UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

DAVID ISAAC HAWS,

Plaintiff,

v.

CIVIL ACTION NO. 2:07-0448
(Judge Copenhaver)

WEST VIRGINIA HIGHER EDUCATION POLICY COMMISSION; PROMISE SCHOLARSHIP BOARD; KAY GOODWIN, in her individual and official capacity as Cabinet Secretary for Education and the Arts and Chair of the Promise Scholarship Board; JACK TONEY, in his individual and official capacity as Executive Director of the Promise Scholarship Program,

Defendants.

BRIEF OF THE UNITED STATES AS *AMICUS CURIAE* IN SUPPORT OF THE PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

The controversy in this case stems from the Defendants' refusal to defer a PROMISE scholarship awarded to the plaintiff, David Haws, while he completed a religious mission. The Defendants' policy for scholarship deferment is subject to heightened scrutiny under the Free Exercise Clause because it permits deferments for various enumerated nonreligious leaves of absence, and has a process in place for permitting additional deferments on a discretionary basis. As such, the Defendants' refusal to grant a deferment for plaintiff's religious mission has the effect of "devalu[ing] religious reasons for [leaves of absence] by judging them to be of lesser import than nonreligious reasons." Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 538 (1993).

The United States submits this brief to address the merits of the underlying claims in the motion for preliminary injunction and discrete jurisdictional issues raised in the motion to

dismiss. The other requirements for preliminary injunctive relief are sufficiently addressed by the parties.

STATEMENT OF INTEREST

Given its statutory mandate to prevent discrimination on the basis of religion in public education, 42 U.S.C. § 2000c-6(a)(2), the United States has a strong interest in ensuring that students are not treated unequally because of their religious practices. See, e.g., O.T. v. Frenchtown Elem. Sch. Dist. Bd. of Educ., 465 F. Supp. 2d 369 (D.N.J. 2006) (permitting United States to participate as amicus curiae in a case challenging a school's censorship of a student's religious song at an after-school talent show); Scheidt v. Tri-Creek Sch. Corp., No. 2:05-CV-204 (N.D. Ind. 2005) (permitting United States to participate as amicus curiae in a case challenging a school policy that punished students for missing more than one school day to attend religious services); Hearn v. Muskogee Pub. Sch. Dist. 020, C.A. No. CIV 03-598-S (E.D. Okla. 2004) (permitting United States to intervene where Muslim student was barred from wearing a headscarf to school); Westfield High School L.I.F.E. Club v. City of Westfield, 249 F. Supp. 2d 98, 101 (D. Mass. 2003) (permitting United States to participate as amicus curiae in case where students were suspended for distributing candy canes with religious messages attached). This case implicates this interest in preventing discrimination in public education because the defendants' PROMISE scholarship policy allows students to defer their scholarship for nonreligious reasons, yet prohibits deferment for religious reasons.

MATERIAL FACTS

David Haws is a devout member of the Church of Jesus Christ of Latter-Day Saints ("Mormon Church"). (See Compl. ¶ 9.) Since childhood, David felt called to serve as a church missionary, as his father and older brother did before him. (Id.; Mot. for Prelim. Inj. at 2.) The

Mormon Church "strongly encourages" all young men to serve--and fund--such missions when they turn 19 years old. (Compl. ¶ 9.) David saved $10,000 to pay for his own mission. (Id. ¶ 14.)

David is also an extraordinary student, graduating as valedictorian of Bridgeport High School with a 4.0 grade point average. (Id. ¶¶ 6-7.) His academic accomplishments earned him a PROMISE scholarship,[1] an award granted by a state-run "program designed to keep qualified students in West Virginia by making college affordable." (Id. ¶ 7); West Virginia PROMISE Scholarship Program, http://www.promisescholarships.org/promise/home.aspx (last visited Aug. 16, 2007). The scholarship covers virtually the entire cost of tuition and fees at West Virginia University ("WVU"), where David enrolled after his high school graduation in 2004.[2] (Id. ¶ 8.)

During the spring semester of his freshman year at WVU, David turned 19 years old. (Id. ¶ 10.) Thereafter, in obedience to his religious beliefs, he planned to leave school temporarily to serve a two-year mission, starting the following summer.[3] (Id. ¶ 10 & Ex. A.) In March 2005, David requested a deferment of his PROMISE scholarship until after he returned from his mission. (Id.) Dr. Lisa DeFrank-Cole, executive director of the PROMISE scholarship, denied the request "based on the presumption that missionary work would constitute a personal leave-

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[1] "PROMISE" is an acronym for "**P**roviding **R**eal **O**pportunities for **M**aximizing **I**n-state **S**tudent **E**xcellence." PROMISE scholars receive $4,098 per year toward tuition and fees at public and private colleges and universities in West Virginia. See PROMISE Scholarship General Information, http://www.promisescholarships.org/promise/information.aspx (last visited Aug. 16, 2007).

[2] For the 2007-08 school year, in-state tuition and fees at WVU total $4,722. West Virginia University, Cost of Attendance, http://www.arc.wvu.edu/admissions/costs.html (last visited Aug. 16, 2007).

[3] David served as a missionary in Nevada and Northern California from August 2005 until August 2007. (Compl. ¶ 15.)

of-absence." (Id. at Ex. B.) David subsequently appealed to the PROMISE Board of Control ("Board"), which affirmed Dr. DeFrank-Cole's decision in August 2005. (Id. at Ex. E.)

In reaching their decisions, Dr. DeFrank-Cole and the Board relied on PROMISE Board of Control Policy #9 ("Policy #9"), which permits scholarship deferment for the following reasons: (1) personal medical leave[4]; (2) family medical leave and bereavement; (3) voluntary military service; and (4) "other unforeseen leave." (See id. at Ex. C.) With respect to the final category, Policy #9 vests the PROMISE scholarship director with discretionary authority to approve "any other unforeseen leave possibility that cannot be put into the policy at this time." (Id.) Policy #9 otherwise indicates that "[t]he PROMISE Board does not wish to grant personal leaves of absence for any reason." (Id.)

In January 2007, David again requested deferment of his scholarship, but was again denied. (Id. at Ex. F & G.) Consequently, in anticipation of his return to WVU in August 2007, David filed a complaint and motion for preliminary injunction on July 19, 2007.

ARGUMENT

The Defendants' policy for PROMISE scholarship deferments is subject to heightened scrutiny under the Free Exercise Clause of the First Amendment because it permits leaves of absence for various enumerated secular reasons and has in place a system for providing additional case-by-case exemptions. Since the Defendants have not posited a compelling, narrowly tailored justification for its denial of David's request for a religion-based leave of

[4] According to the personal medical leave exemption, the PROMISE scholarship program permits deferments based on medical leaves of absence granted by "the institution in which s/he is enrolled." (Compl. at Ex. C.) The institutions apparently are not given any guidelines for making such decisions. By contrast, the other exemptions of Policy #9 either expressly or implicitly require scholarship recipients to directly request deferments from the program director. (Id.)

absence, their actions violate the Free Exercise Clause. Additionally, under federal law, the case should not be dismissed at least as to claims for injunctive relief against Mrs. Goodwin and Mr. Toney in their official capacities.

A. The Case Must Proceed Against Defendants Goodwin and Toney in Their Official Capacities

1. Under Ex Parte Young, the Plaintiff Can Seek Reinstatement of His Scholarship

The Defendants maintain that the complaint should be dismissed against Mrs. Goodwin and Mr. Toney in their official capacities because those defendants are not "persons" under 42 U.S.C. § 1983. The Defendants do not elaborate, but the United States assumes that the basis of this contention is an assertion of state sovereign immunity under the Eleventh Amendment.[5] "State officers acting in their official capacity are . . . entitled to Eleventh Amendment protection, because 'a suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official's office.'" Lytle v. Griffith, 240 F.3d 404, 408 (4th Cir. 2001) (quoting Will v. Mich. Dept. of State Police, 491 U.S. 58, 71 (1989)).

In this case, however, Mrs. Goodwin and Mr. Toney are proper defendants under the "well-recognized exception" to Eleventh Amendment immunity introduced by Ex Parte Young, 209 U.S. 123 (1908), "which allows suits against state officers for prospective equitable relief from ongoing violations of federal law." Lytle, 240 F.3d at 408. At least insofar as David seeks reinstatement of his PROMISE scholarship, he requests prospective equitable relief from the

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[5] According to the Eleventh Amendment to the Constitution, "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State . . . ." As interpreted by the Supreme Court, the Eleventh Amendment "does not provide for federal jurisdiction over suits against nonconsenting States." Nev. Dep't of Human Resources, v. Hibbs, 538 U.S. 721, 726 (2003) (citations omitted).

defendant officials. Thus, Mrs. Goodwin and Mr. Toney may be sued as "persons" under § 1983. E.g., Will, 491 U.S. at 71 n.10 ("Of course a state official in his or her official capacity, when sued for injunctive relief, would be a person under § 1983 because official-capacity actions for prospective relief are not treated as actions against the State.") (citing Ex Parte Young) (quotation omitted).

2. State Law Does Not–And Cannot–Thwart Federal Jurisdiction Under § 1983

The Defendants incorrectly assert that the complaint should be dismissed because David failed to provide pre-suit notice pursuant to West Virginia Code section 55-17-3(a).[6] This statute requires that, "at least thirty days prior to the institution of an action against a government agency, the complaining party or parties must provide the chief officer of the government agency and the attorney general written notice, by certified mail, return receipt requested, of the alleged claim and the relief desired." W. Va. Code § 55-17-3(a). The West Virginia Supreme Court of Appeals recently held that compliance with § 55-17-3(a) is a jurisdictional prerequisite for lawsuits against government agencies and officials in state courts. Motto v. CSX Transp., Inc., No. 33205, 2007 WL 1526995 (W. Va. May 24, 2007).

However, the pre-suit notice requirement does not apply to § 1983 actions in federal courts as a matter of straightforward statutory construction and well-established federal law. Accord Cunningham v. West Virginia, No. 6:06-cv-00169, 2007 WL 895866 (S.D. W. Va. Mar. 22, 2007) (Goodwin, J.) (adopting report and recommendation of Stanley, M.J.). First, West Virginia Code section 55-17-3(a) is expressly limited to suits filed in state courts. W. Va. Code

[6] Although Defendants imply that § 55-17-3(a) applies only to the Board and the Commission, the definition of "government agency" also encompasses any "constitutional officer or other public official named as a defendant . . . in his or her official capacity." Id. § 55-17-2(2).

§ 55-17-2(1) (defining the term "action" as "a proceeding instituted against a governmental agency in a circuit court or in the supreme court of appeals"). Second, in accordance with the Supremacy Clause of Article VI of the Constitution and Supreme Court precedent, state law cannot impose a jurisdictional bar to filing a § 1983 action in federal court. See, e.g., Patsy v. Board of Regents of State of Fla., 457 U.S. 496, 516 (1982) (reaffirming that exhaustion of state administrative remedies cannot be "required as a prerequisite to bringing an action pursuant to § 1983"); Cunningham, 2007 WL 895866, at * 5 ("A state legislature has no authority to determine whether or how an action may proceed under federal law.").

As the Defendants observe, this Court recently dismissed a lawsuit because of a plaintiff's failure to comply with the pre-suit notice provisions of § 55-17-3(a). Petersen v. W. Va. Univ. Bd. of Governors, No. 2:06-cv-0664, 2007 WL 2220192 (S.D. W. Va. July 31, 2007) (Copenhaver, J.). However, a review of Petersen reveals that the parties in that case never raised the issue of the applicability of the pre-suit notice requirement to federal jurisdiction. Id. at *2. As discussed above, had the issue been properly raised, the conclusion that § 55-17-3(a) cannot impede plaintiffs seeking relief in federal court pursuant to § 1983 would have been inescapable.

B. The Defendants' Policy for Scholarship Deferment Violates the Free Exercise Clause Because It Accommodates Nonreligious Deferment Requests But Not Comparable Religious Deferment Requests

1. Standard of Law

The First Amendment's Free Exercise Clause, made applicable to the States by incorporation through the Fourteenth Amendment, Cantwell v. Connecticut, 310 U.S. 296, 303 (1940), provides that "Congress shall make no law . . . prohibiting the free exercise [of religion]." U.S. Const. amend. I. "The free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires." Employment Div. v. Smith,

494 U.S. 872, 877 (1990). "But the 'exercise of religion' often involves not only belief and profession but the performance of . . . physical acts." Id.

The level of judicial scrutiny applied to a Free Exercise claim depends on the nature of the challenged governmental act. A neutral and generally applicable policy need only be rationally related to a legitimate governmental objective to pass constitutional muster. Smith, 494 U.S. at 878-79; Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 531 (1993). If, however, a policy is not neutral and generally applicable, the defendant must show that the policy "advance[s] interests of the highest order" and "is narrowly tailored in pursuit of those interests." Lukumi, 508 U.S. at 546 (citing Smith, 494 U.S. at 888; Wisconsin v. Yoder, 406 U.S. 205, 215 (1972)).

"A [policy] is [not] 'neutral' if it . . . target[s] religiously motivated conduct either on its face or as applied in practice." Blackhawk v. Pennsylvania, 381 F.3d 202, 209 (3d Cir. 2004) (Alito, J.) (citing Lukumi, 508 U.S. at 533-40; Tenafly Eruv Ass'n, Inc. v. Borough of Tenafly, 309 F.3d 144, 167 (3d Cir. 2002)).

A policy is not "generally applicable" if it includes a system of "individualized exemptions." Smith, 494 U.S. at 884. Such a system exists where government officials permit exemptions to an applicable policy based upon a case-by-case "assessment of the reasons for the relevant conduct" and the "particular circumstances" involved. Id.; see also Axson-Flynn v. Johnson, 356 F.3d 1277, 1297 (10th Cir. 2004) ("[A] system of individualized exemptions . . . gives rise to the application of a subjective test.") (quotation and alteration omitted).

Smith derived the "individualized exemptions" exception from Sherbert v. Verner, 374

U.S. 398 (1963),[7] and later Supreme Court cases applying Sherbert. See Smith, 494 U.S. at 884. In Sherbert, the Court held that a state could not constitutionally deny unemployment benefits to a member of the Seventh-day Adventist Church who was discharged from her job as a mill worker and could not find equivalent work because her religious convictions prevented her from working on Saturdays. The Court explained that, because the statute's distribution of benefits permitted individualized exemptions based on "good cause," the state's refusal to consider the plaintiff's religious reasons for not working on Saturdays as good cause violated the Free Exercise Clause. Sherbert, 374 U.S. at 401, 405-07. Accordingly, "in circumstances in which individualized exemptions from a general requirement are available, the government may not refuse to extend that system to cases of religious hardship without compelling reason." Lukumi, 508 U.S. at 537 (internal quotation marks omitted); see also Smith, 494 U.S. at 884. Cf. Sts. Constantine & Helen Greek Orthodox Church, Inc. v. City of New Berlin, 396 F.3d 895, 897 (7th Cir. 2005) (noting that Sherbert's individualized assessment doctrine continues to apply after Smith, and that Congress's codification of that doctrine in the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc, therefore was an "uncontroversial use" of Congress' power under Section 5 of the Fourteenth Amendment).

Moreover, as the Third Circuit has observed, a system of categorical exemptions for enumerated secular reasons can violate Smith's requirement of general applicability. Fraternal

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[7] Under Sherbert and its progeny, the Supreme Court judged free exercise claims by analyzing "whether government has placed a substantial burden on the observation of a central religious belief or practice and, if so, whether a compelling governmental interest justifies the burden." Hernandez v. Comm'r, 490 U.S. 680, 699 (1989); see Sherbert, 374 U.S. at 402-03; Smith, 494 U.S. at 883. The Smith Court did not overrule Sherbert, but noted that cases in which plaintiffs had been successful had all been unemployment cases. See Smith, 494 U.S. at 883 ("We have never invalidated any governmental action on the basis of the Sherbert test except the denial of unemployment compensation.").

Order of Police Newark Lodge No. 12 v. City of Newark, 170 F.3d 359, 365 (3d Cir. 1999) (Alito, J.); Blackhawk, 381 F.3d at 209. In Fraternal Order of Police, the Newark Police Department maintained a policy that required all officers to shave their beards unless they had a medical reason for growing facial hair. 170 F.3d at 360-61. The department, however, denied an exemption to two Muslim officers who believed they had a religious obligation to grow a beard. Id. at 361. Because the department made "exemptions from its policy for secular reasons and [did] not offer[] any substantial justification for refusing to provide similar treatment for officers who are required to wear beards for religious reasons," the court concluded that the policy violated the Free Exercise Clause. Id. at 360; see also Lukumi, 508 U.S. at 542 ("All laws are selective to some extent, but categories of selection are of paramount concern when a law has the incidental effect of burdening a religious practice.") (emphasis added); Blackhawk, 381 F.3d at 211 (holding that a wildlife captivity permit fee statute was not generally applicable because it contained secular exemptions for zoos and circuses that "undermine[d] the interests served by the fee provision to at least the same degree as would" the religious exemption requested by a Native American**)**; Rader v. Johnston, 924 F. Supp. 1540 (D. Neb. 1996) (university rule requiring freshman to live on campus was not generally applicable under Smith and Lukumi, since rule provided for individualized hardship exemptions and categorical exemptions for commuters, married students, and students older than 19 years old).

As to either individualized or categorical exemptions, the general applicability rule underscores "[t]he principle that government, in pursuit of legitimate interests, cannot in a selective manner impose burdens only on conduct motivated by religious belief." Lukumi, 508 U.S. at 543. Accordingly, categorical exemptions are particularly suspect to the extent that they codify inequitable burdens on religion, which, if made on an individualized basis, would be

patently unconstitutional. See Fraternal Order of Police, 170 F.3d at 365; Grace United Methodist Church v. City of Cheyenne, 451 F.3d 643, 654 (10th Cir. 2006).

2. Policy #9 Is Not Generally Applicable

The PROMISE scholarship deferment policy is not generally applicable because it creates exemptions for various secular reasons, but not for analogous religious conduct. Policy #9 allows students to defer their scholarship for personal and family medical leave, bereavement, and voluntary military service. The policy also allows deferments for "unforeseen leave" at the discretion of the scholarship executive director, which is a paradigmatic individualized exception.

The Defendants contend that Policy #9 is generally applicable because it applies to only "emergent and exigent" circumstances. This argument is unavailing, however. With respect to military service, for example, this interpretation is undermined by the unambiguous language of the policy. According to paragraph D of Policy #9, "[a] student may defer his/her scholarship for up to seven years if entering military service. If a student is called to duty while attending college, the PROMISE scholarship will be put on hold during that time." (emphasis added). Therefore, this provision clearly applies not only to students who are called to duty during the school year, but also students who voluntarily enlist in the military full-time--irrespective of when they receive a scholarship award or start college.[8] Furthermore, the medical leave provision of Policy #9 presumably would allow scholarship deferments in circumstances that are not necessarily emergent or unforeseen, such as elective surgery. Cf. Fraternal Order of Police,

[8] In the context of scholarship deferment eligibility, military service is reasonably comparable to religious missions. Generally, both pursuits are inspired by a noble calling or a sense of duty. Both require personal sacrifice and a dedication to service. And, with some obvious exceptions, both are voluntary activities.

170 F.3d at 367 ("We are at a loss to understand why religious exemptions [to the "no facial hair" requirement] threaten important city interests but medical exemptions do not."). In granting such deferments, the Defendants ratify schools' discretionary decisions to approve medical leaves of absence. Thus, by selectively allowing scholarship deferments for non-emergent and foreseeable activities while refusing a deferment for a religious mission, the Defendants made a "'value judgment in favor of secular motivations, but not religious motivations.'" Grace United Methodist Church, 451 F.3d at 654 (quoting Fraternal Order of Police, 170 F.3d at 365); see also Lukumi, 508 U.S. at 537.

Policy #9 also violates the principle of general applicability insofar as it establishes a system of individualized exemptions by permitting discretionary deferments to accommodate "unforeseen leave possibilities." In paragraph E, Policy #9 states that "[i]f there is any other unforeseen leave possibility that cannot be put into policy at this time, the [PROMISE scholarship program] director, at her discretion, . . . has the authority to approve in conjunction with the college or university." On its face, this provision offers the PROMISE scholarship program director broad discretion in making case-by-case assessments for deferments. Moreover, the discretion vested in the director is particularly vague because (1) it fails to define "unforeseen" (e.g., whether the term means "generally unanticipated" in a particular case or "not considered at the time of the policy's adoption"), and (2) it fails to identify the personal reference for an unforeseen leave possibility (i.e., whether the leave possibility must be unforeseen to the Board or the scholarship recipient). Without evidentiary support, the Defendants simply assert that "unforeseen leave possibilities" denote "emergency-type situations, over which the [scholarship] recipient has no control." (Defs' Memo. in Opp. to Mot. for Prelim. Inj. at 19.) The language of the unforeseen leave provision, however, does not offer

any objective standard and potentially creates room for substantial discretion and subjective judgment. As with the "good cause" determination in Sherbert, such a subjective policy would constitute a system of individualized exemptions that the Free Exercise Clause requires to be extended to religious conduct absent a compelling reason.

The Defendants emphasize that the Mormon church did not specifically require David to serve a two-year mission once he turned 19 years old. But there is no requirement under the Free Exercise Clause that conduct be unequivocally mandated in order to be protected. See, e.g., Sherbert, 374 U.S. at 406 n.6 & 405 (noting that the relevant inquiry for substantial burden on religious exercise is whether government action had a "tendency to inhibit constitutionally protected activity"); Thomas v. Review Bd. of Ind. Employment Security Div., 450 U.S. 707, 717-18 (1981) (finding substantial burden on religious exercise where denial of benefits "condition[ed] receipt of an important benefit" on the restraint of his religious practice because while the government "compulsion may be indirect, the infringement upon free exercise is nonetheless substantial."); Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, 450 (1988) (substantial burden exists where government's policy has "a tendency to coerce individuals into acting contrary to their religious beliefs.") (emphasis added). The complaint and accompanying exhibits demonstrate that David sincerely believed that he had a religious duty to complete a mission as soon as he turned 19 years old.[9] (E.g., Compl. Ex. D ("[Serving a two-year mission] is part of my religion and I have had this desire to serve people since I was a small child. This is not a passing fancy nor can I change the timing of this experience."); see

[9] Although the Defendants can challenge the sincerity of David's beliefs, questioning the truth of his beliefs is constitutionally forbidden. United States v. Ballard, 322 U.S. 78 (1944). "Men may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs. Religious experiences which are as real as life to some may be incomprehensible to others." Id. at 86.

also id. ¶¶ 9, 10, 14, Ex. A); see Smith, 494 U.S. at 887. He has therefore demonstrated that his religious exercise would be burdened by the deferment denial.

3. The Defendants' Rationale for Its Application of Policy #9 Fails Strict Scrutiny

Because Policy #9 makes exemptions that do not equitably accommodate religious conduct, it must survive strict scrutiny. See Lukumi, 508 U.S. at 546. Thus, the policy must be narrowly tailored to further a compelling governmental interest. Id. Here, the Defendants have not provided any compelling interest for refusing to defer scholarship awards to students engaging in religious missions. They proffer only one interest to justify their decision in this case: "the even-handed administration of the PROMISE scholarship program." (Defs' Memo. in Opp. to Mot. for Prelim. Inj. at 18.) They argue that "[t]here are no exceptions recognized in [Policy #9] that would have permitted any other scholarship recipient to take a leave of absence for any secular purpose to do anything equivalent or similar to the Plaintiff's missionary work," such as volunteer or community service. Id. As discussed above, however, the policy's exemptions for voluntary military service and medical leave belie this assertion and preclude genuinely "even-handed administration" of scholarship deferments. See Lukumi, 508 U.S. at 547 ("[A] law cannot be regarded as protecting an interest 'of the highest order' . . . when it leaves appreciable damage to that supposedly vital interest unprohibited.") (quotation and citations omitted).

To the extent that the Defendants refuse deferments for religious missions to avoid abuse or fraud, this interest is not compelling because the nonreligious scholarship deferments can be similarly abused. See Lukumi, 508 U.S. at 547. But even if this interest were compelling, Policy #9 is "not drawn in narrow terms to accomplish [that] interest." Lukumi, 508 U.S. at 546.

Any concern about fraudulent requests for such deferments could be mitigated by requiring verifying documentation, which David offered in this case. (Compl. at Ex. A.)

CONCLUSION

The Defendants' current application of Policy #9 violates the general applicability mandate of the Free Exercise Clause. Unless enjoined by the court, this practice threatens to either unduly burden other students who engage in religious missions or force them to sacrifice their religious calling for a college education.

Respectfully submitted,

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