IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

ORIT SKLAR and RUTH MALHOTRA ,	:	
Plaintiffs,	:	
v.	:	CIVIL ACTION NO. 1:06-CV-0627-JOF
G. WAYNE CLOUGH, individually and in his official capacity as President of the Georgia Institute of Technology, et al.,	:	
Defendants.	:	

OPINION AND ORDER

This matter is before the court on the parties' joint motion for reconsideration [110] and Defendants' supplemental motion for reconsideration [111].

I. Background

A. Procedural History

Plaintiffs, Orit Sklar and Ruth Malhotra, are students at the Georgia Institute of Technology. On March 16, 2006, pursuant to 42 U.S.C. § 1983, Plaintiffs filed suit against Defendants G. Wayne Clough, President of Georgia Tech; Gail DiSabatino, formerly Dean of Students at Georgia Tech; Danielle McDonald, Dean of Student Involvement; Stephanie Ray, Director of Diversity Programs; and Michael D. Black, Director of Housing. Plaintiffs'

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complaint challenged the constitutionality of Georgia Tech's: (1) speech code, (2) student activity fee funding guidelines, (3) speech zone, and (4) Safe Space program.

Plaintiffs filed a motion for preliminary injunction as to the speech code and speech zone only. While litigating Plaintiffs' motion for a preliminary injunction, the parties reached agreement on the modification of the list of the "Acts of Intolerance" referred to as the speech code. The court entered an order on August 8, 2006, which reflected that agreement.

Plaintiffs then filed a Second Amended Complaint and the parties engaged in discovery. Plaintiffs moved for summary judgment as to Georgia Tech's alleged ban on using students' activity fees for religious and political activities and Georgia Tech's alleged unconstitutional preference of a particular religious view of homosexuality through the Safe Space program. Plaintiffs also sought declaratory and nominal damages concerning the speech code and the speech zone. Defendants moved for summary judgment on standing and merits issues and moved to strike portions of Plaintiffs' evidence.

In an order dated July 6, 2007, the court granted in part and denied in part Defendants' motion to strike. Specifically, the court granted Defendants' motion to strike four exhibits attached to Plaintiffs' motion for summary judgment: Exhibit DD, which is a newspaper article from Georgia Tech's student newspaper, *Technique*, discussing a funding request from Campus Christian Fellowship; Exhibit EE, another article from the

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Technique discussing Campus Christian Fellowship's funding request; Exhibit MM, a printout from a website addressed www.officialknwanzaawebsite.org discussing the roots and origins of the Kwanzaa celebration; and Exhibit NN, a printout from www.reference.com discussing the history of a celebration called Norouz.

In an order dated August 27, 2007, the court addressed the portion of the parties' motions for summary judgment related to standing. With respect to the "speech code" issue, the court held it was the court's "view that the matter of the speech code had been resolved" when the court entered a consent order reflecting the parties' settlement. *See* Order, dated Aug. 27, 2007, at 9. Based on the reasoning of *Southworth v. Board of Regents of University of Wisconsin System*, 307 F.3d 566, 573 (7th Cir. 2002), the court held that Plaintiffs "have standing to challenge the manner in which student activity fees are distributed because both have paid mandatory students fees to Georgia Tech. It is not relevant to a facial standing analysis that Plaintiffs themselves may have never applied for or have been denied a funding request." *Id.* at 15-16. No party had disputed Plaintiffs' standing to challenge the Safe Space program.

On September 19, 2007, the court denied the parties' cross-motions for summary judgment and set a bench trial in the case for November 13, 2007. Both Plaintiffs and Defendants then filed motions for the court to reconsider its order denying motions for summary judgment. After further reflection, the court determined that the parties would

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benefit from further mediation and reappointed the Honorable Emmet J. Bondurant as a mediator in the case. The parties met for mediation on December 18, 2007, but were unable to reach further settlement of any issues in the case. The court asked Mr. Bondurant to file a report of the mediator and permitted the parties to respond to that report. The court has reviewed these filings and will now revisit the parties' motions for summary judgment in light of them.

B. Facts

Parties

Plaintiff Ruth Malhotra began attending Georgia Tech in the fall of 2002. *See* PSMF, ¶ 4. Plaintiff Orit Sklar began attending Georgia Tech in the fall of 2003. *Id.*, ¶ 6. Defendant G. Wayne Clough is the President of Georgia Institute of Technology and oversees the operation of Georgia Tech. *Id.*, ¶ 8. Defendant Gail DiSabatino is the former Dean of Students at Georgia Tech. *Id.*, ¶ 10. As Dean of Students, her responsibilities involved overseeing campus administration, including policies and procedures. *Id.* Dean DiSabatino supervised Defendant Stephanie Ray and Defendant Danielle McDonald. *Id.*, ¶ 11. Dean DiSabatino reviewed policies of the Student Government Association and provided feedback to students, although she was not authorized to promulgate Student Government Association policies. *Id.*, ¶ 13 & Defs.' Resp., ¶ 13.

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Dean Danielle McDonald is the Assistant Dean of Students and Director of Student Involvement at Georgia Tech. *See* PSMF, ¶ 14. In this role, she serves as an advisor and resource for student leaders and students wanting to get involved at Georgia Tech. *Id.*, ¶ 15. Dean Stephanie Ray is an Associate Dean at Georgia Tech and is the Director of Diversity Programs. *Id.*, ¶ 16. Dean Ray's "primary responsibility is to coordinate and formulate programs, practices and policies pertinent to cultural pluralism, cultural diversity, and meeting the needs of underrepresented students." *Id.*, ¶ 18 (quoting from Ray Aff. (May 4, 2006), ¶ 3).[1]

Defendant Michael D. Black is Director of Campus Housing at Georgia Tech and is responsible for the development, effectuation, and enforcement of policies concerning the residence halls of Georgia Tech. *Id.*, ¶ 19. The housing policies and procedures adopted by Defendant Black are ultimately approved by Defendant Clough. *Id.*, ¶ 20.

Safe Space

Dean Ray testified that the

> Office of Diversity is committed to helping students and organizations of all walks of life be recognized for the value they give our society. Although the religious and political groups do not receive funding as other groups, their programs may receive assistance (sometimes in the forrm [sic] or [sic]

[1]The court notes that Defendants "dispute" this statement of material facts. In formulating this statement, however, Plaintiffs quoted directly from an affidavit Dean Ray submitted in opposition to Plaintiffs' motion for a preliminary injunction. The court finds it puzzling that Defendants would attempt to dispute that statement.

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> funding, sometimes in the form of assisting in advertising, and sometimes in the form of merely attending) depending on the purpose for the activity.

See Ray Aff. (May 4, 2006), ¶ 15.

> The objectives of the Safe Space program are
>
> (a) to provide a supportive environment for GLBT members of the campus community, (b) to facilitate their "coming out" process, (c) to foster a social climate in which others do not feel the need to express anti-gay attitudes in order to "fit in," (d) to dispel negative stereotypes and present factually accurate information about GLBT people, and (e) to publicize other support resources or structures that are available on or off campus.

Id., ¶ 87. Participation in Safe Space is "open to all Georgia Tech faculty and staff members as well as student staff, including Housing Staff, Teaching Assistants, Student Assistants, and leaders of campus organizations." *Id.*, ¶ 88. Participants are asked to "attend an orientation session and sign a statement expressing their agreement with the program's mission and goals." *Id.* The Safe Space program is one of the optional Housing Department staff training sessions that has been offered as part of staff training. See DSMF, ¶ 13.

The Safe Space website is hosted by Georgia Tech. *See* PSMF, ¶ 90. According to Safe Space's website, the "Office of Diversity Programs works with a student coordinator to administer this program, established in 2003." *See id.*, ¶ 91 (quoting PMSJ Ex. FF). The Office of Diversity Programs and the Georgia Tech Housing Department co-sponsor the program. See Defs.' Resp., ¶ 91 (quoting Second Ray Aff., ¶ 23). Safe Space received a grant from the Georgia Tech Student Foundation, a student-operated foundation comprised

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of private donations. *Id.*, ¶ 94. During the course of the funding request, Matt Ridley, a Georgia Tech student and president of Pride Alliance, communicated with Dean Ray on the process. *Id.*, ¶ 95. Dean Ray is listed as a contact and advisor for the Safe Space program. *Id.*, ¶ 100. Dean Ray and other Georgia Tech employees were on the Committee that created the Safe Space program. *Id.*, ¶ 101.[2] The Safe Space Committee has met up to two times per semester. *Id.*, ¶ 104.

There is substantial administrative involvement in the Safe Space committee. *Id.*, ¶ 105.[3] Some committee members, who are Georgia Tech employees, have conducted Safe Space training programs. *Id.*, ¶ 106. Some programs are led by the student coordinator. *See* Defs.' Resp., ¶ 106. The Safe Space Training Manual is used during the training sessions and a copy is generally given to those attending the training sessions. *Id.*, ¶ 107.

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[2]Defendants attempt to dispute this statement by arguing that the "assertions are based upon e-mails which have been taken out of context and which have no evidentiary support." *See* Defs.' Resp., ¶ 101. The court disagrees. This statement is directly supported by the citation to Dean Ray's deposition in which she testifies that Matt Ridley got together a committee to pilot the Safe Space program and that Dean Ray was a member of that committee. *See* Ray Depo., at 12-15. Further, Dean Ray testified that e-mails would be a way to determine who was on the committee. *Id.* at 13.

[3]The court notes that Plaintiffs base this statement upon an analysis done by attorney Travis C. Barham. Mr. Barham reviewed the e-mails sent among Committee members and determined based on domain name which members were students and which were administrators. In its order of July 6, 2007, the court denied Defendants' motion to strike Mr. Barham's affidavit, but did note that some analytical gaps in the affidavit could affect its strength. The court will address this issue in the analysis below.

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Dean Ray has made substantive contributions to the Safe Space manuals, brochures, flyers, training guides and training outlines. *Id.*, ¶ 110. She receives e-mails from individuals interested in the training program and invites people to Safe Space meetings. *Id.*, ¶¶ 111 and 112. Dean Ray is listed as a contact for the Safe Space program. *Id.*, ¶ 113. Dean Ray has participated in a variety of meetings for Safe Space and has used her office to print Safe Space materials. *Id.* ¶¶ 114-15. She has sent reminders of upcoming meetings. *Id.*, ¶ 116. Dean Ray has requested feedback on evaluations and has sent Safe Space training materials via e-mail to individuals. *Id.*, ¶¶ 118-19. Dean Ray was copied on e-mails between members of the Georgia Tech Student Services department and student coordinator for Safe Space on attempts to get the website up and running. *Id.*, ¶ 123. She provided feedback to the student coordinator and others, and along with the student coordinator is the moderator of Safe Space's listserv. *Id.*, ¶¶ 123-15. Dean Ray has provided her office space and refreshment budget for Safe Space events. *Id.*, ¶ 130. She has also directed the student coordinator in terms of dealing with negative reactions to Safe Space, as well as corresponded with an individual outside the Georgia Tech community in defending the Safe Space program. *Id.*, ¶ 131.[4]

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[4]Defendants attempt to dispute the statements in this paragraph by arguing that they are "based upon e-mails and other documents which are taken out of context and which have no evidentiary support." *See* Defs.' Resp., ¶¶ 110-131. Again, the court disagrees. There is no "evidentiary" dispute that the e-mails in Plaintiffs' Exhibit HH accurately reflect e-mails that Dean Ray sent and received. Defendants have not explained how these e-mails have been "taken out of context." The court has reviewed the entirety of the e-mails and has

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The Safe Space Training Manual is distributed to all participants of the Safe Space program and is read in conjunction with the training. *Id.*, ¶ 96. The Training Manual is also available on the Safe Space website. *Id.* The Safe Space Training Manual contains the following statement:

> Is homosexuality immoral?
>
> Many religious traditions have taught, and some continue to teach, that homosexuality is immoral. These condemnations are based primarily on a few isolated passages from the Bible. Historically, Biblical passages taken out of context have been used to justify such things as slavery, the inferior status of women, and the persecution of religious minorities. In recent years, many theologians and clergy have begun to look at sexual relationships in terms of the love, mutual support, commitment, and the responsibility of the partners rather than the sex of the individuals involved. Currently, there are many gay and lesbian religious groups and religious congregations that are open, accepting, and supportive of the gay community.

Id., ¶ 98. The Safe Space Training Manual also contains what it purports to be summaries of some religious views of homosexuality. The Training Manual contains the following statements:

> United Methodist Church
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> In 1972 the church stated that homosexuality was incompatible with Christian teaching, but it supported the civil rights of gays. In general this characterized the Methodist position in succeeding years and was formally reaffirmed in 1992. Church policy states that gay ministers could be banned; they do not perform same-sex union ceremonies. Within the Methodist Church there are

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found them to be self-explanatory. As the court stated in its July 6, 2007 order, Defendants appear to be uncomfortable with the content of the e-mails, but that is no reason for the court not to consider them.

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a growing number of "Reconciling Congregations" that disagree with the official stand and are trying to change the discipline. These congregations perform same-sex ceremonies, although theoretically they can get in trouble for doing so, and they are welcoming communities for people of all sexual orientations.

Mormons (Church of Jesus Christ of Latter-day Saints)

The Church of Jesus Christ of Latter-Day Saints (LDS) has the most anti-gay policies of any religion widely practiced in the United States. The Reorganized Church of Jesus Christ of Latter-Day Saints (RLDS) adopted a policy to include sexual orientation in their antidiscrimination policy. Gay and lesbian individuals can be members without fear of excommunication and do hold lay priesthood offices with some restrictions, but those restrictions are under review.

Episcopal

Historically the Episcopal Church has been more receptive to gay worshipers than many other Christian denominations. They welcome gay and lesbian members, ordain non-practicing homosexuals, and participate in anti-hate programs. They do not, however, perform same-sex union ceremonies.

Evangelical Lutheran

The Lutheran Church believes that the sexual behavior of consenting adults is not an acceptable subject for legislation or police action. They believe that persons who engage in homosexual behavior are sinners only as are all other persons alienated from God and neighbor. They allow gay members and ordain non-practicing homosexuals. In 1990 they suspended two San Francisco churches for ordaining openly gay and lesbian ministers.

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Metropolitan Community Church

Founded by the Rev. Troy Perry in 1968, the Metropolitan Community Church is an ecumenical religious denomination that predominately serves the gay, lesbian, and bisexual community, although they welcome all worshipers. The church ordains openly gay and lesbian clergy, performs same-sex union ceremonies, and believes that the Bible does not condemn homosexuality.

Presbyterian Church-USA

In 1991 delegates issued a letter stating that homosexuality is not God's wish for humanity, rejected the sanctioning of same-sex unions, and forbade the ordination of openly gay clergy. The following year, a church court revoked the appointment of the Rev. Jane Spahr, a lesbian co-pastor in Rochester, N.Y. In 1993 the church reaffirmed that practicing homosexuals could not be ordained.

Roman Catholic Church

The Roman Catholic Church has consistently condemned all homosexual "activity" as being sinful. It does, however, distinguish between homosexual orientation, which it considers morally neutral, and homosexual behavior, which it considers to be sinful. In September of 1997, U.S. Catholic bishops released a pastoral letter urging parents to accept, love, respect, and support their gay children. The message, described as an "outstretched hand" to parents who learn that their children are gay, was developed by the National Conference of Catholic Bishops' committee on marriage and family. The letter states, "A shocking number of homosexual youth end up on the streets because of rejection by their families. This, and other external pressures, can place young people at greater risk of self-destructive behaviors, like substance abuse, and suicide." It went on to say, "[g]enerally, homosexual orientation is experienced as a given, not as something freely chosen. By itself, therefore, a homosexual orientation cannot be considered sinful, for morality presumes the freedom to choose." While the letter said fundamental rights of homosexual men and women were to be respected and defended, it insisted sexual intimacy be limited to man and wife in a marriage.

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United Church of Christ

In 1972 the United Church of Christ became the first Christian denomination to ordain an openly gay person to the ministry. In 1983, UCC delegates voted in favor of a statement that said sexual orientation should not be grounds for barring a person from being ordained. The United Church of Christ performs same-sex union ceremonies and takes an active interest in securing and protecting the rights of homosexuals.

Southern Baptist

In 1987 the Southern Baptist Convention condemned homosexuality as a manifestation of a depraved nature and a perversion of divine standards. They also linked homosexuality to a general problem with moral decline in modern society.

American Baptists

In general the American Baptists support the rights of minorities. In 1974, church president Peter Armacost said the Church is open to any individual, regardless of whether he's sinned or not. "We are all sinners and no church should be closed to someone just because he is a homosexual."

Seventh-Day Adventists

This small sect has been vocal in its condemnation of homosexuality. They believe that same-sex practices are obvious perversions of God's original plan.

Orthodox Jews

Generally take a dim view regarding homosexual behavior as an abomination which is forbidden by the Torah.

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> Conservative Jews
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> Conservative Jews voted in 1990 to recognize the equality of congregation members regardless of sexual orientation. They also went on record as favoring the decriminalization of homosexual activities between consenting adults and the passage of laws that prohibit discrimination against gay and lesbian people. They support equal rights for homosexual people; gay and lesbian people are welcomed at synagogues.
>
> Reform Jews
>
> In 1990 the Central Conference of American Rabbis accepted gay and lesbian rabbis. They do not currently discriminate on the basis of either gender or sexual orientation when ordaining rabbis. In March 1996, they voted to support same-sex civil marriages and to oppose state government efforts to ban such unions. In practice, Reform rabbis are divided on whether to perform same-sex commitment ceremonies; officiating by rabbis at such rituals is expcted [sic] to be voted upon in 200 [sic].
>
> Buddhism
>
> Buddhism does not condemn homosexuality. Buddhist countries tend to have few social and legal prohibitions against homosexuality. Some, such as Thailand, are relatively free of homophobia.
>
> Islam
>
> The Moslem religion has a long tradition of severely proscribing homosexuality in theory, but it's often conveniently overlooked in practice.

Id., ¶ 99. The training materials also contain sections on "What does the Bible say about homosexuality?" and "religion and homosexuality." *See* Ridley Aff., Exh. C, part 4.

The handouts on Religion and Homosexuality: Some Facts to Ponder, states: "Much to the embarrassment of the Vatican, the Catholic theologian Boswell has uncovered proof

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that, up until the fourteenth century, the church was routinely performing wedding ceremonies for same-sex couples." *See* Ridley Aff., Exh. C, part 4, at 5. One of the questions listed under "What does the Bible Say about Homosexuality" contains the following questions and answers:

> 4. Many Fundamentalists suggest that women should remain in the home, submitting to their husbands. Does the Bible especially condemn lesbianism?

Id. at 6.

> 5. Some TV Evangelists act as if homosexuality among men were the worst sin. What Biblical texts do they base this on? Is their approach legitimate? The supposedly sweeping Biblical condemnation of homosexuality rests almost exclusively on only [] eight (brief) passages in the Bible.

Id.

> 6. When homophobic people start using the Bible to attack me, how can I verbally defend myself? Are there any passages in the Bible that seem to support gay relationships, or at least indicate that perhaps marrying and having children is not the ultimate Christian duty?
>
> A. There seems to be little point in arguing with people who still believe the earth was created in 4,004 B.C.; this doesn't mean that you have to accept their interpretation of the Bible. Remember: these people are not homophobic because of the Bible; they hurl these passages at gays and lesbians because they were homophobic to begin with. (You might chide them for wearing mixed fabric or ask them if Jim Bakker must be 'put to death' – if you really enjoy arguing). You might familiarize yourself with the many Biblical passages (Too numerous to mention here) that stress love, compassion, forgiveness of sins, not judging others, etc. Remember: Jesus himself never married nor had

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> children! Other parts of the Bible simply can't be forced into the 'family values' obsession of the Fundamentalists.

Id. at 8.

Defendants present the affidavit of Matthew Ridley, a student who graduated from Georgia Tech in 2005. *See* Ridley Aff., ¶ 3. Mr. Ridley served as President of the student organization Pride Alliance while at Georgia Tech. *Id.*, ¶ 4. He worked through Pride Alliance to initiate the Safe Space program at Georgia Tech. *Id.*, ¶ 8. Mr. Ridley testified that the "Safe Space program has no religious purpose whatsoever [and] is not used as a means to advance any religious belief above another." *Id.*, ¶ 11. Mr. Ridley presented a proposal of his program to Georgia Tech's Office of Diversity Issues and Programs and to the Department of Housing. These groups agreed to co-sponsor the program. *Id.*, ¶ 13.

Mr. Ridley further testified:

> I compiled the materials that are now part of the Safe Space training manual. Although the final product involved the collaborative efforts of many individuals, including Stephanie Ray, and other Tech faculty and staff, no faculty or staff member required that certain information be included or excluded from the course materials.

Id., ¶ 19. The "GLBT People and Spirituality" section of the Safe Space manual is not addressed during actual training sessions. *Id.*, ¶ 23. Mr. Ridley explains that the spirituality section "is included within the text of the training manual as a reference for those who choose to counsel students with gay related issues; this section is designed to help participants better understand the religious issues that a gay or questioning person might

confront." *Id.*, ¶ 25. "The spirituality section of the manual does not have a religious purpose and was not placed within the text of the manual in an effort to advance certain religious beliefs over others." *Id.*, ¶ 26.

Student Activity Fees

In the State of Georgia, the legislature has created the Board of Regents of the University System of Georgia. *See* O.C.G.A. § 20-3-20. By statute, the Board of Regents is given certain powers, including the power to make rules and regulations necessary to perform its duties, to establish schools in the university system, to elect or appoint officials for the schools in the system, and to exercise any power usually granted to such corporation. *Id.*, § 20-3-31. The "government, control, and management of the university system and all of its institutions shall be vested in the board of regents." *Id.*, § 20-3-51.

The Board of Regents Policy Manual states that the "University System of Georgia Budget shall comprise all funds received by System institutions and agencies including, but not limited to, state appropriations, tuition, revenues generated from mandatory and elective fees as defined" within the Policy Manual, as well as other sources. *See* Board of Regents Policy Manual, § 702. The Policy Manual describes "Student Fees and Special Charges" in § 704.02. In particular, Mandatory Student Fees are defined as

> fees which are paid by all students as required by the Board of Regents or as required by the institution subject to approval by the Board of Regents. Mandatory fees shall include, but not be limited to, intercollegiate athletic fees, student health service fees, transportation or parking fees (if the latter are

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> charged to all students), student activity fees, and technology fees. All mandatory fees shall be approved by the Board of Regents at its meeting in April to become effective the following fall semester. Exceptions to this requirement may be granted upon recommendation of the Chancellor and the approval of the Board of Regents.
>
> An institution may waive mandatory fees for students who are enrolled for fewer than six credit hours. Alternatively, institutions may prorate mandatory fees on a per credit hour basis for students taking less than 12 credit hours. Institutions may elect to reduce Board-approved mandatory fees for students enrolled in summer courses.
>
> Proposals to increase mandatory student fees and proposals to create new mandatory student fees, submitted by an institution shall first be presented for advice and counsel to a committee at each institution composed of at least 50 percent students. Students shall be appointed by the institution's student government association.
>
> All mandatory student fees collected by an institution shall be budgeted and administered by the president using proper administrative procedures, which shall include the advice and counsel of an advisory committee composed of at least 50 percent students. Students shall be appointed by the institution's student government association. All payments from funds supported by student mandatory fees shall be made according to approved business procedures and the appropriate business practices of the institution (BR Minutes, 1999-2000, p. 364).

Id., § 704.021.

Each Georgia Tech student is assessed a student activity fee at the beginning of each semester. *Id.*, ¶ 31. Both Plaintiff Malhotra and Plaintiff Sklar have paid student activity fees to Georgia Tech. *Id.*, ¶¶ 32-33. The purpose of Georgia Tech's mandatory student activity fee is to "fund various organizations benefitting students, such as . . . student-run organizations." *Id.*, ¶ 43. Georgia Tech classifies student organizations in one of three

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"tiers." *Id.*, ¶ 37. The Student Government Association allocates student activity fees to student organizations. *Id.*, ¶ 39. The Georgia Tech Faculty Senate reviews and approves the student government association's allocations. *Id.* The disbursement of fees is governed, in part, by the Policies and Priorities of the Joint Finance Committee, a student committee, which provides the "general usage rules associated with student activity fee monies." *Id.*, ¶ 40.

Student activity fees are allocated to student organizations through (1) annual budgets (general operating fund) and (2) bills (event-specific funding). *Id.*, ¶ 41. The Policies and Priorities of the Joint Finance Committee provide a process whereby organizations can request funding and reasons for granting funding. *Id.*, ¶ 42. Both budgets and bills are reviewed by the Joint Finance Committee of the Student Government Association which makes recommendations to the elected Student Government Association representatives on student activity fee allocations. *See* DSMF, ¶ 48. The student activity fee is used to fund organizations with specific ideological viewpoints engaged in speech regarding cultural, political, ideological, and religious issues. *See* PSMF, ¶ 43. The Policies and Priorities of the Joint Finance Committee provide *inter alia* that "partisan political activities" and "religious activities" will not be funded in "budgets." *Id.*, ¶ 44 & Defs.' Resp., ¶ 44.

Dean DiSabatino was the primary advisor for the Georgia Tech student government and attended most of their meetings. *See* PSMF, ¶ 47. Dean DiSabatino or a designee such

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as Dean McDonald, sat on the Student Activities Committee of the Faculty Senate. *Id.*, ¶ 48. Dean McDonald currently serves on the Student Activities Committee of the Faculty Senate. *Id.*, ¶¶ 54-55.

The Student Government Association Vice President of Finance, who is also Chair of the Joint Finances Committee, sets an annual schedule for when student organizations can apply for an annual budget. *Id.*, ¶ 57. The student organizations complete a budget application and submit it to the Joint Finance Committee Chair. *Id.*, ¶ 58. Once all of the budget applications have been submitted, the Chair sets a time line for budget review. *Id.* During the review process student organizations come before the committee, present their budget requests, and are asked questions by the committee. *Id.*, ¶ 59. After the review, the Joint Finance Committee makes a budget recommendation and presents it to the undergraduate and graduate House and Senate of the Student Government Association. *Id.*, ¶ 61. The House and Senate then vote on the allocations. *Id.* The Student Government Association then debates the final budget and votes whether to approve it. *Id.*, ¶ 62. If the final budget passes by a particular ratio, it gets forwarded to the Student Activities Committee of the Faculty Senate. *Id.* If the budget does not pass, it is sent to a joint committee that reviews it and presents another recommendation to the House and Senate of the Student Government Association. *Id.* After approval of the Student Government Association, the final student activity fees budget goes on the agenda for the Student

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Activities Committee of the Faculty Senate. *Id.*, ¶ 63. The Joint Finance Chair explains the budget allocation to the Committee and the budget is then approved by the Faculty Senate through the minutes of the Student Activity Committee. *Id.*

Defendants also presented the affidavit of Mitchel T. Keller to support its arguments on the student activity fees. Mr. Keller is a doctoral student in the School of Mathematics at Georgia Tech. *See* Keller Aff., ¶ 3. Mr. Keller serves as the President of the Tech Graduate Student Government Association. *Id.*, ¶ 6. Previously, he served as Vice President of the Tech Graduate Student Government Association. *Id.* He currently serves on the Mandatory Student Fee Advisory Committee and an ad-hoc committee to review Student Government Association funding policies. *Id.*, ¶ 9. Based on these experiences, Mr. Keller claims to be "very familiar with [Student Government Association] funding policies and the allocation of student activity fees." *Id.*, ¶ 11. Mr. Keller testifies that the funding policies originate from a student committee that may seek guidance from Georgia Tech administrators. *Id.*, ¶ 16. Once that student committee generates a policy, the policy is presented to the Undergraduate House of Representatives and Graduate Student Senate for legislative consideration. *Id.*, ¶ 17. These groups are comprised entirely of students with "non-voting advising provided by the Office of the Dean of Students and Office of Graduate Studies." *Id.* Once the policy is approved by the legislative bodies, the presidents of the Undergraduate and Graduate Student Government Associations can veto the policy. *Id.*, ¶

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21. The policy is then submitted to the Student Activities Committee of the Academic Senate. The Student Activities Committee is composed of elected members of the Georgia Tech faculty and three Georgia Tech students appointed by the two Student Government Associations. *Id.*, ¶ 22. The Student Activities Committee either approves the policy or returns it to the Student Government Association with request for changes. The Student Activities Committee cannot change the policy on its own. *Id.*, ¶ 23.

Mr. Keller further states that pursuant to the funding policy, the Student Government Association "does not fund activities through budgets where the primary purpose of the activity is religious worship or proselytizing." *Id.*, ¶ 31. He explains this "policy has been enacted specifically to avoid any unnecessary or excessive entanglement of the SGA with religion. For the SGA to fund religious activities would have the primary effect of advancing religion." *Id.*, ¶ 32. Mr. Keller states that the Student Government Association "applies this provision equally to all religions." *Id.*, ¶ 33. "By not funding 'partisan political activities' the SGA does not fund activities through budgets where the primary purpose of the activity is to promote one political candidate over another." *Id.*, ¶ 34.

During her deposition, Dean DiSabatino made the following statements with respect to the "religious activities" exemption in the Joint Finance Committee's policies:

> Q What is a religious activity?
> A What is a religious activity? I am Catholic so what would be an example of religious activities, I'll give you an example of religious activities: Prayer service.

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DiSabatino Depo., at 36. Later in the deposition, Dean DiSabatino responded:

> Q This document, Policies and Priorities refers to the fact that the following activities would not be funded in the budget and religious activities is one of them. Could you define religious activities for me?
> A They would be activities associated with – associate is not the right word – the form of religious service, formal religious activities associated with a denomination, I suppose, of service like a mass, prayer – I don't want to say prayer service –
> Q How do you define service then in that definition you gave me?
> A Well, activities that would be associated with a particular – not associated – that would be part of a ritual, a formal ritual.

Id. at 40. Lastly, Dean DiSabatino testified:

> Q Can you define for me what a religious activity is?
> A I can try once again. A formal activity associated with religious rituals – I'm having a really hard time with that as you can see.
> Q Given that definition, is it clear to you what a religious activity would entail a student bill and budget application?
> A Not exactly.

Id. at 71. Similarly, Dean McDonald was unable to offer any kind of definition of this term. *See* McDonald Depo., at 17. She could not define the term "religious activity" and could not say whether a group thinking about bringing a Christian evangelist to campus to talk about Jesus being "the way, the truth and the life" would be a religious activity. *Id.* She also could not offer any definition for "partisan political activities." *Id.* at 17-18. Dean McDonald could not answer whether a politician coming to campus and asking students for their vote would constitute a political activity. *Id.* at 20. Dean Ray defined "partisan

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political activity" as "someone saying 'vote Democrat' or 'vote Republican.'" *See* Ray Depo., at 9-10.

The student organization Campus Crusade for Christ applied for a funding bill for a trip to do hurricane relief work for victims of Hurricane Katrina. *See* McDonald Depo., at 15. During the discussion as to whether to fund that trip, the student government committee asked whether there was going to be worship or prayer on the trip. *Id.* at 16. Dean McDonald could not recall the answer the student organization gave but knew that the trip was funded. *Id.*

The African American Student Union received funding in 2002-03, 2003-04, and 2004-05 for Kwanza programs. *See* PSUMF, ¶ 82. During the 2003-04 school year, the African American Student Union received funding for a "Gospel Concert." *Id.*, ¶ 82. During the 2002-03, 2003-04, 2005-06, and 2006-07 school years, the Iranian Student Organization received funding for a Norouz Festival. *Id.*, ¶ 83. During the 2004-05 school year, the Asian Christian Fellowship applied for funding for "name tags, markers, and flip charts," and received no funding. *Id.*, ¶ 86.

During the 2003-2004 academic year, the College Democrats were given a budget of $984. *See* DSUMF, ¶ 62. Plaintiff Sklar submitted a budget for "Jackets for Israel" and the group received $375. *Id.*, ¶ 63. In 2001, Christian Campus Fellowship was granted $1132.66 to cover travel expenses for their annual leadership conference in Tennessee. *Id.*,

¶ 65. In 2001, 2002, and 2006, the Muslim Student Association was granted money to cover expenses associated with Islamic Awareness Week. *Id.*, ¶¶ 66-67, and 72. In 2002, the College Democrats were given $527 to cover travel expenses to the College Democrats of America National Convention in Washington, D.C. *Id.*, ¶ 68. In 2003, the Christian Campus Fellowship was given $750 to cover cleaning supplies associated with the Roosevelt House Service Project. *Id.*, ¶ 69. In 2005, the Student Government Association approved the Gifted Gospel Choir's bill for $858 to cover expenses for a musical production. *Id.*, ¶ 70. In 2006, Campus Crusade for Christ was given $4,543 to offset expenses associated with a relief trip to rebuild homes damaged by hurricanes in Mississippi. *Id.*, ¶ 71. In 2006, the group Students for Justice in Palestine was given $1700 to cover expenses for bringing a speaker to campus. *Id.*, ¶ 73. In 2006, the Jewish Student Union (Hillel) was given $2,725 for a speaker's fee. *Id.*, ¶ 74.

Speech Zone

At the time Plaintiffs filed their complaint, Georgia Tech's Event Scheduling webpage contained a section described as "Free Speech Area." *Id.*, ¶ 147. The following was described: "Faculty, staff, and students enjoy the rights of free speech on campus, as do members of the general public. The designated free speech area for use by members of the GT community and the general public shall be the small amphitheater located near the

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Ferst Theater." *Id.*, ¶ 148. On January 9, 2007, Defendants informed Plaintiffs that this statement had been changed to:

> Tech reserves the right to regulate the time, manner and place of public speech activities on its campus in accordance with the law. The free speech area for the general public, who are not Tech faculty, staff, students or groups chartered by Tech, is generally limited to the Centennial Amphitheater located near the Ferst Theater. Tech may designate alternative free speech areas to accommodate large crowds and any campus emergency.

Id., ¶ 149.

Beverly Peace, the Manager of Campus Space at Georgia Tech, testified that she is the "contact person for all students, student organizations and members of GA Tech community who wish to make use of the Georgia Tech facilities and outdoor space." *See* Second Peace Aff., ¶ 3. "The vast majority of the GA Tech Campus is considered open for free speech to students, student organizations and GA Tech community. Students and student organizations can reserve many of the classrooms and much of the outdoor space on campus for meetings, fundraisers, and organized activities." *Id.*, ¶ 4. "Student and student organizations can reserve tables for use on Skiles walkway and other areas around campus for the purpose of promoting membership and events." *Id.*, ¶ 5. "Students and organizations complete a request form when they wish to reserve green space for concerts, cookout and other activities. They also complete a request form when they wish to reserve tables and chairs, which can be obtained from the GA Tech Customer Service Department." *Id.*, ¶ 6. "GA Tech permits the posting of flyers at different locations around campus. Students do

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not typically remove their postings; the posting or flyers are typically removed from posted locations at the end of every week by the grounds department." *Id.*, ¶ 7. "Students and student organizations are free to use chalk to make signs and displays on the sidewalks anywhere on campus." *Id.*, ¶ 9.

C. Merits Contentions

Plaintiffs contend that the Safe Space program violates the First Amendment because it prefers denominations that favor homosexual conduct, makes Biblical arguments about the morality of the conduct, and denigrates the theological views of those that do not favor it.

Defendants respond that Plaintiffs' Establishment Clause claim fails because Safe Space (1) does not have a religious purpose, (2) its primary effect is not to advance certain religious beliefs over others, and (3) the program does not constitute a state action.

Plaintiffs argue that Georgia Tech's policy of prohibiting funding of "religious activities" and "partisan political activities" is vague and viewpoint discriminatory. Plaintiffs further contend that the ban on funding "religious activities" directly contradicts the Supreme Court's holding in *Rosenberger v. Rector & Visitors of University of Virginia*, 515 U.S. 819 (1995). Plaintiffs aver that "in practice" Georgia Tech has permitted the funding of some religious organizations and not others. Plaintiffs argue that the funding of "ideological" viewpoints, but not "political" viewpoints, is viewpoint discriminatory under

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Rosenberger. Finally, Plaintiffs aver that the Student Fee Policy is unconstitutionally vague because it fails to define "religious" and "partisan political" activities in a meaningful way.

Defendants respond that Plaintiffs cannot show an unconstitutional application of the funding provisions and the funding provisions are not vague or overbroad. Defendants also assert that the State Constitution of Georgia bars Defendants from providing any funding to religious organizations.

Plaintiffs argue that Georgia Tech's "old" speech zone policy of designating a free speech area to a small amphitheater on campus violated the constitutional rights of Georgia Tech students and was not a reasonable time, manner, place restriction. Plaintiffs aver that even though Defendants voluntarily changed their policy, Plaintiffs are still entitled to nominal damages and declaratory relief. Defendants argue that the old policy was a reasonable time, manner, and place restriction.

Finally, Plaintiffs argue that they are entitled to nominal damages and declaratory relief even though the parties reached settlement agreement as to the specific language of Georgia Tech's "speech code." Defendants continue to deny that Plaintiffs ever had standing to raise a claim with respect to Georgia Tech's speech code.

II. Discussion

As a preface to discussing the merits of Plaintiffs' claims, the court notes that the parties agree that no monetary damages on any claim can be raised against Defendants in

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their official capacities. *See*, *e.g.*, *Will v. Michigan Department of State Police*, 491 U.S. 58, 71 (1989). Plaintiffs, however, may seek injunctive relief against Defendants in their official capacities and monetary damages against Defendants in their individual capacities. In their individual capacities, Defendants may raise the defense of qualified immunity.

A. Safe Space

The Establishment Clause of the First Amendment to the United States Constitution states: "Congress shall make no law respecting an establishment of religion . . . ." A principle at the heart of the Establishment Clause is that "government should not prefer one religion to another, or religion to irreligion." *Board of Education of Kiryas Joel Village School District v. Grumet*, 512 U.S. 687, 703 (1994); *see also Larson v. Valente*, 456 U.S. 228, 244 (1982) ("The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another."); *Gillette v. United States*, 401 U.S. 437, 450 (1971) ("[T]he Establishment Clause prohibits government from abandoning secular purposes in order to put an imprimatur on one religion, or on religion as such, or to favor the adherents of any sect or religious organization."); *Zorach v. Clauson*, 343 U.S. 306 (1952) (the "government must be neutral when it comes to competition between sects"). "In short, when we are presented with a state law granting a denominational preference, our precedents demand that we treat the law as suspect and that we apply strict scrutiny in adjudicating its constitutionality." *See Larson*, 456 U.S. at 246. The Establishment Clause

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applies to the states through the Due Process Clause of the Fourteenth Amendment. *See Everson v. Board of Education*, 330 U.S. 1, 15 (1947); *see also Glassroth v. Moore*, 335 F.3d 1282, 1293 (11th Cir. 2003).

The manner in which to test a practice under the Establishment Clause is a matter in much dispute. Defendants cite to the three part *Lemon* test. "For a practice to survive an Establishment Clause inquiry, it must pass the three-step test laid out in *Lemon v. Kurtzman*, 403 U.S. 602 (1971)." *See Glassroth*, 335 F.3d at 1295. "The *Lemon* test requires that the challenged practice have a valid secular purpose, not have the effect of advancing or inhibiting religion, and not foster excessive government entanglement with religion." *Id.* (citing *Lemon*, 403 U.S. at 612-13, and noting that while *Lemon* test is often "maligned," it is "more often followed"). The inquiry into a practice's purpose is factual. *Id.* at 1296-97. "When evidence shows that endorsement or promotion of religion was a primary purpose for the challenged practice . . . the practice violates the Establishment Clause." *Id.* at 1297 (quotation and citation omitted). "The effect prong asks whether . . . the practice under review in fact would convey a message of endorsement or disapproval to an informed, reasonable observer." *Id.*[5]

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[5]Since the Eleventh Circuit's decision in *Glassroth*, the *Lemon* test has been subjected to even greater malignment. *See*, *e.g.*, *Van Orden v. Perry*, 545 U.S. 677, 685 (2005) (noting that *Lemon* test is only a "helpful signpost" and many Establishment Clause cases do not even bother to apply it).

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It is not clear to the court, however, that the *Lemon* test is applicable to Plaintiffs' challenge. Plaintiffs argue that Defendants' actions favor some religions over others. This type of allegation does not seem to fit comfortably within the *Lemon* test. For example, in *Larson v. Valente*, 456 U.S. 228 (1981), the Supreme Court considered whether Minnesota's Charitable Solicitations Act, which eased registration requirements for certain religious organizations, violated the Establishment Clause because it was preferential to certain denominations. In that case, the Supreme Court did not directly apply the *Lemon* test. Rather, the Court began from the premise that the "clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." *Id.* at 244. The Court discussed this maxim in conjunction with the status of religious denominations during the Revolutionary War period, as well as its interaction with the Free Exercise Clause. The Court then went on to conclude that the Minnesota statute "clearly grants denominational preferences of the sort consistently and firmly deprecated in our precedents," and thus "must be invalidated unless it is justified by a compelling governmental interest, and unless it is closely fitted to further that interest." *Id.* at 246-47 (quotations and citations omitted). The Court considered Minnesota's compelling governmental interest of protecting its citizens from abusive practices in the solicitation of funds for charity. *Id.* at 248. While the Court recognized that this purpose might be a

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"compelling governmental interest," it concluded that the statute was not "closely fitted" to this purpose and thus could not survive scrutiny. *Id.* at 248-51.

The Court then addressed *Lemon* and stated that the "tests" were "intended to apply to laws affording a uniform benefit to *all* religions, and not to provisions like [the Minnesota statute] that discriminate *among* religions." *Id.* at 252 (emphasis in original). "Although the application of the *Lemon* tests is not necessary to the disposition of the case before us, those tests do reflect the same concerns that warranted the application of the strict scrutiny" to Minnesota's statute. *Id.* The Court found the third test on "entanglement" to be most applicable and reviewed the statute under that test, finding it wanting. *Id.* at 252-55.

It would appear then, that under *Larson*, if there is a denominational preference, it must be invalidated unless it is closely fitted to some compelling governmental interest. The *Lemon* test can be considered to the extent that it reflects the same concerns as strict scrutiny does. The court in *Citizens for a Responsible Curriculum v. Montgomery County Public Schools*, 2005 WL 1075634 (D. Md. May 5, 2005), conducted such an analysis when considering similar issues. There, a public high school revised the curriculum of the health education for Grades 8 though 10 to include information on "sexual variation." *Id.* at *1. The Grade 8 Revised Curriculum contained a section entitled, "Myths regarding sexual orientation." *Id.* at *2. Within that section is a "myth" labeled "homosexuality is a sin" and a "facts" section which contained the following passage:

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> Religion has often been misused to justify hatred and oppression. Less than a half a century ago, Baptist churches (among others) in this country defended racial segregation on the basis that it was condoned by the Bible. Early Christians were not hostile to homosexuals. Intolerance became the dominant attitude only after the Twelfth Century. Today, many people no longer tolerate generalizations about homosexuality as pathology or sin. Few would condemn heterosexuality as immoral - despite the high incidence of rape, incest, child abuse, adultery, family violence, promiscuity, and venereal disease among heterosexuals. Fortunately, many within organized religions are beginning to address the homophobia of the church. The Nation Council of Churches of Christ, the Union of American Hebrew Congregations, the Unitarian Universalist Association, the Society of Friends (Quakers), and the Universal Fellowship of Metropolitan Community Churches support full civil rights for gay men and lesbians, as they do for everyone else.

Id. at *4. The materials also stated, "Fundamentalists are more likely to have negative attitudes about gay people than those with other religious views." Several groups challenged the implementation of the Revised Curriculum, in part on the basis of the Establishment Clause. The court set forth both the *Lemon* test and the general prohibition repeated in numerous Supreme Court cases that one religious denomination cannot be preferred over another under a strict scrutiny analysis. The court found that the "Revised Curriculum plainly portrays Baptist churches as wrongly expressing the same intolerance attitude toward homosexuals today as they did towards African Americans during segregation." Further, the Curriculum

> also implies that the Baptist Church's position on homosexuality is theologically flawed. The materials state that theologians and Biblical scholars agree that "Jesus said absolutely nothing at all about homosexuality." The materials also note that many seemingly innocuous activities were deemed abominations by the Bible, such as "wearing clothing made from

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> more than one kind of fiber, and earing [sic] shellfish, like shrimp and lobster," inviting the reader to draw the conclusion that not all activities that were banned in the Bible are still morally objectionable today.

Id. at *11. "Most disturbingly, the Revised Curriculum juxtaposes this portrait of an intolerant and Biblically misguided Baptist Church against other, preferred Churches, which are more friendly towards the homosexual lifestyle." *Id.* The court further stated that it is

> extremely troubled by the willingness of Defendants to venture – or perhaps more correctly bound – into the crossroads of controversy where religion, morality, and homosexuality converge. The Court does not understand why it is necessary, in attempting to achieve the goals of advocating tolerance and providing health-related information, Defendants must offer up their opinion on such controversial topics as whether homosexuality is a sin, whether AIDS is God's judgment on homosexuals, and whether churches that condemn homosexuality are on theologically solid ground.

Id. The court ultimately granted the plaintiffs' motion for a preliminary injunction finding that it is "highly skeptical that the Revised Curriculum is narrowly tailored to serve a compelling government interest." *Id.*

The court finds that the "spirituality" materials provided in the Safe Space training program go even further than those the court considered in the Montgomery County case. Here, the spirituality materials state that the "Church of Jesus Christ of Latter-Day Saints (LDS) has the most anti-gay policies of any religion widely practiced in the United States." "Historically the Episcopal Church has been more receptive to gay worshipers than many other Christian denominations." "The Unitarian Universalist Association has gone further than most denominations to defend the rights of gay men and lesbians."

The handouts on Religion and Homosexuality: Some Facts to Ponder, clearly take the position that churches that condemn homosexuality do so on theologically flawed grounds. For example, the handout states: "Much to the embarrassment of the Vatican, the Catholic theologian Boswell has uncovered proof that, up until the fourteenth century, the church was routinely performing wedding ceremonies for same-sex couples." *See* Ridley Aff., Exh. C, part 4, at 5. One of the questions listed under "What does the Bible Say about Homosexuality" contains the question: "Many Fundamentalists suggest that women should remain in the home, submitting to their husbands. Does the Bible especially condemn lesbianism?" *Id.* at 6. And "Some TV Evangelists act as if homosexuality among men were the worst sin. What Biblical texts do they base this on? Is their approach legitimate? The supposedly sweeping Biblical condemnation of homosexuality rests almost exclusively on only [] eight (brief) passages in the Bible." *Id.*

> When homophobic people start using the Bible to attack me, how can I verbally defend myself? Are there any passages in the Bible that seem to support gay relationships, or at least indicate that perhaps marrying and having children is not the ultimate Christian duty? There seems to be little point in arguing with people who still believe the earth was created in 4,004 B.C.; this doesn't mean that you have to accept their interpretation of the Bible. Remember: these people are not homophobic because of the Bible; they hurl these passages at gays and lesbians because they were homophobic to begin with. (You might chide them for wearing mixed fabric or ask them if Jim Bakker must be "put to death" – if you really enjoy arguing). You might familiarize yourself with the many Biblical passages (Too numerous to mention here) that stress love, compassion, forgiveness of sins, not judging others, etc. Remember: Jesus himself never married nor had children! Other

parts of the Bible simply can't be forced into the "family values" obsession of the Fundamentalists.

As further evidence of criticism of certain religious beliefs, the training manual states, "Many religious traditions have taught, and some continue to teach, that homosexuality is immoral. These condemnations are based primarily on a few isolated passages from the Bible. Historically, Biblical passages taken out of context have been used to justify such things as slavery, the inferior status of women, and the persecution of religious minorities."

The clear preference of certain religious denominations over others is not saved by the fact that Mr. Ridley testified that the "spirituality section of the manual does not have a religious purpose and was not placed within the text of the manual in an effort to advance certain religious beliefs over others." *See* Ridley Aff., ¶ 26. A plain reading of the materials contradicts Mr. Ridley's conclusory statement.[6]

Defendants do not even attempt to show that this material is narrowly tailored to meet any compelling governmental interest. The court presumes that if given the opportunity, Defendants would say they are advocating tolerance. It is puzzling to the court that the

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[6]Even adopting the *Lemon* terminology utilized by Defendants does not save the program. Defendants contend that the effect of the program must be measured by a "disinterested, reasonable observer." *See*, *e.g.*, *Zelman v. Simmons-Harris*, 536 U.S. 639, 655 (2002). "The reasonable observer in the endorsement inquiry must be deemed aware of the history and context underlying a challenged program." *Id.* (quotations and citations omitted). Even with the understanding that the stated purpose of the Safe Space program is to advocate for tolerance, a reasonable observer reading the religious materials passed out during the training program could only conclude that they contain a "message of endorsement or disapproval" of one religion over another.

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promotion of tolerance would take the appearance of such intolerance as is contained in the religious materials distributed with the Safe Space program.

As the court recited above, the instruction of the Establishment Clause could not be more clear: A "principle at the heart of the Establishment Clause [is] that government should not prefer one religion to another, or religion to irreligion." *Board of Education of Kiryas Joel Village School District v. Grumet*, 512 U.S. 687, 703 (1994); *see also Larson v. Valente*, 456 U.S. 228, 244 (1982) ("The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another."); *Gillette v. United States*, 401 U.S. 437, 450 (1971) ("[T]he Establishment Clause prohibits government from abandoning secular purposes to favor the adherents of any sect or religious organization."); *Zorach v. Clauson*, 343 U.S. 306 (1952) (the "government must be neutral when it comes to competition between sects"). The materials used in the Safe Space program clearly contravene these edicts.

Defendants defend themselves from Plaintiffs' claims by arguing that the Safe Space program has no "government" involvement on two grounds: (1) pursuant to *Adler v. Duval County School Board*, 250 F.3d 1330 (11th Cir. 2001), relying on *Sante Fe Independent School District v. Doe*, 530 U.S. 290 (2000), the program materials are "student speech," and (2) under the third prong of the *Lemon* test, there is no excessive government entangling

with religion because the government was not involved in the preparation of these particular materials.[7]

In *Adler*, the court reiterated that "Establishment Clause jurisprudence calls for the difficult task of separating a student's private message, which may be religious in character, from a state-sponsored religious message, protecting the former and prohibiting the latter." *Id.* at 1336. The *Adler* court determined that the Duval County policy on student graduation speakers did not contain any restriction on the identity of the student speaker or the content of the message, and that the school officials were specifically prohibited from reviewing the content of the message. *Id.* at 1336-37. The court explained that the "ability to regulate the content of speech is a hallmark of state involvement." *Id.* at 1337. Thus, the court found that speakers selected through the Duval County policy were engaged in student speech rather than state sponsored speech. *See also Wallace v. Jaffree*, 472 U.S. 38, 73, 76 (1985)

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[7]Defendants also emphasize their arguments under the first and second prong of the *Lemon* test – that the Safe Space program has no religious purpose and it does not have the effect of advancing or inhibiting religion. For the reasons stated earlier, the court finds that these two prongs of the *Lemon* test are not particularly relevant to an Establishment Clause challenge that asserts a governmental program is favoring one religion over another. Furthermore, the first prong of the *Lemon* test ends the analysis if a program does not have a "clearly secular purpose." *See Wallace*, 472 U.S. at 56. "For even though a statute that is motivated in part by a religious purpose may satisfy the first criterion . . . the First Amendment requires that a statute must be invalidated if it is entirely motivated by a purpose to advance religion." *Id.* Thus, while it is true that a program will be deemed unconstitutional if it is entirely motivated by advancing religion, not being entirely motivated by a religious purpose will not automatically save a program from unconstitutionality.

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(O'Connor, J., concurring in judgment) (when considering state involvement in religious activity, relevant question is "whether an objective observer, acquainted with the text, legislative history, and implementation of the statute, would perceive it as a state endorsement of prayer in public schools").

The court understands the unique position of individuals working for a dean of students' office in a public university. Student organizations vary far and wide, and the purposes and identities of the groups of students cannot be attributed to the state per se simply because these student organizations exist at a public institution of higher learning. The court is further cognizant of the fact that – like all other participants in a university setting – the administration is devoted to educating and developing students in all aspects of their lives – academic, social, and leadership development, to name a few. In that capacity, administrators must advise students on what the administrators – in their greater years of experience and education – believe to be a solid course of action that organizations may undertake as well as a myriad of other issues. The court emphasizes that such an advisory capacity would certainly not subject the university to any kind of state actor role.

The Safe Space group, however, is different for many reasons. Significantly, the Safe Space group is housed within Georgia Tech's own Office of Diversity Programs. The introduction to Diversity Programs on Georgia Tech's website states:

> Diversity Programs provides an institutionalized approach for meeting the co-curricular needs of students by coordinating and planning educational

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> opportunities that enhance interaction and learning across groups. Through intentional programs like Religious Awareness Week and Disability and Diversity Week, the Office assist the campus in understanding, appreciating and celebrating Tech's rich cultural diversity. Workshops and training opportunities are available for students, student groups, faculty, staff, and departments.

See Welcome to Diversity Programs, www.diversity.gatech.edu. The website lists only six programs: (1) Don Bratcher Human Relations Award, (2) Black Leadership Conference, (3) Disability and Diversity Week, (4) Diversity Forum, (5) Power over Prejudice Summit, and (6) Safe Space. *Id.* Clicking on the Safe Space link opens up another webpage at www.safespace.gatech.edu. The Safe Space webpage provides the group's mission, frequently asked questions and other information. It also lists two contacts for the group: Scott McKee, the Student Coordinator for the Safe Space program, and Dean Stephanie Ray, Associate Dean, Director of Diversity Programs. The 2007-2008 Georgia Tech catalogue asserts that "Georgia Tech has more than 350 chartered student organizations that offer a variety of activities for student involvement. These organizations are classified in the following categories: honor societies, governing boards, professional/departmental, service, educational, political, cultural/diversity, sport clubs, religious/spiritual, student media, performance, recreation, and fraternities and sororities." *See* Georgia Institute of Technology, Student Life, www.catalog.gatech.edu/students/life/general.php. Of those more than 350 student organizations, only Safe Space is encompassed in the Office of Diversity Programs. Pride Alliance, instrumental in starting the Safe Space program, is not listed in

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the Office of Diversity Programs. Nor are any of the other 32 groups listed as "cultural/diversity" groups on Cyberbuzz. *See* www.cyberbuzz.gatech.edu/main/organizations.

This speaks volumes as to the nature of Georgia Tech's involvement in the group. The only reasonable explanation for this special set aside is a desire by Georgia Tech to exercise substantial influence in conveying that the Institute is an open and tolerant society welcoming to students of any sexual orientation. The propriety of this demonstration is not at issue. What is significant for the purposes of the litigation is that it indicates that Georgia Tech is a willing state actor in this instance.

Moreover, as the statement of facts recites, Dean Ray has been deeply involved in the formation and continued development of the Safe Space program. She and one other Georgia Tech employee were on the Committee that created the Safe Space program. Some committee members, who are Georgia Tech employees, have conducted Safe Space training programs. Dean Ray has made substantive contributions to the Safe Space manuals, brochures, flyers, training guides and training outlines. She receives e-mails from individuals interested in the training program and invites people to Safe Space meetings. Dean Ray has participated in a variety of meetings for Safe Space and has used her office to print Safe Space materials. She has sent reminders of upcoming meetings. Dean Ray has requested feedback on evaluations and has sent Safe Space training materials via e-mail to

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individuals. Dean Ray was copied on e-mails between members of the Georgia Tech Student Services department and student coordinator for Safe Space on attempts to get the website up and running. She provided feedback to the student coordinator and others and along with the student coordinator is the moderator of Safe Space's listserv. Dean Ray has provided her office space and refreshment budget for Safe Space events. She has also directed the student coordinator in terms of dealing with negative reactions to Safe Space, as well as corresponded with an individual outside the Georgia Tech community on the Safe Space program.

The court finds that these facts provide ample evidence for the governmental involvement and participation in the Safe Space program. Safe Space is unlike any student organization at Georgia Tech and holds a unique place as an outreach program of Georgia Tech's Office of Diversity Programs. It matters not that a student compiled the Safe Space training materials. Dean Ray had the opportunity to review those materials and comment on them. In that sense, she had the ability to "regulate" the content of the speech even though she may have chosen not to exercise it. She has used the function of the Office of Diversity Programs to carry forth the Safe Space training program and distribute its materials. A casual reading of the e-mails produced in discovery – whether using the numerical tally produced by Mr. Barham or based upon independent review – demonstrates that this is not an organization which utilizes representatives of the Dean of Students office

in an advisory capacity. Rather, this is an initiative of the Office of Diversity Programs undertaken in conjunction with the student organization, Pride Alliance. Whether it is labeled "excessive entanglement" under the third prong of the *Lemon* test or whether it is determined to be state sponsored speech rather than student speech under *Adler* and *Sante Fe*, the court rejects Defendants' assertion that Safe Space is a student organization that is not bound by the dictates of the Establishment Clause. *See Sante Fe*, 530 U.S. at 305 (noting that the "degree of school involvement" demonstrates the practice bears "the imprint of the State").

The court is puzzled by the parties' inability to reach a settlement with respect to this issue. Defendants proffer testimony from Mr. Ridley and Dean Ray that the religious materials were not really an emphasized part of the training program and were "merely referenced in passing by instructors." One wonders if these materials really were so peripheral, why they could not simply be removed from the program? Plaintiffs never challenged the existence of the Safe Space program, itself, nor did they challenge Safe Space's perspective that issues of religion are often tied up with views on homosexuality. Rather, Plaintiffs challenged the clear preference of one religion over another contained in 12 pages of the Safe Space training materials. It is because the court could see a mutually satisfactory resolution to this issue that it encouraged the parties to return to mediation on it. Having refused to part with materials that one could imagine would not even survive an

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entry level class on religion, the court now finds that the inclusion of the religious materials in the Safe Space training program violates the Establishment Clause of the United States Constitution.

Defendants contend that Plaintiffs have not identified which Defendants should be liable for a violation of the Establishment Clause. Defendants further argue that they are entitled to qualified immunity on this claim. With respect to the Safe Space program, the court finds that Plaintiffs have clearly identified the actions of Dean Ray through her participation and guidance of the program as acts that Dean Ray has committed which violate Plaintiffs' rights. Further, Plaintiffs have established that Dr. Clough, as President of the Georgia Institute of Technology, is charged with oversight and responsibility of the operation of the school and has direct supervision over all aspects of the school, including campus administration.

"Qualified immunity protects government officials performing discretionary functions from liability if their conduct does not violate 'clearly established statutory or constitutional rights of which a reasonable person would have known.'" *See Snider v. Jefferson State Community College*, 344 F.3d 1325, 1327 (11th Cir. 2003) (quoting *Hope v. Pelzer*, 536 U.S. 730 (2002)). "Officials are entitled to fair warning from the preexisting law that their alleged acts, at the time the acts occurred, were unconstitutional." *Id.* at 1328.

> While officials must have fair warning that their acts are unconstitutional, there need not be a case "on all fours," with materially identical facts, before

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> we will allow suits against them. A principle of constitutional law can be "clearly established" even if there are "notable factual distinctions between the precedents relied on and the cases then before the Court, so long as the prior decisions have reasonable warning that the conduct at issue violated constitutional rights."

See, *e.g.*, *Holloman ex rel. Holloman v. Harland*, 370 F.3d 1252, 1277 (11th Cir. 2004) (citation omitted).

Qualified immunity protects individual defendants from personal liability unless it is "clear to a reasonable [public official] that his conduct was unlawful in the situation he confronted." *See Saucier v. Katz*, 533 U.S. 194, 202 (2001). "This inquiry, it is vital to note, must be undertaken in light of the specific context of the case, not as a broad general proposition." *Id.* at 201. For example, to illustrate this point in another First Amendment context, the Seventh Circuit expressed that "[o]ne might well say as a 'broad general proposition' something like 'public officials may not censor speech in a designated public forum,' but whether [the defendant] was bound to know that the [school newspaper] operated in such a forum is a different question altogether." *See Hosty v. Carter*, 412 F.3d 731, 738 (7th Cir. 2005) (en banc) (Easterbrook, J.). The Supreme Court in *Sante Fe* emphasized that "[w]hether a government activity violates the Establishment Clause is 'in large part a legal question to be answered on the basis of judicial interpretation of social facts. . . . Every government practice must be judged in its unique circumstances." *Sante Fe*, 530 U.S. at 315 (citation omitted). The "difficult task of separating a student's private

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message . . . from a state-sponsored religion message" is "of necessity one of line-drawing, sometimes quite fine, based on the particular facts of each case." *See Adler*, 250 F.3d at 1336 (quotations and citations omitted). When such a fact-intensive analysis is required, the protection of qualified immunity becomes even more significant.

Here, as the court has outlined above, the law has been clearly established since the founding of this country that the government may not favor one religion over another. *See generally Larson*, 456 U.S. at 244-46 (discussing historical setting for inclusion of Establishment Clause in First Amendment in 1781 and noting that since *Everson v. Board of Education*, 330 U.S. 2 (1947), the "Court has adhered to the principle, clearly manifested in the history and logic of the Establishment Clause, that no State can 'pass laws which aid on religion' or that 'prefer one religion over another'"). However, the "broad general proposition" of the prohibition against favoring one religion over another is not the question. The question is whether Defendants Ray and Clough were bound to know that the manner in which Safe Space was operated rendered it state-sponsored speech for these purposes. While the court has rejected Defendants' argument on the merits of this claim, the court does find that the law with respect to the imprimatur of the state is not so clearly established on these facts and that Defendants are entitled to qualified immunity on this point.

The court found that an objective student observing the manner in which the Safe Space program is administered would perceive it as receiving the stamp of approval of the

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administration of Georgia Tech. The court understands, however, that an experienced educator in the Dean of Students Office thinking more about the nuances of student organizations and viewing the participation of the student leader from Pride Alliance might not reach that conclusion. In fact, the court has not located another case involving a "hybrid" student organization at the university level. *But cf. Cummins v. Campbell*, 44 F.3d 847 (10th Cir. 1994) (granting qualified immunity to Board of Regents of Oklahoma State University when it suspended (and later rescinded the suspension of a) showing of controversial film because Board was concerned that university would be perceived as a sponsor of film where it was put on by Student Union Activities Board which received money from student activity fund and used university-owned theater for showing of movie, and manager of student union was employee of university). Because the analysis of state-sponsorship in the First Amendment context is so fact-specific and because the court has located no controlling case law in circumstances such as these, the court finds that Defendants Clough and Ray are entitled to qualified immunity on Plaintiffs' First Amendment Establishment Clause claim.

The court finds that the current manner in which the Safe Space program is administered violates the Establishment Clause. The court DIRECTS Defendants Ray and Clough to remove the religious/spirituality materials from the Safe Space training manual.

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B. Student Activity Fees

In *Rosenberger v. Rector & Visitors of University of Virginia*, 515 U.S. 819 (1995), a student organization at the University of Virginia filed suit against the University's Board of Visitors challenging a decision by the student government not to provide money from student activity funds to the student group Wide Awake Publications to use in publishing a journal because the group had a Christian editorial viewpoint.

Before a group at the University could receive funding, it has to become a Contracted Independent Organization. Once a group satisfies the procedural requirements of becoming a Contracted Independent Organization, it may apply for funds from the Student Activities Fund whose purpose is to "support a broad range of extracurricular student activities that are related to the educational purpose of the University." *Id.* at 824. The Student Activities Fund received its money from a mandatory fee of $14 per semester assessed to each full-time student. *Id.* "The Student Council, elected by the students, has the initial authority to disburse the funds, but its actions are subject to review by a faculty body chaired by a designee of the Vice President for Student Affairs." *Id.* Certain categories of expenses are not permitted to be reimbursed from the Student Activities Fund: "religious activities, philanthropic contributions and activities, activities that would jeopardize the University's tax-exempt status, those which involve payment of honoraria or similar fees, or social entertainment or related expenses." *Id.* at 825. "Political activities" are defined as

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electioneering and lobbying. *Id.* The funding guidelines state that "restrictions on funding political activities are not intended to preclude funding of any otherwise eligible student organization which . . . espouses particular positions or ideological viewpoints." *Id.* "Religious activity" is defined as any activity that "primarily promotes or manifests a particular belief in or about a deity or an ultimate reality." *Id.*

No direct payments were made to student groups; rather, the groups submitted their bills to the Student Council which determined whether the expenses were appropriate and then paid the organization's creditors. Wide Awake Publications submitted a request to the Student Activity Fund for $5,862 to pay its printer for the costs of printing a journal entitled Wide Awake: A Christian Perspective at the University of Virginia. *Id.* at 827. The Appropriations Committee of the Student Council denied Wide Awake's request on the grounds that it was a "religious activity." The group appealed to the full Student Council. The appeal was denied without comment and the group appealed to the Student Activities Committee. In a letter signed by a representative of the Dean of Students Office, the committee sustained the denial of funding. *Id.* The student group then filed suit alleging that the denial based on the religious editorial viewpoint violated their rights to freedom of speech and press, the free exercise of religion, and equal protection of the law.

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The Court determined that the Student Activity Fund was a forum, although in a metaphysical sense, and proceeded to apply the free speech principles of a forum to the Fund. *Id.* at 830. In

> determining whether the State is acting to preserve the limits of the forum it has created so that the exclusion of a class of speech is legitimate, we have observed a distinction between, on the one hand, content discrimination, which may be permissible if it preserved the purposes of that limited forum, and, on the other hand, viewpoint discrimination, which is presumed impermissible when directed against speech otherwise within the forum's limitations.

Id. at 830-31. The University argued that it was not engaging in viewpoint discrimination, but rather content discrimination when it declined Wide Awake's funding request. The Court disagreed. "By the very terms of the [Student Activity Fund] prohibition, the University does not exclude religion as a subject matter but selects for disfavored treatment those student journalistic efforts with religious editorial viewpoints." *Id.* at 831. "Having offered to pay the third-party contractors on behalf of private speakers who convey their own messages, the University may not silence the expression of selected viewpoints." *Id.* at 835. The Court determined, therefore, that the funding guidelines violated the plaintiffs' right of free speech under the First Amendment. *Id.* at 837.

The Court next considered whether the University's action was excused by the necessity of complying with the Constitution's prohibition against state establishment of religion. The Court determined that the governmental program was neutral toward religion.

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Id. at 840. "The neutrality of the program distinguishes the student fees from a tax levied for the direct support of a church or group of churches." *Id.* The student activity fee is "designed to reflect the reality that student life in its many dimensions includes the necessity of wide-ranging speech and inquiry and that student expression is an integral part of the University's educational mission." *Id.* The "disbursements from the fund go to private contractors for the cost of printing that which is protected under the Speech Clause of the First Amendment. This is a far cry from a general public assessment designed and effected to provide financial support for a church." *Id.* at 841. "We do not confront a case where, even under a neutral program that includes nonsectarian recipients, the government is making direct money payments to an institution or group that is engaged in religious activity." No "public funds flow directly to [Wide Awake's] coffers." *Id.*

The Court revisited *Rosenberger* in *Board of Regents of the University of Wisconsin System v. Southworth*, 529 U.S. 217 (2000). There, students at the University of Wisconsin alleged that the University's mandatory student activity fee violated their First Amendment rights of free speech, free association, and free exercise and that the University was required to give them the choice to opt out of funding organizations that engage in political and ideological expression that is offensive to their personal beliefs. The money for student activities fees was disbursed by "students in consultation with the chancellor and subject to the final confirmation of the board" of Regents. *Id.* at 222. As with the policy at the

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University of Virginia, at the University of Wisconsin, funds were not disbursed directly to the student groups, but rather the organizations submitted receipts or invoices to the University for reimbursement. The University's policy established that the student organizations could not receive reimbursement for "[g]ifts, donations, and contributions," the cost of legal services, or for "[a]ctivities which are politically partisan or religious in nature." *Id.* at 225. No examples were given for these activities, but a separate policy noted that an organization could receive funding if it "does not have a primarily political orientation (i.e. is not a registered political group)." *Id.* at 225-26. Further, the separate policy also states that the organization should not use any funds for lobbying purposes. *Id.* at 226. The parties entered into a stipulation at the beginning of litigation that the University's policy was viewpoint neutral. *Id.*

The Supreme Court found that the student activities program as designed by the University was intended to be at the initiative of the students. *Id.* at 229. The Court, thus, contrasted the program with a situation where the challenged speech was funded by tuition dollars and the University and its official were responsible for its content. *Id.* "The University of Wisconsin exacts the fee at issue for the sole purpose of facilitating the free and open exchange of ideas by, and among, its students. We conclude the objecting students may insist upon certain safeguards with respect to the expressive activities which they are required to support." *Id.* "We decide that the viewpoint neutrality requirement of the

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University program is in general sufficient to protect the rights of the objecting students."

Id. at 230.

> The University may determine that its mission is well served if students have the means to engage in dynamic discussions of philosophical, religious, scientific, social, and political subjects in their extracurricular campus life outside the lecture hall. If the University reaches this conclusion it is entitled to impose a mandatory fee to sustain an open dialogue to these ends.

Id. at 233.

> The University must provide some protection to its students' First Amendment interests, however. The proper measure, and the principal standard of protection for objecting students, we conclude, is the requirement of viewpoint neutrality in the allocation of funding support. Viewpoint neutrality was the obligation to which we gave substance in *Rosenberger*.

Id. The Court concluded by stating:

> There is a symmetry then in our holding here and in *Rosenberger*: Viewpoint neutrality is the justification for requiring the student to pay the fee in the first instance and for ensuring the integrity of the program's operation once the funds have been collected. We conclude that the University of Wisconsin may sustain the extracurricular dimensions of its programs by using mandatory student fees with viewpoint neutrality as the operational principle.

Id. at 233-34.

On remand, the Seventh Circuit further addressed the issues outlined by the Supreme Court in *Southworth*. Although the Supreme Court premised its decision in *Southworth* on a stipulation that the University's policy was viewpoint neutral, on remand, the plaintiffs were granted leave to withdraw that stipulation. *See Southworth v. Board of Regents of the University of Wisconsin System*, 307 F.3d 566 (7th Cir. 2002). The plaintiffs then argued that

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the "mandatory fee system failed to satisfy the constitutional mandate of viewpoint neutrality because it grants the student government unbridled discretion" to disburse funds. *Id.* at 574. The Seventh Circuit looked to a series of Supreme Court cases addressing licensing or permitting to determine whether unbridled discretion was an aspect of viewpoint neutrality. *See id.* at 575-79 (discussing *Thomas v. Chicago Park District*, 534 U.S. 316 (2002); *Forsyth County v. Nationalist Movement*, 505 U.S. 123 (1992); *City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750 (1988); *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215 (1990); *Shuttlesworth v. City of Birmingham*, 394 U.S. 147 (1969); and *Freedman v. Maryland*, 380 U.S. 51 (1965)). Based on its analysis of these cases, the Seventh Circuit held that a prohibition on unbridled discretion is an element of viewpoint neutrality. *Id.* at 578-79; *see also Amidon v. Student Association of the State University of New York at Albany*, 508 F.3d 94, 103-04 (2d Cir. 2007).

Ultimately, the Court of Appeals determined that the University's policies – which had been revised during the course of the litigation – did not permit unbridled discretion because they contained a requirement that decisions be made on a viewpoint neutral basis, allocation deliberations must be tape recorded, organizations must receive a written explanation of denials, students participating in the allocation process must avoid conflicts of interest, and a detailed appeals process was established. 307 F.3d at 581-83; *but compare Amidon*, 508 F.3d at 104-05 (holding that such protections not sufficient to assure viewpoint

neutrality in context of referendum on whether organization should receive funding). Significantly, however, the court notes that prior to the revision of policies, the University had prohibited funding of "[a]ctivities which [were] politically partisan or religious in nature." 307 F.3d at 594. Because of this, "organizations espousing partisan political or religious viewpoints [were] at a funding disadvantage compared to other viewpoints" as the policy permitted decisions makers to consider the length of time a student organization had been in existence and the amount of funding the organization received in prior years. *Id.* The court found that the University, therefore, could not make preferences on this basis.

The general principle to be derived from these cases is that a pool of student activity fees to fund private speech is a limited public forum. *See Rosenberger*, 515 U.S. at 830. A controlling body may impose restrictions on speech in a limited public forum so long as the restrictions are viewpoint neutral and reasonable in light of the forum's purpose. Denial of funding based on viewpoint discrimination is impermissible in the same way that denial of access to a physical forum in a viewpoint-discriminatory manner. *See*, *e.g.*, *Good News Club v. Milford Central School*, 533 U.S. 98, 110 (2001).[8]

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[8]*Good News Club* reiterated the holdings of *Rosenberger*. There, a couple living within the Milford School District were sponsors of the local Good News Club, a private Christian organization for children ages 6 to 12. 533 U.S. at 103. Pursuant to a school district policy, the couple applied to the superintendent to hold the Club's weekly after-school meetings in the school's cafeteria. *Id.* The superintendent denied the request finding that the group's proposed use was the "equivalent of religious worship." *Id.* Because the school district's policy prohibited the use "by any individual or organization for religious purposes," the Club could not hold its meetings at the school. The Club's sponsors sued.

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Turning to the specifics of Plaintiffs' allegations, Plaintiffs filed suit against G. Wayne Clough, individually and in his official capacity as President of Georgia Tech; Gail DiSabatino (formerly Dean of Students at Georgia Tech) in her individual capacity; Danielle McDonald, individually and in her official capacity as Dean of Student Involvement; Stephanie Ray, individually and in her official capacity as Director of Diversity Programs; and Michael D. Black, individually and in his official capacity as Director of Housing. There is no evidence in the record to show, however, that any of these Defendants are even arguably responsible for any constitutional violation in their individual capacities.

Plaintiffs allege that their constitutional rights have been violated as a result of the Policies and Priorities of the Joint Finance Committee. The Joint Finance Committee is a standing committee of the Georgia Tech Student Government Association and is composed of students only. Plaintiffs, however, have sued Dr. Clough and several representatives of

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The Supreme Court first reviewed that "[w]hen the State establishes a limited public forum, the State is not required to and does not allow persons to engage in every type of speech. The State may be justified in reserving its forum for certain groups or for the discussion of certain topics. . . . The restriction must not discriminate against speech on the basis of viewpoint and the restriction must be reasonable in light of the purposes served by the forum." *Id.* at 107 (quotations and citations omitted). The Court reminded that in "*Rosenberger*, we held that a university's refusal to fund a student publication because the publication addressed issues from a religious perspective violated the Free Speech Clause. Concluding that Milford's exclusion of the Good News Club based on its religious nature is indistinguishable from the exclusions in these cases, we hold that the exclusion constitutes viewpoint discrimination. Because the restriction is viewpoint discriminatory, we need not decide whether it is unreasonable in light of the purposes served by the forum." *Id.*

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the Dean of Students Office in their official and individual capacities.[9] To succeed in a suit against these defendants, Plaintiffs must show that either these individuals or the entity of which they are officers are the actors making or maintaining an unconstitutional policy. *See*, *e.g.*, *Busby v. City of Orlando*, 931 F.2d 764, 776 (11th Cir. 1991) (suing an individual in her official capacity is "another way of pleading an action against an entity of which an officer is an agent"). Plaintiffs have failed to do so. *See*, *e.g.*, *Pembaur v. City of Cincinnati*, 475 U.S. 469, 481 (1986) (for actions of government official to be deemed representative of municipality, acting official must be imbued with final policymaking authority); *Monell v. Department of Social Services*, 436 U.S. 658, 694 (1978) (municipalities may only be held liable where injury is inflicted by government's "lawmakers or by those whose edicts or acts may fairly be said to represent official policy"); *Quinn v. Monroe County*, 330 F.3d 1320 (11th Cir. 2003); *Scala v. City of Winter Park*, 116 F.3d 1396 (11th Cir. 1997).

As the court outlined above, the Board of Regents apparently authorizes each school in the university system to impose mandatory student activity fees. The Board of Regents Policy Manual also states that the fees "shall be budgeted and administered by the president using proper administrative procedures, which shall include the advice and counsel of an

[9]There is no allegation that Defendants Ray or Black were involved in the administration of the student activity fees, and they are not defendants to this particular claim.

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advisory committee composed of at least 50 percent students." The record of this litigation also includes the Policies and Priorities of the Joint Finance Committee (as of Summer 2005). These policies govern the manner in which the student activities fees are allocated. The record, however, is devoid of any information that shows how Georgia Tech or any of its administrators have implemented the Board of Regents' Policy Manual's directive regarding the duty of the president, and there is no evidence that the president has delegated his authority to the Student Government Association (and its committees) or to the Faculty Senate to promulgate its Policies and Priorities. In short, there is no evidence that Dr. Clough himself has done anything about student fees or that he has empowered any of the other of the named officials or student body groups to act in his stead.

The only activities that Plaintiffs associate with any particular Defendant is that Dean DiSabatino or her designate, Dean McDonald, sit on the Student Activities Committee of the Faculty Senate which apparently gives final approval to the Student Government Association policies and budget allocation. There is no evidence in the record that Dean DiSabatino or Dean McDonald have any power to change the student activity fee policy. The court finds that the mere participation of Dean DiSabatino or Dean McDonald in final approval of allocation decisions made by the Joint Finance Committee of the Student Government Association is not a sufficient basis upon which to hold them liable in a facial

challenge to the Policies and Priorities' ban on funding of "religious activities or "partisan political activities."

The same failures of evidence apply when considering Plaintiffs' suit against Dr. Clough in his official capacity as the President of the Georgia Institute of Technology. The court notes that the Board of Regents "is a state agency that governs and manages the University System of Georgia and its member institutions, including the Georgia Institute of Technology. Georgia Tech is not a separate or distinct legal entity from the Board and, therefore, cannot sue or be sued in its own capacity." *See*, *e.g.*, *Board of Regents of the University System of Georgia v. Doe*, 278 Ga. App. 878, 878-79 (2006).

The Board of Regents has granted authority to the president to "budget and administer" the mandatory student activity fees program. The record is silent as to how or if that authority was transferred or delegated to the Student Government Association at Georgia Tech. The Joint Finance Committee develops the policy which is then either approved or disapproved in its entirety by a committee of the Faculty Senate, and again there is no evidence that they have the power to make or approve policies of this type for the Institute. In sum, there is no evidence to show that the policy is approved by any person with the authority to make this decision a policy of Georgia Tech or the Board of Regents. Thus, with respect to Plaintiffs' suit against the Defendants in their official capacities, there

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is nothing in the record to show that any official at Georgia Tech or the Board of Regents took any action in the creation of an unconstitutional policy.[10]

In this light, the court notes that the challenges raised to the student activity fee allocation decisions in *Rosenberger* were made against the University of Virginia as

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[10]The court may be accused of admitting of an inference that the Georgia Tech Student Government Association has usurped the authority to administer student activity fees. But those familiar with the talents of that student body in going around the administration may not think that this is impossible. Take the case of George P. Burdell.

> George P. Burdell, Tech's long-lived mythical student, began attending class in 1927. William E. Smith created Burdell while filling out his enrollment papers. He was amused by the idea of also completing the paperwork for George P. Butler, his high school principal and loyal University of Georgia alumnus. But Smith lost his nerve after writing George P. on the application and finished with Burdell, the maiden name of his best friend's mother.
>
> By signing Burdell's name in addition to his own on all his class rolls, Smith developed his alter ego into a "legitimate" student. He even turned in separate exam papers for Burdell, changing the handwriting and answers enough to fool some professors into thinking George was a real student. In 1930, Burdell received his undergraduate degree from Tech.
>
> In the following years, other students have picked up the task of keeping Burdell alive. His name has appeared on a multiplicity of attendance rolls, registrar's forms, magazine subscriptions, insurance policies, letters to the editor and love letters. During World War II, Burdell showed up at Harvard for a brief time before serving with the Eighth Air Force in England.
>
> In the spring of 1969, the first quarter of Tech's computerized registration system, Burdell managed to enroll in every course offered – more than 3,000 hours. Ever thirsty for knowledge, Burdell replicated the feat in 1975 and 1980.
>
> It is tradition for Tech students to attempt to have George paged at away football games.

See Ramblin' Reck Club, Traditions, George P. Burdell, located at www.cyberbuzz.gatech.edu/reck/traditionsGeorge.php. Whatever the truth is, it is Plaintiffs' burden to establish that the policy is that of the Institute, and they have not done that.

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denominated under state law as "the Rector and Visitors of the University of Virginia" responsible under state law for "governing the school." *See* 515 U.S. at 823. A review of the district court's opinion in *Rosenberger* shows that in addition to the Rectors and Board of Visitors as a group, the individual Board members, as well as Robert Stump, an Associate Dean of Students, were also sued in their official capacities. *See Rosenberger v. Rector & Visitors of University of Virginia*, 795 F. Supp. 175, 177 (W.D. Va. 1992). The record further shows that under state law, the Rector and the Board of Visitors had ultimate responsibility for the operation of the student activity fund, but delegated the responsibility for allocating funds to the University's Student Council. *Id.* The Student Council allocated funds on the basis of Guidelines issued by the Board. *Id.* It was those Guidelines that excluded *inter alia* from funding "religious activities" and "political activities." *Id.* Dean Stump, on behalf of the University's Student Activities Committee, issued a letter to Wide Awake Productions, informing it that the Committee had affirmed the decision of the Student Council to deny funding. *See Rosenberger v. Rector & Visitors of the University of Virginia*, 18 F.3d 269, 274 (4th Cir. 1994). Similarly, the students in *Southworth* sued the Board of Regents of the University of Wisconsin System. *See Fry v. Board of Regents of the University of Wisconsin System*, 132 F. Supp. 2d 744, 745 (W.D. Wis. 2000). Under state law, both the Board of Regents and the students control the funds generated by the student activity fee. *Id.*

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For these reasons, the court finds that Plaintiffs have failed to demonstrate the liability of any of Defendants before the court on the constitutionality of Georgia Tech's student activity fees program, and the court must grant summary judgment to Defendants on Plaintiffs' claims with respect to the student activity fees program.[11]

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[11]There are other problems with the state of the record. The manner in which Plaintiffs challenge Georgia Tech's funding policy is not entirely clear to the court. Because of that uncertainty, the court finds that there may be problems with Plaintiffs' standing. In their Second Amended Complaint, Plaintiffs allege that as a result of Georgia Tech's policy, "Plaintiffs have been denied the ability to participate in student organizations and receive funding on an equal basis to students engaged in other forms of expressive ideological activity not subject to the Institute's funding ban." *Id.*, ¶ 38. Plaintiffs also alleged: "The prohibition against the funding of political or religious activities at the same time that the Institute funds a wide variety of cultural and ideological activities constitutes impermissible viewpoint discrimination, both facially and as applied." *Id.*, ¶ 39.

"The irreducible constitutional minimum of standing contains three elements." *CAMP Legal Defense Fund, Inc. v. City of Atlanta*, 451 F.3d 1257, 1269 (11th Cir. 2006) (quotation and citation omitted). A plaintiff who invokes the jurisdiction of a federal court bears the burden to show (1) an injury in fact, meaning an injury that is concrete and particularized, and actual or imminent, (2) a causal connection between the injury and the causal conduct, and (3) a likelihood that the injury will be redressed by a favorable decision." *Id.* (quotation and citation omitted). A plaintiff much show each element. *Id.* "An injury in fact requires the plaintiff to show that he personally has suffered some actual or threatened injury." *Id.* (quotation and citation omitted). It is clear that Plaintiffs have not established any evidence in the record to show that they attempted to apply for funding and had that funding denied on the basis of its religious or political nature. For that reason, the court finds that Plaintiffs have not alleged any harm to them or to their organizations and would have no standing to challenge Georgia Tech's student activity fees policy in this respect.

It appears, however, that Plaintiffs also argue they are forced to pay into the mandatory student activities fee system and therefore can challenge the allocation of the fees if they believe it not to be done in a viewpoint neutral manner. As the court wrote in its prior order, the Supreme Court in *Southworth* authorized such a challenge. On remand, the Seventh Circuit explicitly held that "students have a First Amendment interest in assuring that the University administers the mandatory fee system in [a] manner ensuring viewpoint

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Although Plaintiffs' claims on the student activity fees cannot proceed, the court finds it prudent to make some additional comments for the guidance of the parties.

There are two salient points concerning the Policies and Priorities of the Joint Finance Committee. First, the policy plainly prohibits the funding of religious activities. The language of the document is substantially similar to that of the University of Virginia's policy challenged – and rejected – in *Rosenberger*. The holding of *Rosenberger* is clear:

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neutrality." *Southworth v. Board of Regents of University of Wisconsin System*, 307 F.3d 566, 573 (7th Cir. 2002). "This independent First Amendment right satisfies the injury-in-fact requirement of standing." *Id.* at 573-74. The court held that the students had standing "to facially challenge the mandatory fee system on the grounds that it grants the student government unbridled discretion" even though they had not applied for or had been denied funding. *Id.* at 581. *See* Order, Aug. 27, 2007, at 14-15.

Also, Plaintiffs attempted to raise several incidents of viewpoint discrimination in funding, but the evidence for those instances – newspaper articles – was stricken for evidentiary reasons in the court's order of July 6, 2007. For example, one newspaper article reported that in April 2006, the Campus Christian Fellowship submitted a bill to fund a benefit concert to help a migrant group suffering a drought in Eastern Africa. During the hearing on the request, the Joint Finance Committee expressed concern that the organization would use stage time to advocate its religious beliefs. Ultimately, the group's funding request was denied. During the same Joint Finance Meeting, the committee voted to grant funds to the Muslim Student Organization to bring an imam to campus during Islamic Cultural Awareness Week. Even if the court were to consider that incident, the newspaper articles indicated that in addition to concerns about religious activities, the student committee also discussed whether it was appropriate to fund concerts at all. Thus, the basis for the committee's ultimate denial of the funds is not clear.

The record is further not clear on another point that appears to have been of great significance to the Supreme Court in *Rosenberger* – that is, the manner in which funds are distributed. The court has no information as to whether funds are disbursed directly to student groups or whether the Student Government reimburses student groups for permissible expenses based upon invoices and receipts produced to the Student Government. The reimbursement aspect of the University of Virginia policy was referred to numerous times by the majority in *Rosenberger*, as well as in Justice O'Connor's concurrence.

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It is unconstitutional to discriminate against a viewpoint of religion in funding extracurricular activities.

Second, the court notes that the manner in which the policy is administered at Georgia Tech is whimsical and would appear to exceed even an arbitrary and capricious standard. The policy claims to prohibit the funding of religious activities, but as the court noted above, all manner of activities that could be construed as "religious activities" do get funded, such as Hillel, the Christian Campus Fellowship, the Gifted Gospel Choir, the Muslim Student Association, and Campus Crusade for Christ. The policy clearly is more honored in the breach than the observance.

The inability of Deans DiSabatino and McDonald to define the terms "religious activity" and "partisan political activity" speaks volumes as to the potential for uneven application of the restrictions, particularly to show that students, themselves, would not be able to implement the policy in a consistent manner. Despite Mr. Keller's attempts in his affidavit to round out the terms, the court is not reassured that the opinion of one student constitutes sufficient definition to avoid a claim of unbridled discretion. Further, there is no evidence in the record that Georgia Tech employs any of the "procedural" devices the University of Wisconsin implemented to avoid a finding of "unbridled discretion." To the extent that viewpoint neutrality requires a policy to be administered without unbridled discretion, it would be difficult to see how Georgia Tech's policy meets that expectation.

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Further, Defendants raise several defenses to Plaintiffs' claims. Defendants argue that the Student Government Association adopted the policy prohibiting the funding of religious activities to avoid excessive entanglement with the Establishment Clause. The Supreme Court in *Rosenberger*, however, specifically rejected this defense. There, the Court noted that the Fourth Circuit had ruled that the University's decision to deny funding to Wide Awake violated the Speech Clause of the First Amendment, but that the action was justified by the necessity of avoiding a violation of the Establishment Clause, an interest it found compelling. *See* 515 U.S. at 838. The Fourth Circuit found that by funding the publication of a magazine by Wide Awake, the University would be sending an "unmistakably clear signal" that it supported Christian values and wishes to promote those values. *Id.*

The Supreme Court rejected this notion finding that the

> governmental program here is neutral toward religion. There is no suggestion that the University created it to advance religion or adopted some ingenious device with the purpose of aiding a religious cause. The object of the [Student Activity Fund] is to open a forum for speech and to support various student enterprises, including the publication of newspapers, in recognition of the diversity and creativity of student life.

Id. at 840. "The University's [Student Activity Fee] Guidelines have a separate classification for, and do not make third-party payments on behalf of, "religious organizations," which are those "whose purpose is to practice a devotion to an acknowledged ultimate reality or deity." *Id.* "The program respects the critical difference

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between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercises Clauses protect." *Id.* at 841 (quotation and citation omitted). For the same reasons, Georgia Tech cannot raise a defense to Plaintiffs' claims based on its fear of abrogating the Establishment Clause.

Defendants also contend that allowing the funding of "religious activities" through Student Activity Fees would violate the Establishment Clause of the Georgia Constitution. Article I, § II, Para. VII of the Georgia Constitution provides, "[n]o money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect, cult, or religious denomination or of any sectarian institution."[12] "Under this provision, neither the State nor any of its political subdivisions can own or control, or give monetary aid, to a church or religious institution." *Taetle v. Atlanta Independent School System*, 280 Ga. 137, 138 (2006); *see also Savannah v. Richter*, 160 Ga. 177 (1925) (holding that City of Savannah's assumption of paving assessments against churches and sectarian institutions were unconstitutional); *Bennett v. City of LaGrange*, 153 Ga. 428 (1922) (resolution of city council authorizing payment to Salvation Army to perform city's charitable work unconstitutional).

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[12]This clause, sometimes referred to as the Separation Clause, was previously located in the Georgia Constitution as follows: 1877 Const., Art. I, § 1, ¶ XIV; 1945 Const., Art. I, § 1. ¶ XIV; and 1976 Const., Art. I, § II, ¶ X.

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Other than these few cases, the Separation Clause of the Georgia Constitution has not received much scrutiny. In a 1960 opinion of the Attorney General of Georgia discussing whether the use of prison labor to gratuitously clear and maintain church grounds and cemeteries violated state and federal constitutional limits on the separation of church and state, the author noted that the Separation Clause "has received only meager judicial interpretation." *See* 1960-61 Op. Att'y Gen., p. 349, at 351.

> It is to be noted that the State provision is far more explicit than the Federal, as the State Constitution deals specifically with State-Aid to churches, while the Federal does so only inferentially. Moreover, the State provision refers to money being granted "directly or indirectly," which indicates on its face the broadest type of proscription. That the State provision quoted above was intended to have a stronger application than the Federal is indicated by the fact that the State Constitution contains in the immediately preceding paragraph, Sec. 2-112, a more general religious freedom guaranty which declares: "All men have the natural and inalienable right to worship God, each according to the dictates of his own conscience, and no human authority should, in any case, control or interfere with such right of conscience."

Id. at 351-52; *see also Birdine v. Moreland*, 579 F. Supp. 412, 417 (N.D. Ga. 1983) (Shoob, J.).

Theoretically, then, it is possible that Georgia's Separation Clause is to be read more broadly than the First Amendment of the United States Constitution. This fact, however, should be of no comfort to Georgia Tech. In *Good News Club*, the school district had defended its decision not to permit a private Christian organization to hold meetings after school in the school's cafeteria because to do so would violate a section of the state's

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Education Law. 533 U.S. at 107. The Supreme Court rejected that argument stating, "[b]ecause we hold that the exclusion of the Club on the basis of its religious perspective constitutes unconstitutional viewpoint discrimination, it is no defense for Milford that purely religious purposes can be excluded under state law." *Id.* Thus, if a court were to determine that Georgia Tech's student activity fee policy were not viewpoint neutral, any interpretation of the Georgia Constitution likely would not save it. The court further notes that Defendants did not even attempt to explain how the student activity fee program at Georgia Tech could come within the ambit of Georgia's Separation Clause, but rather merely cited the Clause with no further explanation.

Defendants contend that it is constitutionally legitimate for a state entity to prohibit support of partisan political activities by government bodies or employees based on *Galda v. Rutgers*, 772 F.2d 1060 (3d Cir. 1985). As an initial matter, the viability of *Galda* in light of the Supreme Court's decision in *Southworth* is highly questionable. *Galda*, like *Southworth v. Grebe*, 151 F.3d 717 (7th Cir. 1988), *rev'd sub nom. Board of Regents v. Southworth*, 529 U.S. 217 (2000), premised its holding on an analogy to *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977) (addressing constitutionality of agreement that required teachers who did not join union to pay mandatory service charge equal to union dues to the union), and *Keller v. State Bar of California*, 496 U.S. 1 (1990) (considering

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challenge to use of mandatory state bar dues to fund lobbying on social issues), which relied on a "germaneness" analysis.

In the context of the university setting, however, the Supreme Court explicitly rejected a "germaneness" analogy in *Southworth*, deciding instead the "proper measure" of protection to objecting students is "the requirement of viewpoint neutrality." *See* 529 U.S. at 232-33 and 231 (the "standard of germaneness as applied to student speech at a university is unworkable"). Furthermore, *Galda* involved the direct funding of an organization independent of and outside of the university campus, facts not at issue here. *Southworth* directly holds that the First Amendment permits a public university to charge its students a mandatory student activity fee to fund programs that promote political or ideological speech so long as the allocation of the fees is done on a viewpoint neutral basis.[13]

The court makes a few final comments. While the court cannot rule in favor of Plaintiffs with respect to any constitutional violation based on the record before it, the court believes its lengthy explanation of the case law in this area demonstrates that Georgia Tech's student activity fees policy might not be capable of passing constitutional muster. From the parties' pleadings in this case, the court is not confident that Georgia Tech has appreciated

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[13]The report of the mediator filed on January 18, 2008, indicates that Georgia Tech may also take the position that the funding of "partisan political activities" is barred by state law. *See* Report, at 5. The court has not located any such argument in Georgia Tech's pleadings and therefore does not address it here.

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the nature and degree of this problem.[14] The case law in this area has developed significantly with the onset of the Supreme Court's opinion in *Rosenberger*, and there is no reflection of any consideration of that development in Georgia Tech's policies. The holding of *Rosenberger* is clear. Again, this is why the court ordered the parties to mediation and encouraged settlement hoping that the Institute would take the opportunity to reevaluate its funding policies in light of the relevant case law. The school chose not to do so and despite the fact that this case is not the one to squarely challenge the policy, the court has no doubt that challenge will occur in the future, and it would behoove the school to prepare for that eventuality.

Because Plaintiffs have not carried their burden of demonstrating that Georgia Tech's student activities fee policy is unconstitutional, the court grants Defendants' motion for

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[14]The court notes, for example, that Georgia Tech repeatedly relies on holdings of the Fourth Circuit in *Rosenberger*. *See* Defs.' Mot. S.J., at 33-35. Defendants argue: "It is commonly held that if a university presents sufficient compelling state interests in not funding religious activities, the policy is not per se unconstitutionally vague or overbroad." *Id.* at 33 (citing *Rosenberger*, 18 F.3d 269, 287 (4th Cir. 1992). This discussion in the Fourth Circuit's opinion most certainly did not survive the Supreme Court's decision, as it relied on the Fourth Circuit's view that the University could defend its denial of funding on the basis that it did not wish to violate the Establishment Clause. *Id.* ("[I]t is difficult for us to conceive how the Rector and Visitors may avoid offending the Establishment Clause without extending the prohibition on SAF funding to all 'religious activities.'"). The Supreme Court specifically rejected this view. The Supreme Court held that any funding decision must be viewpoint neutral. A decision to deny funding because of an association with religion is not viewpoint neutral. Once the decision is made that a policy is not viewpoint neutral, the court does not go on to determine whether the restriction is unreasonable in light of the purposes served by the forum. *See Good News Club*, 533 U.S. 98, 107 (2001).

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summary judgment with respect to this claim. The court further DIRECTS that the Clerk of the Court dismiss Defendants DiSabatino and McDonald from this suit.

C. Speech Zone

There is no dispute that Georgia Tech changed its policy on the Speech Zone during the conduct of the litigation and that Plaintiffs do not challenge the constitutionality of the policy as it stands now. Further, the court has previously held that Plaintiffs have standing to challenge this policy. The court must now consider whether any of the remedies sought by Plaintiffs are available under these circumstances. Plaintiffs still seek a declaratory judgment declaring Georgia Tech's prior policy unconstitutional, a permanent injunction against the prior policy, damages, and attorney's fees.

As an initial matter, the court finds that Georgia Tech's amendment of its Speech Zone policy has mooted a portion of Plaintiffs' complaint. Georgia Tech has changed its policy and there is no "reasonable expectation that the same complaining party would be subjected to the same action again." *See*, *e.g.*, *Murphy v. Hunt*, 455 U.S. 478, 482 (1982). There is no sufficient possibility that anyone in the future will be subjected to any constitutional harm regarding the policy. *See*, *e.g.*, *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975). To be entitled to an injunction – the purpose of which is to prevent future violations – Plaintiffs would have to show "some cognizable danger of recurrent violation, something more than the mere possibility." *See*, *e.g.*, *United States v. W.T. Grant Co.*, 345 U.S. 629,

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634 (1953). While Plaintiffs contend that in the past, Georgia Tech has inconsistently enforced its policy and the same danger remains now, the court finds that this speculation is an insufficient basis upon which to enter a permanent injunction, particularly where Plaintiffs agree that the policy as it is currently stated is constitutional. Thus, "the issue of the validity of the old regulation is moot, for this case has 'lost its character as a present, live controversy of the kind that must exist if we are to avoid advisory opinions on abstract questions of law.'" *See Princeton University v. Schmid*, 455 U.S. 100, 103 (1982) (per curiam) (quotations omitted) (citing *Hall v. Beals*, 396 U.S. 45, 48 (1969)). *See also Jews for Jesus, Inc. v. Hillsborough County Aviation Authority*, 162 F.3d 627 (11th Cir. 1998); *Cotterall v. Paul*, 755 F.2d 777, 780 (11th Cir. 1985) ("Past exposure to illegal conduct does not in itself show a pending case or controversy regarding injunctive relief if unaccompanied by any continuing, present injury or real and immediate threat of repeated injury.").

Although Plaintiffs' claims for injunctive and declaratory relief may be moot, generally, a claim for nominal damages precludes a finding of mootness even if a defendant has abandoned or altered the allegedly unconstitutional policy underlying the plaintiff's claims. *See*, *e.g.*, *DA Mortgage, Inc. v. City of Miami Beach*, 486 F.3d 1254 (11th Cir. 2007) ("A change in statute will not always moot a constitutional claim, however. If a litigant asserts damages from the application of a constitutionally defective statute, he may be able to pursue his constitutional challenge notwithstanding later legislative changes that would

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appear to address his complaint."); *Tanner Advertising Group, L.L.C. v. Fayette County*, 451 F.3d 777 (11th Cir. 2006); *Crown Media LLC v. Gwinnett County*, 380 F.3d 1317, 1325 (11th Cir. 2004) ("When a plaintiff requests damages, as opposed to only declaratory or injunctive relief, changes to or repeal of the challenged ordinance may not necessarily moot the plaintiff's constitutional challenge to that ordinance.").

DA Mortgage, however, goes on to state that "[d]amage claims can save a § 1983 claim from mootness, but only where such claims allege compensatory damages or nominal damages for violations of procedural due process." 486 F.3d at 1259 (footnote omitted) (citing *Memphis Community School District v. Stachura*, 477 U.S. 299, 310 (1986), and *Carey v. Piphus*, 435 U.S. 247, 266-67 (1978)). The court notes, however, that other circuits have not so narrowly interpreted the availability of compensatory or nominal damages. *See, e.g.*, *Lighthouse Institute for Evangelism, Inc. v. City of Long Branch*, 510 F.2d 253, 260-61 (3d Cir. 2007) (allowing nominal damages to proceed Free Exercise claim although request for injunctive relief mooted). Nor does this seem to be the prevailing view in the Eleventh Circuit. "[N]ominal damages are similarly appropriate in the context of a First Amendment violation." *See Al-Amin v. Smith*, 511 F.3d 1317, 1334-35 (11th Cir. 2008); *KH Outdoor, LLC v. City of Trussville*, 465 F.3d 1256 (11th Cir. 2006) (citing *Familias Unidas v. Briscoe*, 619 F.2d 391, 402 (5th Cir. 1980)); *Hughes v. Lott*, 350 F.3d 1157, 1162 (11th Cir. 2003) ("Nominal damages are appropriate if a plaintiff establishes a violation of a fundamental

constitutional right, even if he cannot prove actual injury sufficient to entitle him to compensatory damages."); *Oliver v. Falla*, 258 F.3d 1277 (11th Cir. 2001) ("we question whether nominal damages are appropriate in an Eighth Amendment case, even if sought. This is so because in an Eighth Amendment case, the plaintiff must show actual injury, whether it is compensable or not."); *Sicker v. Jackson*, 215 F.3d 1225, 1231-32 (11th Cir. 2000) ("a § 1983 plaintiff alleging excessive use of force is entitled to nominal damages even if he fails to present evidence of compensable injury"). As such, the court finds that Plaintiffs could be entitled to nominal damages for any injury they suffered related to the former speech zone policy.

In order to determine whether Plaintiffs would be entitled to nominal damages, the court would be required to consider the constitutionality of the prior speech zone policy. Neither party, however, has devoted any manner of resources to discussing the constitutionality of the prior policy. Defendants argue primarily that it was never the intention of the school to restrict free speech to the small amphitheater, citing to the testimony of Ms. Peace, the school's Manager of Campus Space. Clearly, it is no defense to liability to argue that the school never intended to enforce an unconstitutional policy, particularly in the area of the First Amendment. Beyond that, the position of the school is either incredible or shows an intent on the part of the Institute to attempt to avoid difficult speech situations. That is to say, if the school established the policy knowing it was not

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going to enforce it, the court presumes that the only reason for doing so would be to chill speech the school did not want to encourage. Plaintiffs, themselves, cite to only one case to support their argument that the former speech zone policy was unconstitutional – *Roberts v. Haragan*, 346 F. Supp. 2d 853 (N.D. Tex. 2004).

The court finds that the constitutional analysis is more complex than any of the parties admit. "[S]tate colleges and universities are not enclaves immune from the sweep of the First Amendment." *Healy v. James*, 408 U.S. 169, 180 (1972). However, the First Amendment does not guarantee access to property simply because it is owned or controlled by the government." *Perry Education Association v. Perry Local Educators' Association*, 460 U.S. 37, 46 (1983). The process of evaluating restrictions on government property "differ[s] depending on the character of the property at issue." *Id.* at 44; *Hays County Guardian v. Supple*, 969 F.2d 111, 116 (5th Cir. 1992) (a "speaker's right to access government property is determined by the nature of the property or 'forum'"). Most cases have discussed three types of forums for the purposes of First Amendment scrutiny: traditional public, such as streets and parks, which receive strict scrutiny; nonpublic, such as military installations which are evaluated on a reasonableness standard; and "designated public forums" which fall in a middle ground. *See*, *e.g.*, *Justice for All v. Faulkner*, 410 F.3d 760, 765 (5th Cir. 2005); *Chiu v. Plano Independent School District*, 260 F.3d 330, 346 (5th Cir. 2001). Some cases have further distinguished between a "designated" public forum

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and a "limited" forum, although this distinction is unclear. *See Faulkner*, 410 F.3d at 765. The strict scrutiny analysis requires that a regulation be "narrowly tailored to serve a significant government interest and must leave open ample alternative channels of communication." *See Hays*, 969 F.2d at 118. "A regulation is 'narrowly tailored' when it does not 'burden substantially more speech than is necessary to further the government's legitimate interests.'" *Id.* (quoting *Ward v. Rock Against Racism*, 491 U.S. 781 (1989)). Further muddying the waters is the fact that different parts of a college campus may be classified as different types of forums depending on the nature of the speech at issue. *Faulkner*, 410 F.3d at 766 (citing *Arkansas Educational Television Comm. v. Forbes*, 523 U.S. 666, 677-81 (1998)); *Bowman v White*, 444 F.3d 967, 976 (8th Cir. 2006) (a "modern university contains a variety of fora").

Numerous cases have discussed the classification of university campuses in a free speech context. No uniform conclusion has been reached. *See*, *e.g.*, *Bowman v. White*, 444 F.3d 967 (8th Cir. 2006) (outdoor common areas in university were unlimited designated public fora); *ACLU v. Mote*, 423 F.3d 438 (4th Cir. 2005) (outdoor area of campus was "limited public forum"); *Justice for All v. Faulkner*, 410 F.3d 760 (5th Cir. 2005) ("outdoor open areas" of university campus "generally accessible to students – such as plazas and sidewalks –" are "public forums for student speech"); *ASU Students for Life v. Crow*, 2008 WL 686946 (D. Ariz. 2008) (holding that the outdoor zones on the Arizona State University

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campus are limited public forums); *Gilles v. Miller*, 501 F. Supp. 2d 939 (W.D. Ky. 2007) (university is designated public forum); *Roberts v. Haragan*, 346 F. Supp. 2d 853 (N.D. Tex. 2004) (certain portions of university campus public forum); *Pro-Life Cougars v. University of Houston*, 259 F. Supp. 2d 575 (S.D. Tex. 2003) (university and Butler Plaza are public fora designated for student speech). *But see Gilles v. Blanchard*, 477 F.3d 466 (7th Cir. 2007) (Posner, J.) (resisting attempts to classify portions of university campus because certain areas "fall into a crack between the rules" and instead holding that university may bar uninvited speakers based on a policy that assures nondiscrimination).

The context of these challenges has varied. *See*, *e.g.*, *Bowman* (street preacher challenging university's restrictions on use of campus facilities by nonstudents); *Mote* (nonstudents challenge university's policy restricting speech of nonsponsored groups); *Faulkner* (student challenge to policy prohibiting any anonymous leafleting); *Miller* (challenge by member of general public to university's requirement that non-affiliated individuals must have sponsor to come on campus and engage in expressive activities); *Roberts* (student challenging prior permission requirement to engage in expressive activity); *Pro-Life Cougars* (students challenged university's policy setting forth stricter requirements for "potentially disruptive" speech under First Amendment prior restraint theory).

Few have specifically addressed a "speech zone" challenge. In *Roberts*, a law student at Texas Tech University wanted to deliver a speech and hand out literature expressing his

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religious and political view that homosexuality was a sinful lifestyle. The university had established a specific area near the student union building for such speech, but the student wanted to give his speech in a different location. The student submitted a request form to the university prior to his planned speech for the other location. The school informed the student that he should use the designated speech area. After appealing, the school suggested another location nearer to where the student originally requested. The school believed that location would be more suitable and would allow for the proper flow of vehicular traffic and safety. The student agreed that those grounds were reasonable but eventually filed suit challenging the University's policies. After the initiation of the suit, the University altered its policies.

The *Roberts* court held that the park areas, sidewalks, streets and other like areas of the campus were public forums for the University's students where any restrictions had to survive strict scrutiny. *Id.* at 861-62. Thus, the "University's policy is unconstitutional to the extent it regulates the content of student speech in areas of the campus that are public forums, either by tradition or designation, in order to serve anything less than a compelling interest. In addition, it is unconstitutional to the extent that it imposes on expression in those public forums any content-neutral regulations that serve anything less than a significant interest and that do not provide for adequate alternative venues for that expression." *Id.* at 863.

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All cases agree that a university setting is unique and requires the court to apply special consideration to a school's regulations, relying primarily on the following footnote in the case of *Widmar v. Vincent*, 454 U.S. 263 (1981), which stated:

> This Court has recognized that the campus of a public university, at least for its students, possesses many of the characteristics of a public forum . . . . At the same time, however, our cases have recognized that First Amendment rights must be analyzed in light of the special characteristics of the school environment. We continue to adhere to that view. A university differs in significant respects from public forums such as streets or parks or even municipal theaters. A university's mission is education, and the decisions of this Court have never denied a university's authority to impose reasonable regulations compatible with that mission upon the use of its campus and facilities. We have not held, for example, that a campus must make all of its facilities equally available to students and nonstudents alike, or that a university must grant free access to all of its grounds or buildings.

Id. at 268 n.5. *See also Bowman*, 444 F.3d at 978 (discussing special characteristics and mission of university and noting that "streets, sidewalks, and other open areas that might otherwise be traditional public fora may be treated differently when they fall within the boundaries of a university's vast campus); *Mote*, 423 F.3d at 444; *Faulkner*, 410 F.3d at 770 ("as a general principle, the government does have a significant interest in preserving the campuses of public colleges and universities for the use of students" and finding that policy prohibiting anonymous leafleting not narrowly tailored to state's interest in "forum preservation").

The court has located only one case in the Eleventh Circuit which addresses the nature of the forum in a university setting. In *Alabama Student Party v. Student Government*

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Association of the University of Alabama, 867 F.2d 1344 (11th Cir. 1989), students interested in running for office filed suit challenging the regulations adopted by the Student Government Association which restricted the distribution of campus literature to three days prior to the election and limited open forums the week of the election. There, the court did not consider the nature of the forum of the university setting, but rather considered the level of control a university could exert over school-related activities of the students. *Id.* at 1345-46. The court found that even within the confines of the First Amendment, in the university setting, a school "should be entitled to place reasonable restrictions on [the] learning experience" of a student election. *Id.* at 1347. The court further found that the "University judgment on matters such as this should be given great deference by federal courts." *Id.* These "principles translate into a degree of deference to school officials who seek to reasonable regulate speech and campus activities in furtherance of the school's educational mission." *Id.*

Even if the court were to assume that Georgia Tech's previous policy was unconstitutional, however, for the purposes of a qualified immunity discussion, *Alabama Student Party* is not particularly helpful, and the court is not certain that the level of deference that case grants to the University would stand up to current First Amendment analysis in the university setting.[15] *Roberts* is more on point than *Alabama Student Party*

[15]In dissent, Judge Tjoflat analyzed the characteristics of the university forum – an analysis that would appear to be more in line with persuasive authority than the majority

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and may be a correct statement of the law, but *Roberts* is an out of circuit district court opinion that would not set forth clearly established law for these Defendants. Finally, Plaintiffs, themselves, have not argued to the court that any law clearly established that the former speech zone policy was unconstitutional. Under these circumstances, the court finds that, based on its extensive discussion of the varied approaches taken by cases attempting to classify the spaces on a university campus and the permissible restrictions to speech, there is no clearly established law in the this area, and Defendants are entitled to qualified immunity.[16] Therefore, the court declines to award nominal damages.

Plaintiffs also seek attorney's fees on this claim. In *Smalbein v. City of Daytona Beach*, 353 F.3d 901 (11th Cir. 2003), the Eleventh Circuit considered whether a party is a

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opinion. Judge Tjoflat concluded that as to those persons for whom "the government has made the property available [i.e., the students], a limited public forum is to be treated as a public forum . . . [and] is bound by the same constitutional standards that apply in traditional public forum contest [i.e., strict scrutiny]," whereas "for all other[s] . . . it is treated as a nonpublic forum" subject only to a reasonableness standard. *See* 867 F.2d at 1350 (Tjoflat, J., dissenting).

[16]In similar circumstances, the Eleventh Circuit has considered the "qualified immunity question prior to deciding whether the plaintiff has demonstrated a constitutional violation." *See Rowan v. Harris*, 2008 WL 54877 (11th Cir. Jan. 4, 2008) (unpublished opinion) (per curiam) (citing *Ehrlich v. Town of Glastonbury*, 348 F.3d 48, 57 (2d Cir. 2003) (recognizing that in situations where determining the constitutional violation depends on factual issues not yet developed, court need not decide constitutional violation question before reaching qualified immunity); *Dirrane v. Brookline Police Department*, 315 F.3d 65, 69-70 (1st Cir. 2002) ("But it is an uncomfortable exercise where, as here, the answer whether there was a violation may depend on a kaleidoscope of facts not yet fully developed. It may be that *Saucier* was not strictly intended to cover the latter case.").

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"prevailing party" under § 1988 after the Supreme Court's opinion in *Buckhannon Board & Care Home, Inc. v. W. Va. Department of Health & Human Resources*, 532 U.S. 598, 602 (2001), rejecting the "catalyst theory." Quoting *Buckhannon*, the court found that it "is now established that in order to be considered a prevailing party under § 1988(b), there must be a court-ordered material alteration of the legal relationship of the parties necessary to permit an award of attorney's fees." *Id.* at 904-05 (quotation and citation omitted). "In other words, there must be: (1) a situation where a party has been awarded by the court at least some relief on the merits of his claim or (2) a judicial imprimatur on the change in the legal relationship between the parties." *Id.* at 905 (quotation and citation omitted). Further, a court may award attorney's fees even if there has been no formal entry of a consent decree if the court has incorporated the terms of the settlement into a final order of dismissal or the court has explicitly retained jurisdiction to enforce the terms of the settlement. *Id.*

Here, the court finds that there was no judicial imprimatur in Georgia Tech's voluntary decision to change its speech zone policy. For this reason, Plaintiffs cannot receive attorney's fees on this claim. The court finds that Plaintiffs are entitled to no relief or remedy for the speech zone claim.

D. Speech Code

In their responses to the mediator's report, neither Plaintiffs nor Defendants addressed the court's prior finding that all issues with respect to the speech code had been

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resolved. Plaintiffs simply assert that the court can determine whether the former speech code violated Plaintiffs' First Amendment rights, and whether Plaintiffs are entitled to damages and attorney's fees. Defendants state, "[a]lthough the Court has determined that all issues relating to the GA Tech Housing policy are settled, should the Court be inclined to address the constitutionality of the original wording of the Housing policy, Defendants maintain that Plaintiffs do not have standing to assert such claim." *See* Defendants' Response, at 7.

Because neither party has even argued that the court's belief that the parties had resolved the speech code issues is subject to challenge, the court stands by its order of August 27, 2007, at 8-12, finding that all issues with respect to the speech code have been resolved. The court DIRECTS that Defendant Black, Director of Housing, be DISMISSED from this suit.

III. Conclusion

To the extent that the court has ruled on the merits of the parties' motions for summary judgment, the court GRANTS parties' joint motion for reconsideration [110] and GRANTS Defendants' supplemental motion for reconsideration [111]. The court VACATES its order of September 19, 2007, denying the parties' motions for summary judgment. The court now GRANTS IN PART AND DENIES IN PART Plaintiffs' motion

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for summary judgment [83] and GRANTS IN PART AND DENIES IN PART Defendants' motions for summary judgment [87].

The court DIRECTS that the Clerk of the Court DISMISS Defendants DiSabatino, McDonald, and Black from this suit.

In sum, the court finds that the parties settled all claims related to the speech code, and no further action is necessary on that claim.

The court finds that Plaintiffs' request for declaratory and injunctive relief on Georgia Tech's speech zone policy is moot and their request for nominal damages is barred by qualified immunity. Because Georgia Tech changed its speech zone policy without any judicial association, Plaintiffs are not entitled to attorney's fees on that claim.

Because of the failure of Plaintiffs to link Defendants sued in this case with the allegedly unconstitutional actions taken with respect to the student activities fee program and allocation, the court finds that Plaintiffs cannot establish a constitutional violation on this claim.

However, the court finds that Plaintiffs have demonstrated that Dean Ray and President Clough in their official and individual capacities have violated the Establishment Clause by favoring one religion over another in the state-associated Safe Space Program, although in their individual capacities they are entitled to qualified immunity for this

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violation. The court DIRECTS that Defendants remove the religious information from the Safe Space training manual.

IT IS SO ORDERED this 29th day of April 2008.

s/ J. Owen Forrester
J. OWEN FORRESTER
SENIOR UNITED STATES DISTRICT JUDGE

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