND HARASSMENT". WE SEE THOSE WORDS IN  
7 PARAGRAPH SEVEN AND WE ARE, BECAUSE WE'VE JUST BEEN ORDERED  
8 TO, GOING TO APPLY THEM ONLY TO CONDUCT THAT THREATENS, BLAH  
9 BLAH, BLAH.

10           I DON'T KNOW, WHETHER, IN ADDITION TO THAT, THE  
11 UNIVERSITY COULD SAY, "AND WE DEFINE", TAKE THE WORD  
12 INTIMIDATION, WE DEFINE THE WORD INTIMIDATION AS FOLLOWS. I  
13 DON'T KNOW WHETHER THE UNIVERSITY HAS THE AUTHORITY TO DO  
14 THAT.

15           IF THESE ARE STATE-WIDE PROMULGATIONS, I DON'T  
16 KNOW. BUT IF THE UNIVERSITY DID HAVE THE AUTHORITY, OR IF  
17 THE LEGISLATURE WAS SO INCLINED, OR IF YOU PEOPLE, AS A  
18 MATTER OF YOUR OWN SETTLEMENT AND CONSTRUCTIVE  
19 CONVERSATIONS, WANT TO USE IT HERE, HERE ARE A COUPLE OF  
20 IDEAS -- THESE COME FROM THE CASES BY THE WAY. THESE ARE  
21 NOT -- I AM NOT MAKING THIS STUFF UP. AND IT IS ARGUABLE,  
22 AND I MEAN THIS QUITE SERIOUSLY, IT IS AUGMENTABLE THAT  
23 THESE ARE TOO SKINNY BUT THEY ARE A GOOD STARTING POINT. SO  
24 HARASSMENT FIRST.

25           THE KEY THING HERE IS I PULLED OUT OF A CASE, AND

1 I DON'T REMEMBER WHICH ONE HONESTLY. LET ME SEE HERE.  
2 WELL, I DIDN'T WRITE -- I DIDN'T WRITE THE CASE AUTHORITY  
3 FOR THIS. BUT IT -- TAKE MY WORD FOR IT THERE IS A CASE --  
4 CASE AUTHORITY THAT SAYS BASICALLY, YOU CANNOT DEFINE  
5 HARASSMENT IN SETTINGS LIKE THIS TO BE BASED ON NO MORE THAN  
6 WORDS THAT OFFEND. HARASSMENT HAS TO BE -- YOU DON'T HAVE  
7 HARASSMENT UNLESS YOU GOT SOMETHING MORE THAN OFFENSE. AND  
8 THAT, YOU KNOW, THAT COMES OUT OF ONE OF THESE CASES. AND  
9 THAT STRIKES ME AS A GOOD PLACE TO START IF YOU'RE TRYING TO  
10 CLARIFY THINGS SO THAT PEOPLE CAN HAVE THEIR RALLIES AND  
11 HAVE THEIR -- EXPRESS THEIR VIEWS. SAY, DON'T WORRY. JUST  
12 BECAUSE YOU'RE OFFENDING SOMEBODY, THAT BY ITSELF WE'RE NOT  
13 GOING TO PUNISH YOU. WE'RE NOT GOING TO TAKE ANY ACTION.  
14 WE'RE NOT GOING TO INVESTIGATE YOU. JUST BECAUSE YOU'RE  
15 OFFENDING. YOU CAN OFFEND EVERY SINGLE PEOPLE -- PERSON ON  
16 THE CAMPUS EXCEPT YOURSELF. OFFEND YOURSELF. THAT'S NOT  
17 HARASSMENT. ANY WAY, THAT'S ONE IDEA.

18 NOW, LET'S TALK ABOUT INTIMIDATION. AND THIS --  
19 THIS IS ARGUABLY TOO SKINNY, BUT IT'S -- BUT IT'S  
20 INTERESTING.

21 THIS COMES FROM VIRGINIA VERSUS BLACK AND I THINK  
22 IT'S JUSTICE O'CONNOR SPEAKING FOR A MAJORITY THAT DEFINES  
23 INTIMIDATION IN THAT SETTING. AND, AS I RECALL, THAT WAS A  
24 CROSS BURNING DEAL SO THAT'S, UM, A DIFFICULT CIRCUMSTANCES,  
25 UM, FROM LOTS OF PERSPECTIVES. BUT IN THAT SETTING, SHE

1     DEFINES INTIMIDATION CLEARLY AS A SUBCATEGORY OF THE CONCEPT  
2     TRUE THREAT OF VIOLENCE.  SHE STARTS WITH TRUE SET OF  
3     VIOLENCE -- EXCUSE ME -- TRUE THREAT OF VIOLENCE, AND SAYS,  
4     OKAY, INTIMIDATION IS A SUBPART OF THAT.

5             SO LET'S START WITH TRUE THREAT OF VIOLENCE.  
6     HERE'S WHAT SHE SAYS, AND I'M PARAPHRASING A LITTLE BIT  
7     HERE, BUT I'M NOT DOING ANY VIOLENCE TO HER CONCEPT.

8             A TRUE THREAT OF VIOLENCE CAN BE FOUND INDEPENDENT  
9     OF THE INTENT OF THE SPEAKER OR ACTOR AND CONSISTS OF  
10    EXPRESSIVE CONDUCT OR WORDS THAT -- THAT COMMUNICATE A  
11    SERIOUS EXPRESSION OF AN INTENT TO COMMIT AN ACT OF UNLAWFUL  
12    VIOLENCE TO A PARTICULAR PERSON OR GROUP OF PERSONS.

13            SHE GOES ON TO SAY THAT WHAT'S LEGITIMATELY THE  
14    SUBJECT OF PROTECTION HERE IS NOT JUST AGAINST VIOLENCE  
15    ITSELF BUT AGAINST A REASONABLE FEAR OF VIOLENCE AND TO THE  
16    DISRUPTION THAT A REASONABLE FEAR OF VIOLENCE CAN ENGENDER.

17            THAT'S NOT INTIMIDATION.  THAT'S THE BROADER  
18    CATEGORY CALLED TRUE THREAT OF VIOLENCE.

19            NOW, JUST MY LITTLE AVUNCULAR SUGGESTION FOR YOU  
20    FOLKS TO THINK ABOUT.  I THINK THIS IS TOO SKINNY, AT LEAST  
21    AS AN INSTINCT, I WOULD LIKE TO THINK A LITTLE BIT MORE  
22    ABOUT THIS BEING TOO SKINNY, BECAUSE I DON'T KNOW WHY AN  
23    UNLAWFUL THREAT OF DAMAGE TO PROPERTY OF A PARTICULAR PERSON  
24    OR PERSONS SHOULD ESCAPE AT LEAST THE DEFINITION OF  
25    INTIMIDATION.  MAYBE THREAT OF VIOLENCE.  I DON'T KNOW.  BUT

1 SHE'S TRANSPORTING HER DEFINITION OR PARTS OF HER DEFINITION  
2 OF TRUE OF VIOLENCE INTO HER DEFINITION OF INTIMIDATION.  
3 AND THAT TRANSPORTATION LEAVES OUT THE NOTION OF THREAT TO  
4 PROPERTY.

5 ANY WAY, INTIMIDATION. A SUBCATEGORY OF TRUE ACTS  
6 OF VIOLENCE AND SHE DEFINES INTIMIDATION IN THIS SETTING AS  
7 A TYPE OF TRUE THREAT WHERE A SPEAKER DIRECTS A THREAT TO A  
8 PERSON OR GROUP WITH THE INTENT OF PLACING THE VICTIM IN  
9 FEAR OF BODILY HARM OR DEATH.

10 NOW, THIS IS THE PLACE, UNLIKE THE TRUE THREAT OF  
11 VIOLENCE, WHERE I THINK YOU CAN MAKE A BETTER ARGUMENT THAT  
12 YOU OUGHT TO ADD OR "FEAR OF UNLAWFUL HARM TO PROPERTY OF A  
13 PERSON OR GROUP". AND I PLAYED WITH THIS A LITTLE WHILE AND  
14 SAID, WELL, MAYBE IT SHOULD BE SUBSTANTIAL HARM OR HARM TO  
15 SUBSTANTIAL PROPERTY OR SOMETHING.

16 WELL, THE PROBLEM WITH THAT IS WHAT IF I HAVE A  
17 NECKLACE, BEING A CHILD OF THE SIXTIES, THAT'S REALLY  
18 IMPORTANT TO ME. IT'S GOT SOME PEACE SYMBOL ON IT THAT, IN  
19 FACT, MY MOM GAVE IT TO ME -- AND I'M MAKING THIS UP -- IN  
20 1964 BECAUSE OF SOME VIEW WE SHARED ABOUT THE VIET NAM WAR  
21 OR ABOUT THE CIVIL RIGHTS MOVEMENT. ANY WAY, I GOT THIS  
22 THING. IT'S NOT WORTH A DIME. IT'S MADE OUT OF LITTLE  
23 TEENY WEENY BEADS THAT YOU CAN BUY A BILLION OF FOR TEN  
24 CENTS, NOT WORTH A DIME TO ANYONE IN THE WORLD, EXCEPT ME  
25 AND MY MOM. RIP IT OFF. OR "I'M GOING TO RIP IT OFF IF YOU

1 DON'T", WHY SHOULDN'T THAT BE WITHIN THE ZONE OF PROTECTION  
2 EVEN THOUGH THE PROPERTY ISN'T WORTH A NICKEL?

3 ANY WAY, ALL THIS IS AVUNCULAR. MAYBE THESE ARE  
4 THINGS WE CAN THINK ABOUT. MAYBE THE UNIVERSITY CAN'T THINK  
5 ABOUT, AS A MATTER OF THE UNIVERSITY'S AUTHORITY, BUT WHERE  
6 THE LEGISLATURE HAS GIVEN SOME PRONOUNCEMENTS THAT ARE  
7 UNSPECIFIED OR UNTUTORED AND UNELABORATED, AND SAID TO THE  
8 UNIVERSITY, HEY, YOU GOT TO ENFORCE THESE, UNIVERSITY, IT  
9 SEEMS TO ME THAT THAT GIVES THE UNIVERSITY AT LEAST SOME  
10 AUTHORITY TO SAY, OKAY, WELL, WE HAVE TO ENFORCE THESE.  
11 THESE AREN'T CLEAR. WE WANT TO HAVE OUR PEOPLE, OUR  
12 UNIVERSITY EMPLOYEES AND STUDENTS KNOW WHAT THE RULES ARE SO  
13 THAT THEY'RE NOT ENFORCED IN SOME, UM, ARBITRARY AND  
14 EPISODIC MANNER. UM, AND WE HAVE TO HAVE SOMETHING. AND  
15 YOUR WORDS, LEGISLATURE, AREN'T QUITE GOOD ENOUGH. SO AS  
16 LONG AS WE'RE WITHIN SOMETHING THAT YOU DON'T DISAPPROVE OF,  
17 WE OUGHT TO BE OKAY. I DON'T KNOW IF THAT PASSES MUSTER OR  
18 NOT.

19 MS. GUNN: IF I COULD JUST EXPLAIN. ACTUALLY, THE  
20 LEGISLATURE HAS GIVEN THE BOARD OF THE TRUSTEES OF THE  
21 SYSTEM, OF THE CAL STATE UNIVERSITY SYSTEM, THE POWER TO  
22 PROMULGATE THESE REGULATIONS SO IT IS THE BOARD OF TRUSTEES.

23 THE COURT: ACTING.

24 MS. GUNN: ACTING ON BEHALF OF THE STATE.

25 THE COURT: SO THESE PARTICULAR WORDS THAT I'VE

1 BEEN FOCUSING ON TODAY, THE WORDS IN THE REGULATIONS OF  
2 STUDENT CONDUCT CODE, FOR EXAMPLE, THOSE ARE WORDS THAT WERE  
3 NORMALLY PROMULGATED BY THE BOARD OF TRUSTEES?

4 MS. GUNN: THAT IS CORRECT.

5 THE COURT: OKAY. WELL, CLEARLY, THE BOARD CAN  
6 CHANGE THEM.

7 AND DOES THE BOARD DELEGATE, AS A GENERIC MATTER,  
8 SOME AUTHORITY TO REFINE, NOT CHANGE, BUT REFINE THE, AND  
9 CLARIFY THE MEANING OF SOME OF THESE TERMS TO INDIVIDUAL  
10 CAMPUSES?

11 MS. GUNN: NOT TO INDIVIDUAL CAMPUSES, NO.

12 THE COURT: TO WHOM?

13 MS. GUNN: IF A CHANGE IS MADE, IT IS MADE TO  
14 TITLE FIVE AS A WHOLE AS TO THE PROVISION.

15 THE COURT: SO THE BOARD, SO SOMEBODY SHORT OF THE  
16 BOARD CAN MAKE A CHANGE?

17 MS. GUNN: THAT'S RIGHT.

18 THE COURT: NOW, WHAT I WASN'T PROPOSING WAS A  
19 CHANGE. I WAS PROPOSING A CLARIFICATION AND ELABORATION,  
20 A -- SO THIS IS WHAT THIS MEANS OR THIS IS ONE OF THE THINGS  
21 THIS MEANS SO WE ALL KNOW A LITTLE BIT BETTER.

22 IS THAT PROHIBITED?

23 MS. GUNN: NO. THEY'RE, ON OCCASION, THERE ARE  
24 PROVISIONS OR REVISIONS MADE TO RESPECTIVE PROVISIONS MADE  
25 WITHIN TITLE FIVE. SO IT'S NOT IMPOSSIBLE BUT DONE RARELY.

1 THE COURT: BUT I THINK WE'RE MISSING EACH OTHER.  
2 WHAT YOU'RE SAYING IS THAT IT'S DONE VERY OCCASIONALLY BUT  
3 IT'S DONE BY THE BOARD.

4 MS. GUNN: CORRECT.

5 THE COURT: IT'S NOT DONE BY INDIVIDUAL CAMPUSES.

6 MS. GUNN: THAT IS CORRECT.

7 MR. HACKER: YOUR HONOR, MAY I CLARIFY SOMETHING  
8 AS WELL?

9 THE COURT: SURE.

10 MR. HACKER: ORIGINALLY, THE PLAINTIFFS SUED THE  
11 ENTIRE, ALL OF THE TRUSTEES, OFFICIALLY AND INDIVIDUALLY.  
12 AND COUNSEL AND I HAVE STIPULATED THAT ANY ORDER BY THIS  
13 COURT WOULD BE ENFORCEABLE AGAINST THE TRUSTEES. AND THAT'S  
14 WHY WE KEPT DEFENDANT REED AS KIND OF THE LEAD DEFENDANT  
15 BECAUSE HE DOES REPRESENT THE TRUSTEES. I DO BELIEVE HE IS  
16 A MEMBER OF THE BOARD.

17 MS. GUNN: HE IS A MEMBER. HE IS AN EX OFFICIO  
18 MEMBER OF THE BOARD OF TRUSTEES. AND HE HAS A CHANCELLOR  
19 AND THE SYSTEM HAS BEEN DELEGATED CERTAIN AUTHORITY BY THE  
20 BOARD OF TRUSTEES.

21 THE COURT: OKAY. AND HE IS A CHANCELLOR FOR THE  
22 ENTIRE SYSTEM?

23 MS. GUNN: THAT'S CORRECT.

24 THE COURT: WELL, I DON'T HONESTLY KNOW HOW ALL  
25 THAT STUFF PLAYS OUT. BUT I JUST WANTED TO SHARE WITH YOU

1 SOME IDEAS ABOUT WAYS TO GET TO THE KINDS OF BEHAVIORS THAT  
2 REALLY ARE, AND SHOULD BE, SANCTIONABLE AND SANCTIONED, AND  
3 TO CLARIFY FOR THE WORLD OUT THERE IF PEOPLE WHO -- WHO, UM,  
4 NEED TO OPERATE WITHIN THIS ENVIRONMENT A LITTLE BIT MORE  
5 CLEARLY WHAT THEIR -- WHAT THE BOUNDARIES ARE ON WHAT THEY  
6 CAN DO.

7 NOW, THERE'S, UM, THE CIVILITY PROVISION IS JUST  
8 WAY TOO BROAD. IT JUST CAN'T PASS CONSTITUTIONAL MUSTER.  
9 NOW, THAT'S AGAIN, THAT IS A PRELIMINARY HEARING. BUT --  
10 BUT, UM, I JUST, FRANKLY THAT JUST ALMOST SEEMS LIKE A NO  
11 BRAINER TO ME. IT MIGHT BE FINE FOR THE UNIVERSITY TO SAY,  
12 HEY, WE HOPE ALL YOU FOLKS ARE CIVIL TO ONE ANOTHER. BUT  
13 IT'S NOT FINE FOR THE UNIVERSITY TO SAY IF YOU'RE NOT CIVIL,  
14 WHATEVER THAT MEANS, WE'RE GOING TO PUNISH YOU. AND THE  
15 WORD IS, AT A MINIMUM, IT'S A PART OF A UNIVERSITY, UM,  
16 POLICY OR GOAL. AND THE WAY THESE THINGS ARE WRITTEN BRINGS  
17 IN POLICIES AND GOALS, AT LEAST THROUGH THE STUDENT  
18 HANDBOOK, TO PUNISH ORGANIZATIONS LIKE THE COLLEGE RE --  
19 POTENTIALLY PUNISH ORGANIZATIONS LIKE THE COLLEGE  
20 REPUBLICANS. SO THERE'S A -- THERE'S A -- THESE THINGS COME  
21 BACK. AND THEY, YOU KNOW, IF SOMEONE STUDIED THIS CAREFULLY  
22 THEY'D SAY, OH, GOSH, IF I'M NOT CIVIL, I'M SUBJECT TO  
23 SANCTIONS. IF TWO OF MY OFFICERS, YOU KNOW, GET INTO A  
24 SHOUTING MATCH, EVEN IF IT'S A DEFENSIVE SHOUTING MATCH,  
25 WE'RE OUT OF HERE. THAT'S NOT -- THAT'S NOT ACCEPTABLE TO

1 THE FIRST AMENDMENT.

2 UM, SO THOSE ARE THE PROVISIONS THAT ARE  
3 VULNERABLE IN MY VIEW. THOSE, THE PROVISION THAT IS GOING  
4 TO STAND IS ONE OF THE CENTRAL ONES, THAT'S PARAGRAPH SEVEN.  
5 AND I SAY STAND TEMPORARILY. PARAGRAPH SEVEN, AS CONSTRUED  
6 BY ME HERE. AND MY AVUNCULAR-ISMS ABOUT HARASSMENT AND  
7 INTIMIDATION, YOU'RE FREE TO IGNORE, EXCEPT WHEN YOU GO BACK  
8 TO THE REAL WORLD WHERE YOU MIGHT PAY ATTENTION TO THEM, NOT  
9 FOR LEGAL PURPOSES, BUT FOR LARGER PURPOSES.

10 ALL RIGHT. LET'S TALK ABOUT, AND WE'LL WRITE  
11 SOMETHING TO THESE EFFECTS. UM, I CAN'T SAY THAT IT WILL BE  
12 IN YOUR HANDS TOMORROW BECAUSE THIS STUFF IS FAIRLY  
13 COMPLICATED. BUT I THINK, BECAUSE I'VE SPENT SO MUCH TIME  
14 DISCOURSING HERE, UM, I THINK WE'LL DO SOMETHING MORE IN THE  
15 ORDER OF SUMMARY IN THE ORDER RATHER THAN FULL EXPLANATION  
16 BECAUSE IT IS A, UM, A TEMPORARY STAY ON CERTAIN KINDS OF  
17 ACTIVITIES ON A TEMPORARY DIRECTION WITH RESPECT TO CERTAIN  
18 COURSES. AND -- AND IF IT BECOMES PERMANENT, THEN WE NEED  
19 TO, I NEED TO BE, TO DOT MORE I'S AND CROSS MORE T'S IN THE  
20 PRESENTATION OF THE WRITING.

21 ALL RIGHT. NOW, LET'S TURN TO THE CASE MANAGEMENT  
22 STUFF. THE FIRST THING, OF COURSE, THAT CATCHES MY EYE,  
23 JUST LIKE MOST JUDGES EYES IS, HEY, WE MIGHT BE ABLE TO  
24 SETTLE THIS THING. AND LET ME TELL YOU JUST SO YOU DON'T  
25 UNDERSTAND, AND SARAH HAS HEARD ME SAY THIS ABOUT 400 TIMES

1 SO APOLOGIES TO HER.

2 I THINK ALMOST -- I KNOW ALMOST EVERY SINGLE CIVIL  
3 CASE I GET STARTS WITH THE SAME SPEECH AT THE FIRST CASE  
4 MANAGEMENT CONFERENCE. AND IT RUNS, THESE ARE PIECE OF IT,  
5 I'M NOT GOING TO GIVE YOU THE WHOLE SPEECH, BUT PIECES OF IT  
6 INCLUDE, UM, THIS INFORMATION.

7 WHAT PERCENTAGE DO YOU FOLKS SUPPOSE, AND YOU  
8 CAN'T HIDE BEHIND YOUR NEWSPAPERS. I'M GOING TO CALL ON  
9 YOU. WHAT PERCENTAGE OF CASES DO YOU SUPPOSE, CIVIL CASES  
10 THAT ARE FILED IN THIS COURT ANNUALLY, GO TO TRIAL?

11 I'LL ANSWER THE QUESTION FOR YOU SO YOU DON'T HAVE  
12 TO GET OUT YOUR CALCULATORS. THE ANSWER IS 1.1. 1.1  
13 PERCENT.

14 AND EVEN THOUGH THIS CASE IS OF CONSIDERABLE  
15 PHILOSOPHICAL MOMENT, IT'S NOT LIKELY THAT YOU'RE SO FAR AN  
16 OUTLIER THAT YOU'RE GOING TO BE IN THAT 1.1 PERCENT. IT MAY  
17 BE.

18 BUT I START WITH THAT TO SAY, AND, AGAIN, THIS  
19 CASE IS DIFFERENT. I ACKNOWLEDGE THAT. BUT TO SAY TO MOST  
20 CIVIL LITIGANT LAWYERS YOU'RE GOING TO SETTLE YOUR CASE.  
21 STATISTICALLY, YOU'RE GOING TO SETTLE. THE QUESTION IS  
22 WHEN, AT WHAT EXPENSE, BOTH FINANCIAL AND OTHERWISE, TO YOUR  
23 CLIENTS. SO LET'S -- LITERALLY, THIS IS THE WAY I TALK TO  
24 EVERYONE WHO I FIRST SEE IN A NEW CASE. UM, AND IN THAT  
25 SPIRIT I SAY, OKAY, OUR GOALS ARE TO GET YOU HOME IN A WAY

1 WITH -- WITH WHICH YOU FEEL RESPONSIBLY COMFORTABLE WITH AS  
2 LITTLE PAIN AS POSSIBLE. AND MOST OF THE TIME, I'M TALKING  
3 ABOUT PAIN TO THE POCKETBOOK.

4           HERE, THERE ARE OTHER KINDS OF PAINS AS WELL. FOR  
5 EXAMPLE, THEORETICALLY, AND I DON'T MEAN TO DENIGRATE IT BY  
6 SAYING THAT. DON'T FORGET, I'M A THEORETICIAN.  
7 THEORETICALLY, HARM TO THEIR FREEDOM TO EXPRESS THEMSELVES.  
8 UM, SO THERE ARE POTENTIAL HARMS TO A LOT OF THINGS IN  
9 ADDITION TO POCKETBOOKS WHICH SAY, OKAY, LET'S TRY TO KEEP  
10 THAT STUFF TO A MINIMUM.

11           THE WAY TO DO THAT IS TO, LET'S FIND THOSE FEW  
12 THINGS THAT ARE REALLY CENTRAL TO RESPONSIBLE DECISIONS  
13 ABOUT SETTLEMENT. AND IN A REGULAR OLD CASE DEPOSE THE  
14 PLAINTIFF, DEPOSE THE DOCTOR, MAYBE TWO HOURS EACH, NOT TWO  
15 DAYS. TWO HOURS. BECAUSE WHAT I DO IS I PROMISE EVERYBODY  
16 WHAT WE'RE GOING TO DO IN THE FIRST PHRASE -- WE'RE GOING TO  
17 HAVE THREE PHASES IN THIS CASE. THE FIRST PHASE IS WHAT DO  
18 WE REALLY NEED TO DO TO BE SERIOUS ABOUT SETTLEMENT  
19 CONVERSATIONS? LET'S DO THAT FIRST. IT'S CHEAP, FOCUSED  
20 AND SURGICAL.

21           THE SECOND PHASE IS TRY TO SETTLE AND YOU FOLKS  
22 ARE THE ONES TO DO THAT. AND YOU CAN DO IT WITH THE HELP OF  
23 A COURT-DESIGNATED PERSON OR SOMEONE YOU CHOOSE ON YOUR OWN.  
24 THAT IS PHASE TWO.

25           PHASE THREE WE REACH IF YOU DON'T SETTLE. TOTALLY

1 FINE. EVERYBODY HAS AN ABSOLUTE RIGHT TO GET TO TRIAL. IF  
2 YOU DON'T SETTLE, THEN IN PHASE THREE YOU GET TO DO THE  
3 DISCOVERY AND ALL THE OTHER MOTION WORK THAT YOU WOULD THAT  
4 YOU ARE ENTITLED TO DO UNDER THE FEDERAL RULES OF CIVIL  
5 PROCEDURE TO GET READY FOR TRIAL.

6 SO IN THE FIRST STAGE YOU HAVE TELESCOPED  
7 PROCEEDINGS THAT CAN INCLUDE THE DEPOSITIONS OF KEY PLAYERS.  
8 AND YOU CAN TAKE THOSE SAME PEOPLE, YOU CAN DEPOSE THOSE  
9 SAME PEOPLE AGAIN. AND IN STAGE THREE, BECAUSE I'M GOING TO  
10 PROTECT YOUR RIGHT TO DO THAT. NOW, YOU CAN'T ASK THEM THE  
11 SAME QUESTIONS AGAIN, OBVIOUSLY. BUT TO PREPARE FOR TRIAL  
12 YOU NEED TO ASK, YOU KNOW, THE PERSON WHO DID YOU SIT NEXT  
13 TO IN THE SECOND GRADE, YOU CAN JUSTIFY THAT, OKAY, YOU GET  
14 TO DO IT. AND THE WAY, THE REASON IS, I WANT TO -- I'M  
15 CLIENT ORIENTED. I WANT TO GET THESE THINGS DONE WITH AS  
16 LITTLE PAIN TO EVERYBODY AS POSSIBLE. SO THAT'S THE PITCH I  
17 MAKE EVERY TIME. UM, STRIKE THE ALMOST.

18 UM, BY THE WAY YOU KNOW WHAT SHOWS UP WHEN WE SAY  
19 STRIKE. STRIKE THE ALMOST. THAT'S -- THOSE WORDS SHOW UP.  
20 NOT -- SHE DOESN'T STRIKE IT. SHE JUST SAYS, OH, THE JUDGE  
21 THEN SAID STRIKE THE ALMOST.

22 I HAD A LAWYER THIS MORNING DO THAT THINKING THAT  
23 HE WAS -- THAT THE RECORD WAS NOT GOING TO REFLECT WHAT HE'D  
24 SAID A FEW MINUTES AGO. SORRY, PAL.

25 SHE'S GOING TO WHOLLY DUTY TO THE RECORD. IT'S

1 EVERY WORD THAT COMES OUT OF HERE, MUCH TO MY CHAGRIN  
2 SOMETIMES. UM, ANY WAY, I DON'T HONESTLY KNOW WHETHER  
3 THERE'S A LOT OF DISCOVERY YOU FOLKS NEED TO DO. THERE'S A  
4 FAIR AMOUNT OF PARTICIPATION IN THE PROCESS, UM, THAT  
5 VARIOUS PLAYERS HAD. AND THE PROCESS ISN'T THAT OLD,  
6 STARTING, I GUESS, LAST OCTOBER OR SO.

7 THE -- I'VE FORGOTTEN HIS TITLE, BUT THE FELLOW  
8 WHO DECIDED, OKAY, WE'RE NOT GOING TO DO THIS INFORMALLY.  
9 IT'S GOING TO GO OVER TO THE FORMAL PROCESS. THAT FELLOW'S  
10 THOUGHTS MIGHT BE OF SOME CONSEQUENCE TO THE APPLIED PART OF  
11 THE CASE. IT IS OF NO CONSEQUENCE.

12 WELL, ACTUALLY, THAT'S WRONG. IT IS OF  
13 CONSEQUENCE TO THE OVERBREADTH AND VAGUENESS PART OF THE  
14 CASE BECAUSE HE PASSED ALONG, AS WITHIN THE SCOPE OF  
15 PUNISHABLE CONDUCT, THE NOTION THAT THE PLAINTIFFS WERE  
16 UNCIVIL. HE READ HIS OWN UNIVERSITIES' RULES AS PERMITTING  
17 PUNISHMENT FOR UNCIVIL CONDUCT. THAT CAN'T APPLY.

18 SO TO THAT EXTENT HIS ACTIONS REFLECT WHAT IS  
19 PRESUMABLY SOMEONE'S REASONABLE VIEWS, A KNOWLEDGABLE  
20 PERSON'S REASONABLE VIEW OF HOW TO READ THE SCOPE OF THESE  
21 STANDARDS AND REQUIREMENTS.

22 BUT, ANY WAY, I'M HAPPY TO PERMIT YOU, IF YOU CAN  
23 AGREE, TO DO SOME LIMITED DISCOVERY. AND I'M HAPPIER TO  
24 FIND A NEUTRAL FOR YOU. AND I SAY THAT -- LET ME EXPLAIN  
25 WHAT THAT MEANS.

1           UM, THE COURT HAS A VERY ACTIVE ADR PROGRAM, WHICH  
2 YOU MIGHT KNOW ABOUT. IT INCLUDES A WHOLE BUNCH OF VERY  
3 EXPERIENCED, WELL TRAINED, BY US, IN ADDITION TO OTHER  
4 PEOPLE, BUT NOBODY IS IN OUR PROGRAM UNLESS THEY'RE TRAINED  
5 BY US.

6           ANY WAY, A WHOLE BUNCH OF SENIOR, GOOD MEDIATORS  
7 SO WE CAN PROVIDE ONE. AND THE WAY THAT THE RULE OPERATES,  
8 IN CASE YOU DON'T KNOW THIS, IS THEY HAVE TO PREPARE, FOR  
9 FREE, THEY HAVE TO CONDUCT A PRE-MEDIATION PHONE CONFERENCE  
10 WITH YOU FOLKS FOR FREE, IN WHICH YOU MAKE SURE YOU'RE ON  
11 THE SAME PAGE, WHO IS GOING TO BE THERE, WHAT DOES THE  
12 PROCESS LOOK LIKE, DO WE NEED TO MASSAGE IT A LITTLE THIS  
13 WAY OR THAT AWAY. TIMING, THOSE KINDS OF THINGS. FREE.

14           FIRST FOUR HOURS OF SESSION, FREE. AFTER THAT  
15 CHARGING ONLY AT THE COURT'S RATE, I'VE FORGOTTEN WHAT IT  
16 IS -- ABOUT TWO HUNDRED BUCKS AN HOUR. ONLY AT THAT RATE.  
17 ONLY IF EVERYBODY AGREES. AND, FRANKLY, MOST OF OUR  
18 NEUTRALS SAY, I WANT TO DO THIS. IT'S A MATTER OF PUBLIC  
19 SERVICE. I'M NOT GOING TO EVEN RAISE THE ISSUE OF CHARGING.

20           SO OUR PROGRAM PROVIDES THAT BECAUSE WE WANT TO BE  
21 AN INSTITUTION THAT IS RELEVANT TO YOUR LIVES. AND SINCE  
22 1.1 PERCENT GO TO TRIAL, WE'RE NOT VERY RELEVANT TO VERY  
23 MANY LITIGATION LIVES IF WE DON'T HELP IN THE ARENA WHERE  
24 MOST OF THE ACTION IS.

25           SO, ANY WAY, YOU CAN DO THAT. OR, OF COURSE, YOU

1 CAN GO AND PICK YOUR OWN NEUTRAL. UM, AND I'M NOT GOING TO  
2 REQUIRE YOU JUST SO IT'S CLEAR. I'M NOT GOING TO REQUIRE  
3 YOU TO DO ANYTHING IN THIS ARENA. I HOPE YOU WILL. AND I'M  
4 TAKING A CLUE FROM YOUR CASE MANAGEMENT STATEMENT THAT  
5 YOU'RE INTERESTED AT LEAST IN EXPLORING THIS POSSIBILITY.

6 SO THAT LONG WINDED STUFF, HOW MUCH TIME DO YOU  
7 NEED TO DO ROUGHLY WHAT BEFORE YOU MIGHT BE ABLE TO ENGAGE  
8 IN -- IN CONSTRUCTIVE, AND THAT DOES NOT MEAN SUCCESSFUL IN  
9 THE SENSE OF GETTING IT ALL DONE -- BUT CONSTRUCTIVE  
10 SETTLEMENT NEGOTIATIONS?

11 MS. GUNN: I BELIEVE WE HAD STATED THAT WE WOULD  
12 NEED APPROXIMATELY 90 DAYS FROM TODAY'S DATE, THE DATE OF  
13 THIS HEARING, OR AND/OR THE RULING TO GO AHEAD AND ENGAGE IN  
14 MEDIATION.

15 THE COURT: THE RULING IS ORALLY GIVEN SO THE 90  
16 DAYS CAN START NOW. YOU'RE GOING TO SEE A LITTLE BIT OF  
17 VERBAGE ABOUT THIS BUT NOWHERE NEAR AS MUCH FRANKLY AS YOU  
18 HEARD TODAY.

19 MR. HACKER: YEAH. I THINK THAT WOULD BE  
20 PERFECTLY FINE. I KNOW THAT THE UNIVERSITY DOES CLOSE DOWN  
21 A BIT DURING THE HOLIDAY SEASON. BUT I THINK WE CAN WORK  
22 AROUND THAT WITH THE RELEVANT PEOPLE.

23 THE COURT: OKAY. ALL RIGHT.

24 UM, AND DO YOU THINK YOU GUYS CAN AGREE ON, AND IF  
25 YOU DO AGREE, I DON'T NEED TO BE INVOLVED. I DON'T WANT TO

1 BE INVOLVED. IF YOU CAN AGREE ON SOME DISCOVERY OR SOME  
2 INFORMATION EXCHANGE OR SOMETHING IN ADVANCE OF THAT  
3 MEDIATION, GREAT. AND I'LL JUST LET YOU DO IT. IF YOU  
4 CAN'T AGREE, THEN YOU NEED TO TELL ME WHAT YOU'RE FIGHTING  
5 ABOUT AND I'LL RESOLVE WHATEVER YOUR DISPUTE IS.

6 LET ME MAKE THIS SUGGESTION. LET ME SUGGEST THAT  
7 YOU TRY TO AGREE AND THEN YOU CALL SARAH WEINSTEIN. SHE IS  
8 MY LAW CLERK HERE. YOU CALL SARAH IF YOU GET INTO A DISPUTE  
9 ABOUT WHAT IS APPROPRIATE TO DO DURING THIS 90 DAYS, AND  
10 I'LL GET ON THE PHONE WITH YOU AND TRY TO FIGURE OUT THE  
11 ANSWER THE LAW PROVIDES.

12 AND IF I CAN'T DO IT THAT WAY ORALLY, THEN I'LL  
13 LET YOU DO SOME WRITING AND STUFF, BUT I WANT TO KEEP YOUR  
14 WRITING TO A MINIMUM.

15 UM, SO LET'S GIVE YOU 90 DAYS TO DO THAT. SO  
16 THAT'S NOVEMBER, DECEMBER, JANUARY. SO WE NEED TO SET A  
17 FOLLOWUP DATE FOR A CASE MANAGEMENT CONFERENCE AT THE END  
18 OF -- ACTUALLY I'M -- I REALIZED THAT I'M UNCLEAR ABOUT  
19 SOMETHING.

20 DO YOU WANT 90 DAYS TO DO EVERYTHING AND THEN  
21 MEDIATE OR DO YOU WANT TO HAVE THE MEDIATION AND LET'S SAY  
22 JANUARY, BECAUSE 90 DAYS IS THE END OF JANUARY.

23 MS. GUNN: I THINK, UM, GIVEN THE HOLIDAYS THAT  
24 ARE COMING UP IF WE COULD HAVE THE 90 DAYS TO CONDUCT  
25 WHATEVER DISCOVERY THAT MIGHT NEED TO BE CONDUCTED, AND THEN

1 DO MEDIATION.

2 THE COURT: OKAY. SO MEDIATION IN FEBRUARY?

3 MS. GUNN: YES.

4 THE COURT: OKAY. THAT'S FINE.

5 NOW, DO YOU WANT TO USE A COURT-SUPPLIED MEDIATOR?  
6 AND THE WAY THIS WORKS, BY THE WAY, IS THAT I WOULD -- SARAH  
7 ACTUALLY WOULD SEND A NOTE OVER TO THE ADR ADMINISTRATORS  
8 AND SAY WE HAVE THIS INTERESTING CHALLENGING FIRST AMENDMENT  
9 CASE. PLEASE, PEOPLE WHO RUN OUR PROGRAM, FIND SOMEONE WHO  
10 IS QUALIFIED IN THIS ARENA WHO IS IN OUR POOL. ANY WAY,  
11 THAT IS OPTION ONE.

12 OPTION TWO IS FOR YOU GUYS TO GO OUT AND FIND YOUR  
13 OWN MEDIATOR.

14 WHICH DO YOU PREFER?

15 MS. GUNN: I PREFER -- I'LL NEED TO CONFER WITH MY  
16 CLIENT. I'M NOT ADVERSE TO IT BUT I JUST NEED TO CHECK TO  
17 MAKE SURE. I THINK.

18 THE COURT: WHY DON'T YOU SEND ME A NOTE NO LATER  
19 THAN LIKE NEXT TUESDAY THAT SAYS, YOU KNOW, WE'LL EITHER --  
20 MAYBE YOU CAN DO IT JOINTLY OR YOU CAN SAY THE UNIVERSITY  
21 CAN SAY IN ITS NOTE WE'VE CONFERRED AND WE AGREE THAT X THE  
22 MOST APPROPRIATE WAY TO PROCEED. AND I DON'T CARE WHAT YOUR  
23 ANSWER IS OBVIOUSLY. AND YOU DON'T -- YOU DO NOT NEED TO  
24 IDENTIFY FOR ME IF YOU DECIDE TO PICK YOUR OWN MEDIATOR, YOU  
25 DON'T NEED TO IDENTIFY THAT PERSON. YOU JUST NEED TO SAY

1 WE'RE GOING TO FIND OUR OWN AND WE PROMISE WE'LL HAVE OUR  
2 MEDIATION BY NO LATER THAN FEBRUARY 28, OKAY.

3 IF YOU WANT A COURT-APPOINTED MEDIATOR, THEN,  
4 OBVIOUSLY, TELL ME THAT, AND I'LL START THE PROCESS PRONTO  
5 TO GET SOMEONE IN TOUCH WITH YOU. OKAY.

6 ALL RIGHT. SO LET'S HAVE A FOLLOW UP. I'M GOING  
7 TO BE IN BRAZIL, RATHER THAN JUST BEING BRAZIL, IN THE WEEK  
8 OF MARCH THE FIFTH, SO HOW ABOUT WEDNESDAY -- OOPS, WAIT A  
9 MINUTE. I GOT THE WRONG CALENDAR. I SAID FEBRUARY 28.  
10 THAT'S WRONG FOR NEXT YEAR. IT'S FEBRUARY 29 BECAUSE WE  
11 HAVE A LEAP YEAR COMING UP.

12 SO MARCH, HOW ABOUT WEDNESDAY, MARCH 12 WE HAVE A  
13 CASE MANAGEMENT CONFERENCE. AND THE PURPOSE OF THAT  
14 CONFERENCE, OBVIOUSLY, WILL BE TO FIGURE OUT WHAT TO DO  
15 NEXT. IT MIGHT BE SOME MOTION ACTIVITY. IT MIGHT BE SIMPLY  
16 PICKING DATES TO CONCLUDE DISCOVERY AND FOR TRIAL AND ALL  
17 THAT STUFF.

18 I SHOULD REASSURE YOU, BY THE WAY, ONE OF THE FEW  
19 ADVANTAGES TO AGREEING TO MAGISTRATE JUDGE JURISDICTION IS  
20 THAT I CAN GIVE YOU A TRIAL DATE WITHIN TWO MONTHS, ALMOST  
21 ALWAYS. A DISTRICT JUDGE, OF COURSE, COULD NEVER DO THAT.  
22 BUT I HAVE -- I HAVE A SORT OF STRANGE CALENDAR AND IT'S  
23 ONLY ME BECAUSE I'M THE ONLY ONE WHO SITS AT MY LEVEL HERE  
24 IN OAKLAND. BUT EVERY SINGLE DAY I HAVE A CRIMINAL CALENDAR  
25 IN THE MORNING AND I DO MY CIVIL STUFF IN THE AFTERNOON.



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COURT REPORTER'S CERTIFICATE

I, STARR A. WILSON, CSR NO. 2462, UNITED STATES  
DISTRICT COURT, NORTHERN DISTRICT OF CALIFORNIA, DO HEREBY  
CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPT FROM THE  
RECORD OF PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.

I CERTIFY THAT THE TRANSCRIPT FEES AND FORMAT  
COMPLY WITH THOSE PRESCRIBED BY THE COURT AND JUDICIAL  
CONFERENCE OF THE UNITED STATES.

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STARR A. WILSON, CSR NO. 2462