BRYAN H. HECKENLIVELY (SBN 279140)
bryan.heckenlively@mto.com
JESLYN A. EVERITT (SBN 274701)
jeslyn.everitt@mto.com
ELIZABETH A. KIM (SBN 295277)
elizabeth.kim@mto.com
MUNGER, TOLLES & OLSON LLP
560 Mission Street
Twenty-Seventh Floor
San Francisco, California 94105-2907
Telephone: (415) 512-4000
Facsimile: (415) 512-4077

CHARLES F. ROBINSON (SBN 113197)
charles.robinson@ucop.edu
MARGARET L. WU (SBN 184167)
margaret.wu@ucop.edu
UNIVERSITY OF CALIFORNIA
Office of the General Counsel
1111 Franklin Street, 8th Floor
Oakland, CA 94607-5200
Telephone: (510) 987-9800
Facsimile: (510) 987-9757

Attorneys for Defendants

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA, SAN FRANCISCO DIVISION

YOUNG AMERICA'S FOUNDATION, a Tennessee nonprofit corporation; and BERKELEY COLLEGE REPUBLICANS, a student organization at the University of California, Berkeley,

Plaintiffs,

v.

JANET NAPOLITANO, in her official capacity as President of UC; NICHOLAS B. DIRKS, individually and in his official capacity as Chancellor of UC Berkeley; STEPHEN C. SUTTON, individually and in his official capacity as Interim Vice Chancellor of the Student Affairs Division of UC Berkeley; JOSEPH D. GREENWELL, individually and in his official capacity as Associate Vice Chancellor and Dean of Students of UC Berkeley; MARGO BENNETT, in her official capacity as Chief of Police of UC Police Department, at Berkeley; ALEX YAO, individually and in his official capacity as Operations Division Captain of UC Police Department, at Berkeley; and LEROY M. HARRIS, individually and in his official capacity as Patrol Lieutenant of UC Police Department, at Berkeley,

Defendants.

Case No. 3:17-cv-02255-MMC

DEFENDANTS' NOTICE OF MOTION AND MOTION TO DISMISS COMPLAINT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

[Filed concurrently with Defendants' Request for Judicial Notice or for Application of the Incorporation By Reference Doctrine; Declaration of Bryan H. Heckenlively; Declaration of Andrew Goldblatt; and [Proposed] Order]

Date: August 25, 2017
Time: 9 a.m.
Place: Courtroom 7, 19th Floor
Judge: Maxine M. Chesney

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NOTICE OF MOTION AND MOTION TO DISMISS

PLEASE TAKE NOTICE that on August 25, 2017, at 9:00 a.m., before the Honorable Maxine M. Chesney in Courtroom 7 on the 19th floor of the above-entitled court located in San Francisco, California, Defendants Janet Napolitano, Nicholas B. Dirks, Stephen C. Sutton, Joseph D. Greenwell, Margo Bennett, Alex Yao, and Leroy M. Harris will and hereby do move to dismiss Plaintiffs' Complaint. This motion is made pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6) and is based on the Notice of Motion and Motion, the Memorandum of Points and Authorities, the Request for Judicial Notice and Declarations of Bryan H. Heckenlively and Andrew Goldblatt, all pleadings and papers on file, and such other matters as may be presented to this Court.

STATEMENT OF RELIEF SOUGHT

Defendants seek an order pursuant to Rules 12(b)(1) and/or 12(b)(6) dismissing with prejudice the Complaint and each of its causes of action for lack of subject matter jurisdiction and failure to state a claim for relief.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

The University of California is committed to free speech on its campuses. When radical groups used violent and destructive tactics to shut down the speech of Milo Yiannopoulos on the Berkeley campus and threatened to use the same tactics at events featuring conservative speakers David Horowitz and Ann Coulter, the University of California, Berkeley (hereinafter, "UC Berkeley" or "the University") responded with careful planning and a willingness to expend significant resources so that the events could proceed at a time and place and in a manner that would not endanger students, speakers, attendees, or any others in the University community.

Plaintiffs' Complaint flows from the premise that the University has "muzzled" conservative speakers in order to accomplish those goals, but even the facts alleged in the Complaint demonstrate that is not true. The University never banned any speech. Rather, UC Berkeley instituted permissible time-place-manner restrictions to address specific and credible security threats. Plaintiffs therefore have not plausibly pleaded any entitlement to relief.

But even before reaching the merits, this Court should dismiss Plaintiffs' declaratory and injunctive relief claims as moot. The University is engaged in a public process to develop and implement a new policy that will take all reasonable stakeholder perspectives—including Plaintiffs'—into account and govern any future events like the ones at issue here. The new policy will be in place on an interim basis before the fall semester and on a permanent basis before the spring semester. The Complaint does not challenge the new policy and it therefore is moot.

In addition, Plaintiffs have not adequately pleaded a violation of any constitutional rights. Plaintiffs' First Amendment free speech claim fails because the relevant venues were limited public forums and the alleged restrictions were reasonable and viewpoint neutral. Even if Plaintiffs had plausibly pleaded that the venues were designated public forums, the alleged restrictions still would survive constitutional scrutiny because they regulated only the time, place, and manner of Mr. Horowitz and Ms. Coulter's speech—for example requiring that events end by 3:00 or 3:30 p.m. and be held in a securable venue—and were content neutral, narrowly tailored to serve the important government interests of safety, education, and regulating access to university resources, and left open ample alternative channels of communication. Likewise, Plaintiffs' viewpoint discrimination, retaliation, and equal protection claims fail because Plaintiffs have not alleged that any Defendant acted with the requisite discriminatory or retaliatory intent, and Plaintiffs' due process claim fails because Plaintiffs were not deprived of any protected liberty or property interest.

Finally, Plaintiffs' claims for damages must be dismissed because Defendants are entitled to qualified immunity, and because Plaintiffs have not alleged the necessary motive or intent.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. The Yiannopoulos Event Erupted in Violence

On February 1, 2017, the Berkeley College Republicans (BCR) hosted a speaking event featuring Milo Yiannopoulous, a contentious conservative commentator. (Compl. ¶ 25.) The widely-publicized event was scheduled to begin at 8:00 p.m. (*Id.*) In the hours leading up to the event, "dozens of black-clad, masked agitators and demonstrators" protested the event by setting fires, throwing objects at buildings, and engaging in physical altercations. (*Id.* ¶¶ 25-26.) The University of California Police Department ("UCPD") and Berkeley Police struggled to contain

"the violent mob." (*Id.* ¶¶ 26-27.) Given these violent demonstrations and the imminent security risks, the University canceled the Yiannopoulos event and imposed a campus-wide "lockdown" that lasted until approximately 10:55 p.m. that evening. (*Id.* ¶ 29.)

B. The University Imposed Limited Time-Place-Manner Restrictions to Ensure Safety at the Horowitz Event

Shortly after the violence that thwarted Mr. Yiannopoulos's speaking event, BCR and YAF (collectively, "Plaintiffs") invited prominent conservative writer and speaker, David Horowitz, to speak on campus in mid-April 2017.

On March 23, 2017, BCR met with unnamed University administrators and UCPD officers to "discuss event logistics and security." (*Id.* ¶ 35.) At this meeting, "UCPD rejected BCR's request that the event be held in Room 100 of the Genetics and Plant Biology building on the central UC Berkeley campus" because of "safety concerns." (*Id.*) Plaintiffs allege numerous back-and-forth communications with unnamed University administrators and UCPD officers Yao and Harris in an attempt to find a safe alternative venue for the Horowitz event. (*Id.* ¶¶ 36-41.)

As a part of these discussions, Plaintiffs allege that UCPD's Captain Yao and unnamed University administrators required the Horowitz event to end by "3:00 p.m., due to purported security reasons" and "strongly suggested" that Plaintiffs limit the event to students only and not disclose the location of the event in advance. (*Id.* ¶ 40.) In addition, Stephen Sutton, UC Berkeley Interim Vice Chancellor for the Division of Student Affairs, in an email dated April 6, 2017, recommended that the event occur at the Clark Kerr Krutch Theater, which Plaintiffs allege is more than one mile from the center of the UC Berkeley campus, and start by 1:00 p.m. (*Id.* ¶ 41.) Vice Chancellor Sutton explained that these restrictions were necessitated by "UCPD's objective analysis of how best to mitigate risk, ensure safety for all, and maximize the chances that the event will take place as planned" based on UCPD's "comprehensive review" done "[i]n the wake of events surrounding the cancelled appearance by Milo Yiannopoulos." (*Id.*) The Krutch Theater is approximately 0.9 miles from the center of campus and about equidistant from the primary residence halls (Units 1, 2, and 3) as the Genetics and Plant Biology Building. (Heckenlively Decl. ¶¶ 6-7 & Exhs. 5 & 6.) Finally, Plaintiffs allege that on April 10, 2017, unnamed University

and UCPD officials required a security fee of $5,788 for the Horowitz event. (Compl. ¶ 42.) Rather than comply with restrictions, Plaintiffs chose to cancel the event. (*Id.* ¶ 43.)

C. The University Imposed Limited Time-Place-Manner Restrictions to Ensure Safety at the Coulter Event

Around the same time, Plaintiffs began efforts to bring Ann Coulter, a conservative commentator, to campus as a counterpoint to progressive speaker Maria Echaveste. (*Id.* ¶¶ 45-47.) On March 28, 2017, BCR member Matt Ronnau informed Ms. Chaney by email that Ms. Coulter had agreed to speak at the University on April 27, 2017, from 7:00-9:00 p.m., and he requested a room that could accommodate at least 500 people. (*Id.* ¶ 51 & Exh. D.) On March 29, 2017, Plaintiffs allege that they entered into contract with Ms. Coulter through which YAF agreed to cover a minimum of $13,000 in costs associated with hosting Ms. Coulter on campus. (*Id.* ¶ 53.)

Plaintiffs allege that BCR representatives met with University administrators on April 3, 2017, to discuss "event logistics and security." (*Id.* ¶ 56.) Three days later, BCR representatives met with UCPD representatives Captain Yao, Lt. Harris, and University administrators Ms. Chaney and Marissa Reynosso. (*Id.* ¶ 57.) Plaintiffs allege that at this April 6 meeting, unnamed members of UCPD instructed BCR that the Coulter event must conclude by 3:00 p.m., informed BCR that the University and UCPD would select a "securable" venue on campus, and "strongly encouraged" BCR and BridgeCal not to publicly disclose the location of the event and to limit the event to student attendees. (*Id.* ¶¶ 57-58.)

BCR representatives met again with Ms. Chaney to discuss "event logistics and security" on April 10, 2017. (*Id.* ¶ 61.) In an email dated April 12, 2017, Ms. Chaney explained to BCR representatives that "due to the safety and security issues concerning this event (which includes that of your attendees, the speaker's personal safety, the surrounding campus constituents and residential communities) UCPD has indicated that it cannot recommend approval of this event in any campus facility that ENDS later than 3:00 p.m." (*Id.*, Exh. E & ¶¶ 63-64.) Ms. Chaney also explained that the University was working to secure a venue at the law school from 1 to 3 p.m. on April 27, 2017, but that the venue was not yet confirmed. (*Id.*, Exh. E.) Ms. Chaney further stated that if this timing was not suitable for Ms. Coulter, that the University would work to accommodate

a different date during the following week (May 1-7) or the following semester, and Ms. Chaney highly recommended moving the event to the beginning of the fall semester to maximize the group's ability "to host Ms. Coulter in an environment that is secure and prepared for productive dialogue." (*Id.*) Plaintiffs allege that Lt. Harris also explained to BCR representatives that the 3 p.m. "curfew" was necessitated by "UCPD's 'research' into Ms. Coulter and the February activity by the violent demonstrators in connection with the canceled [Yiannopoulos] [e]vent" and corresponding assessment of "security threats." (*Id.* ¶ 64.) On April 14, 2017, Dean Greenwell extended the allowable end time for the event to 3:30 p.m., and Mr. Irwin acknowledged Plaintiffs' acceptance of this end time in an email dated April 17, 2017. (*Id.* ¶ 69 & Exhs. E-F.) There is no allegation that the University had located or promised a venue to Plaintiffs.

The following day, on April 18, 2017, Dean Greenwell called BCR representative Naweed Tahmas to inform him that the University had not been able to secure a room for April 27. (*Id.* ¶ 70.) Later that evening Vice Chancellor Scott Biddy and Vice Chancellor for Student Affairs Stephen Sutton sent an email to the BCR representatives confirming that "despite extensive efforts on the part of UCPD and the staff within Student Affairs, we have been unable to find a safe and suitable venue for your planned April 27th event featuring Ann Coulter" and "must now work together to reschedule her appearance for a later date." (*Id.*, Exh. A.) The email emphasized the University's "unqualified support for our students' right to bring speakers of their choosing to the University, and our deep commitment to the values and principles embedded in the First Amendment of the U.S. Constitution" while acknowledging that the "campus retains responsibility for ensuring safety and security during such events." (*Id.*) The email referenced the recent violent protests "surrounding the planned appearance by Milo Yiannopoulos in February, as well as several riots which have occurred in recent weeks in the City of Berkeley" and explained "[w]e base our decisions regarding an event's timing and location on the objective analysis of the law enforcement professionals of UCPD as to how best to ensure safety for all while maximizing the chances that the event can take place as planned." (*Id.*) The email explained that UCPD had, based on a "comprehensive review of potential sites and security arrangements," "determined that, given currently active security threats, it is not possible to assure that the event could be held

successfully—or that the safety of Ms. Coulter, the event sponsors, audience, and bystanders could be adequately protected—at any of the campus venues available on April 27th." (*Id.*) Again, there is no allegation that any venue had previously been offered, promised, or booked.

Nonetheless, Plaintiffs allege that the University "unilaterally ... canceled" Ms. Coulter's speaking event. (*Id.* ¶ 73.) Ms. Coulter then publicly announced her intention to speak on campus without University support or approval. (*Id.*) On April 20, 2017, Ellen Topp, the Interim Chief of Staff for Student Affairs, on behalf of Vice Chancellors Sutton and Biddy, emailed Plaintiffs expressing "grave concern" with "Ms. Coulter's announcement that she intends to come to campus on April 27th without regard for the fact that we don't have a protectable venue available on that date" and "very specific intelligence regarding threats that could pose a grave danger to the speaker, attendees, and those who may wish to lawfully protest the event." (*Id.* ¶ 74 & Exh. H.) This email informed Plaintiffs that "an appropriate, protectable venue" that could "accommodate a substantial audience and meet the security criteria established by [UCPD]" would be available on May 2, 2017, from 1:00-3:00 p.m, during the week that Ms. Chaney had suggested considering in her April 12, 2017 email. (*Id.*, Exh. H.) Plaintiffs rejected the University's proposed alternative time and venue, alleging it fell during a "dead week" in which no classes are held. (*Id.* ¶¶ 75-76.)

Following the filing of this Complaint, the University continued to work with Plaintiffs to find a suitable time and place for the Coulter event. In an exchange between counsel on April 25, 2017, Plaintiffs' counsel gave several demands for the Coulter event to go forward, including that the event must occur on April 27, 2017, at a central location on the main campus, in a "[r]oom holding hundreds of participants," and with "sufficient security to ensure the safety of attendees." (Heckenlively Decl. ¶ 2 & Exh. 1.) Defendants' counsel responded within hours that the University could not commit to providing a securable indoor venue for Ms. Coulter's speech on April 27, but would "ensure a very robust police presence at and around Sproul Plaza . . . to attempt to maintain safety" at 2 p.m. on April 27, 2017, the day and time on which Ms. Coulter had publicly indicated that she intended to come to Sproul Plaza to speak. (*Id.* ¶ 3 & Exh. 2.) Defendants' counsel also emphasized that "the University absolutely does not intend to prevent Ms. Coulter from coming to campus or from speaking on April 27 or any other day." (*Id.*)

In a press release dated April 25, 2017, YAF stated that it would not "jeopardize the safety of its staff or students" by going forward with the event. (*Id.*, Exh. 3; *see also* RJN, p. 4.) The New York Times reported that Ms. Coulter canceled her speech "because she had lost the backing of conservative groups that had initially sponsored her appearance." (*Id.*, Exh. 4; *see also* RJN p. 4.)

D. The Alleged High-Profile Speaker Policy

Following the violence at the Yiannopoulos event, Plaintiffs allege that on or around March 1, 2017, unnamed University administrators and members of UCPD met with officials from the City of Berkeley Mayor's Office and Berkeley Police Department "to discuss adopting a new policy that would impose more stringent restrictions on events involving 'high-profile speakers.'" (Compl. ¶ 30.) According to Plaintiffs, this policy restricted the "time and place of all events involving 'high-profile' speakers" by requiring such events to conclude by 3:00 p.m. and to be held in "securable" locations. (*Id.*) Plaintiffs further allege that UCPD Captain Yao represented that the "campus is in the process of drafting an event policy which will formalize a number of requirements in writing, such as the event end time." (*Id.*, Exh. G.)

Plaintiffs contend that Defendants enforced the "unwritten, High-Profile Speaker Policy against YAF and BCR," while allowing Vicente Fox Quesada, the former president of Mexico, to speak on campus at 4:00 p.m. on April 17, 2017, and Maria Echaveste to speak on campus from 6:45 to 8:00 p.m. "without incident or interference from Defendants." (*Id.* ¶¶ 78-79, 91.) Plaintiffs do not allege any threats to security accompanying the speeches of Mr. Fox or Ms. Echaveste.

E. The University's New Event Policy

The University has publicly committed to implementing a new policy (hereinafter "new event policy") governing events sponsored by non-departmental users, including student organizations. On June 26, 2017, the University published an "Events Policy Timeline" setting forth a multi-phase process for the development of the new event policy, which includes public and stakeholder comment periods and several layers of review, with the adoption of the interim policy prior to the Fall 2017 semester and the adoption of the final policy prior to the Spring 2018 semester. (Goldblatt Decl. ¶¶ 3-4, Exh. A.) The University disputes that it ever had a "High-Profile Speaker Policy" as alleged in the Complaint, but to the extent a "High-Profile Speaker

Policy" existed it will be rescinded and replaced by the new event policy. (*Id.*)

III. LEGAL STANDARD

A Rule 12(b)(1) motion for lack of subject matter jurisdiction must be granted unless plaintiff, who has the burden of proving jurisdiction, shows "'in his pleading, affirmatively and distinctly, the existence of whatever is essential to federal jurisdiction.'" *Tosco Corp. v. Communities for a Better Env't*, 236 F.3d 495, 499 (9th Cir. 2001) (per curiam) (quoting *Smith v. McCullough*, 270 U.S. 456, 459 (1926)), *abrogated on other grounds by Hertz Corp. v. Friend*, 559 U.S. 77 (2010)). Where, as here, defendants make a factual challenge to the existence of subject matter jurisdiction, the court may consider evidence outside the pleadings and need not assume that all allegations in the complaint are true. *White v. Lee*, 227 F.3d 1214, 1242 (9th Cir. 2000). The Court may look to "any evidence, such as affidavits and testimony, to resolve factual disputes concerning the existence of jurisdiction." *McCarthy v. United States*, 850 F .2d 558, 560 (9th Cir. 1988).

A Rule 12(b)(6) motion for failure to state a claim must be granted "where the complaint lacks a cognizable legal theory or sufficient facts to support a cognizable legal theory." *Mendiondo v. Centinela Hosp. Med. Ctr.*, 521 F.3d 1097, 1104 (9th Cir. 2008). To survive a Rule 12(b)(6) motion, a complaint must plead facts "to state a claim to relief that is plausible on its face." *Cousins v. Lockyer*, 568 F.3d 1063, 1067-68 (9th Cir. 2009) (internal quotation marks omitted). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). The Court may consider the complaint and (1) documents "whose contents are alleged in [the] complaint and whose authenticity no party questions," *Branch v. Tunnell*, 14 F.3d 449, 454 (9th Cir. 1994), *overruled on other grounds by Galbraith v. Cty. of Santa Clara*, 307 F.3d 1119 (9th Cir. 2002); (2) matters subject to judicial notice, *Mir v. Little Co. of Mary Hosp.*, 844 F.2d 646, 649 (9th Cir. 1988).

IV. ARGUMENT

A. Plaintiffs' Claims for Declaratory and Injunctive Relief Are Moot

Plaintiffs' claims for declaratory and injunctive relief must be dismissed as moot. A claim is moot when "the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome. The basic question is whether there exists a present controversy as to

which effective relief can be granted." *Outdoor Media Grp., Inc. v. City of Beaumont*, 506 F.3d 895, 900 (9th Cir. 2007) (quotation marks omitted). There is no present controversy when a defendant has replaced or firmly committed to replacing a policy challenged in litigation with a new one that has not been challenged. Thus, in *Coalition of Airline Pilots Associations v. F.A.A.*, 370 F.3d 1184 (D.C. Cir. 2004), the D.C. Circuit held that the plaintiffs' challenge to administrative regulations was moot where the agencies had publicly committed to drafting new regulations. *Id.* at 1190-91. The court observed that the public commitment, which the agencies made to the court and on the public rulemaking docket, "provides sufficient assurance that the agencies will never return to [the challenged regulation's] allegedly unlawful procedures" and that "the alleged constitutional violations are unlikely to recur" in part because plaintiffs would have the opportunity to comment on the regulations in the rulemaking process. *Id.* Relatedly, in *Desert Outdoor Advertising, Inc. v. City of Oakland*, 506 F.3d 798 (9th Cir. 2007), the Ninth Circuit held that a challenge to an ordinance was moot where the city had amended the ordinance to delete the challenged provision. *Id.* at 808. Although that amendment would expire 60 days after the Ninth Circuit's decision in the case, the city planned on adopting permanent amendments after the expiration of the temporary amendment and there was no indication that the city intended to readopt the challenged provision. *Id.* at 806-08.

Here, Plaintiffs' declaratory and injunctive relief claims concern the prospective application of the supposed "High-Profile Speaker Policy." These claims are moot because the University firmly commits to the Court that the challenged policy, to the extent it existed, will be superseded by the new event policy (to be implemented on an interim basis before the next semester begins and before the hearing on this Motion), and Plaintiffs' Complaint does not challenge the new event policy. There is no reasonable basis to believe that the alleged violations will recur because the University has publicly committed to issuing a new policy before the semester begins, including by posting the timeline for the policy's development on its website, and Plaintiffs will have the opportunity to shape the policy by providing comments. *See Coal. of Airline Pilots*, 370 F.3d at 1190-91; *Desert Outdoor*, 506 F.3d at 808. The University reaffirms that commitment here. Accordingly, Plaintiffs no longer have a legally cognizable interest in

receiving prospective equitable relief. *See, e.g., ASU Students For Life v. Crow*, 357 F. App'x 156, 158 (9th Cir. 2009) (new policy mooted plaintiff's claims for prospective relief).

B. Plaintiffs Have Not Pleaded Any Constitutional Violation

1. Plaintiffs Have Not Plausibly Pleaded a Violation of Their First Amendment Free Speech Rights

Plaintiffs mount three challenges based on their free speech rights, namely that (1) Defendants engaged in viewpoint discrimination, Compl. ¶ 99; (2) Defendants imposed unreasonable time, place, and manner restraints on the Horowitz and Coulter events, *id.* ¶¶ 98-100; and (3) the supposed "High-Profile Speaker Policy" was facially overbroad, *id.* ¶ 101.[1] Each fails.

(a) The Relevant Venues Were "Limited Public Forums" for Which Restrictions Need Only Be Viewpoint Neutral and Reasonable

The classrooms and other campus facilities that Plaintiffs sought to reserve for the Horowitz and Coulter events are "limited public forums" because they have been made available for the limited purpose of hosting student-sponsored events and have not intentionally been opened for indiscriminate use by the general public. (Compl. ¶¶ 25, 51, 81.) The Supreme Court has repeatedly found a limited public forum under these circumstances. *See, e.g., Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995) (campus facilities opened to various student groups); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 47 (1983) (school mail facilities opened for periodic use by civic and church organizations).[2]

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[1] To the extent Plaintiffs contend that the "High-Profile Speaker Policy" is unconstitutionally vague (Compl. ¶ 101), this challenge arises under the Due Process Clause, not the First Amendment. *See United States v. Williams*, 553 U.S. 285, 304 (2008); *United States v. Kilbride*, 584 F.3d 1240, 1256 (9th Cir. 2009); *see* Part IV.B.3, *infra* (discussing due process claim).

[2] Numerous other cases are in accord. *See, e.g., Christian Legal Soc'y Chapter of Univ. of Cal., Hastings Coll. of Law v. Martinez*, 561 U.S. 661, 679 n.11 (2010) (a "limited public forum" exists when the government limits its property "to use by certain groups or dedicate[s it] solely to the discussion of certain subjects"); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 270 (1988) (school newspaper was not a public forum because school did not evince an intent to open the paper to indiscriminate use by the general public or student body); *Bloedorn v. Grube*, 631 F.3d 1218, 1232 (11th Cir. 2011) (university's sidewalks, pedestrian mall, and rotunda were limited public forums because they were open for use only "by a discrete group of people—the GSU community; its students, faculty, and employees; and their sponsored guests"); *Am. Civil Liberties Union v. Mote*, 423 F.3d 438, 444 (4th Cir. 2005) (university campus was a limited public forum because "the campus is not akin to a public street, park, or theater, but instead is an institute of higher

Notably, "[t]he government does not create a public forum by inaction or by permitting limited discourse, but only by *intentionally* opening a nontraditional forum for public discourse." *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 802 (1985) (emphasis added). Plaintiffs have not plausibly alleged any intentional act. To the contrary, the factual allegations in the Complaint, which state that Plaintiffs needed to "submit[] a request for a room" (Compl. ¶¶ 34, 51 & Exhs. D-E), and the judicially noticeable Berkeley Campus Regulations Implementing University Policies ("the Regulations"), which provide that use of "University facilities" must be authorized and that "designated University facilities" may be reserved by limited groups and for limited purposes, are inconsistent with an intent to create a generally accessible public forum.[3] (*See* Heckenlively Decl. ¶ 9 & Exh. 8 (Regulations §§ 211, 220-222); RJN, pp. 4-5.)

Because the venues at issue are limited public forums, restrictions on expressive activity need only be viewpoint neutral and reasonable in light of the purpose served by the forum. *Rosenberger*, 515 U.S. at 829. That standard is met here.

(b) *The Alleged Restrictions Were Viewpoint (and Content) Neutral*

(i) The University's Purpose in Adopting the Alleged Restrictions Was Unrelated to Content or Viewpoint

The alleged restrictions were content and viewpoint neutral because they were adopted to protect students and the community and not because of any message or viewpoint conveyed.

When determining content or viewpoint neutrality, "the principal inquiry . . . is whether the government has adopted a regulation of speech because of disagreement with the message it

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learning that is devoted to its mission of public education"); *Kreimer v. Bureau of Police for Town of Morristown*, 958 F.2d 1242, 1260 (3d Cir. 1992) (public library was a limited public forum because it was "open to the public only for specified purposes: reading, studying, using the Library materials" and had "not opened its door for the exercise of all First Amendment activities"); *Piarowski v. Ill. Cmty. Coll. Dist. 515*, 759 F.2d 625, 628-29 (7th Cir. 1985) ("Occasional use by outsiders . . . is not enough to make a college art gallery a public forum.").

[3] For example, the Regulations limit reservation of "University facilities and services" to particular groups for particular purposes, for example "[r]ecognized campus organizations, for events related to the purposes of the organizations" and "recognized student government . . . for events related to their purposes." (Regulations § 222.) These reservation requirements stand in stark contrast to the University's treatment of Sproul Plaza and Lower Sproul Plaza, which the campus has opened as "areas for public expression" thereby creating designated public forums. (*Id.* § 331.)

conveys." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). For content neutrality, a "[g]overnment regulation of expressive activity is content neutral so long as it is justified without reference to the content of the regulated speech" even if the regulation "has an incidental effect on some speakers or messages but not others." *Id.* (internal quotation marks omitted). "The government's purpose is the controlling consideration." *Id.* Similarly, when determining *viewpoint* neutrality, courts ask whether the Government was motivated by disagreement with the speaker's viewpoint. *See Martinez*, 561 U.S. at 696 (applying *Ward* to hold policy justified without reference to viewpoint was viewpoint neutral). This is because "[v]iewpoint discrimination is [] an egregious form of content discrimination" that occurs when "the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction." *Rosenberger*, 515 U.S. at 829.

Thus, in *Ward*, the Supreme Court held that a sound-amplification guideline was content neutral because its principal justification was to "control noise levels at bandshell events," which was unrelated to the content of speech. 491 U.S. at 792. Likewise, in *Menotti v. City of Seattle*, 409 F.3d 1113 (9th Cir. 2005), the Ninth Circuit held that an emergency order barring all protests in certain locations during a World Trade Organization ("WTO") conference was content neutral because it "had everything to do with the need to restore and maintain civic order, and nothing to do with the content of Appellants' message," *id*. at 1128-29, and the order was also viewpoint neutral because it "applied equally to persons who wished to protest about any topic," *id*. at 1130 n.30. The court noted that "[a]s a matter of law [the order] was not a regulation of speech content, but rather was 'a regulation of the places where some speech may occur'" even if the order "predominantly affected protestors with anti-WTO views." *Id*. at 1129.

Relatedly, in order to state a claim for viewpoint discrimination, or to show that a facially neutral policy was applied in a viewpoint discriminatory way, Plaintiffs would need to allege that "the specific motivating ideology or the opinion or perspective of the speaker is the *rationale* for the restriction [on speech]." *Alpha Delta Chi-Delta Chapter v. Reed*, 648 F.3d 790, 800 (9th Cir. 2011) (internal quotation marks omitted, emphasis in original); *see also Moss v. U.S. Secret Serv.*, 572 F.3d 962, 970 (9th Cir. 2009) (to prevail on a viewpoint discrimination claim, plaintiffs must

establish that the defendants restricted speech "*because of* not merely in spite of" the protected viewpoint) (emphasis in original). Thus in *Iqbal*, a Pakistani Muslim man arrested and detained in the days after September 11, 2001 failed to allege that he was targeted "on account of his race, religion, or national origin" because his factual allegations, while consistent with an improper motive, did not plausibly allow for an inference of discriminatory intent where there were "more likely explanations" for the detentions, namely "nondiscriminatory intent to detain aliens who were illegally present in the United States and who had potential connections to those who committed terrorist acts." *Iqbal*, 556 U.S. at 681-82. And in *Moss*, the Ninth Circuit dismissed plaintiffs' claim that the U.S. Secret Service removed protesters because of their anti-President Bush viewpoint where the more likely explanation for the relocation was to ensure the safety of the President, noting that it was not enough for the factual allegations to be "consistent with a viable First Amendment claim" because "mere possibility is not enough" to withstand a motion to dismiss. 572 F.3d at 970-72.

Here, Plaintiffs have not alleged any *facts* demonstrating that any Defendant restricted Plaintiffs' protected speech "*because of* not merely in spite of" the viewpoints of Plaintiffs, the speakers, or any protesters. *Moss*, 572 F.3d at 970 (emphasis in original). As in *Ward* and *Menotti*, the alleged restrictions were content and viewpoint neutral because, even accepting all allegations in the Complaint as true, the "purpose" of the University's actions was to ensure the safety of its students and community, and the University restricted only the location, not the content, of the speech. *See, e.g.*, Compl. ¶¶ 35-41, 55-74 & Exhs. A-E, H; *Davenport v. City of Alexandria*, 710 F.2d 148, 151 (4th Cir. 1983) (en banc) (interest in public safety is a content-neutral basis to regulate speech). Plaintiffs' conclusory allegation that Defendants would not permit conservative viewpoints (*e.g.*, Compl. ¶ 72) is not entitled to an assumption of truth where Plaintiffs have not alleged facts showing that Defendants commented on or imposed the alleged constraints because of those viewpoints. Rather, the factual allegations in the Complaint make clear that the only basis for Defendants' actions—and certainly the "more likely explanation"—was to provide security and serve the educational objectives of the University. *Iqbal*, 556 U.S. at 681-82; *see also* Compl. ¶¶ 26-29, 35-41, 55-65, 70-74, 86 & Exhs. A-E, H.

(ii) The Heckler's Veto Doctrine Does Not Render the Alleged Restrictions Content or Viewpoint Based

Plaintiffs' assertion that the University permitted a "heckler's veto" does not defeat content or viewpoint neutrality. A heckler's veto is "an impermissible content-based speech restriction where the speaker is silenced due to an anticipated disorderly or violent reaction of the audience." *Rosenbaum v. City & Cty. of San Francisco*, 484 F.3d 1142, 1158 (9th Cir. 2007). Because the heckler's veto is "a form of content discrimination, generally forbidden in a traditional or designated public forum," the doctrine does not apply to a limited public forum, where only viewpoint discrimination is precluded, unless the "claimed fear of hostile audience reaction" is "mere pretext for suppressing expression because public officials oppose the speaker's point of view." *Seattle Mideast Awareness Campaign v. King Cty.*, 781 F.3d 489, 502-03 (9th Cir. 2015). Plaintiffs have not alleged any facts here demonstrating that the safety concerns were pretextual.

Nor have Plaintiffs alleged that Defendants were motivated by the message or views of the protesters. The Ninth Circuit has rejected application of the heckler's veto doctrine where defendants were "not motivated by fear of any hostile or unruly reaction by citizens who complained about appellants' activities." *Rosenbaum*, 484 F.3d at 1159. The court reasoned that a plaintiff must show "some genuine nexus" between the heckler's views and the defendant's action, because simply "imput[ing]" the view of the heckler to the defendant would "lead to an absurd result" in which any response to a complaint about expressive activity "would automatically be transformed into a First Amendment violation." *Id.* Similarly, the Third Circuit rejected a heckler's veto challenge where police moved speakers because they had attracted a crowd that was blocking vendors and not because of any message or viewpoint. *Startzell v. City of Philadelphia*, 533 F.3d 183, 200 (3d Cir. 2008).

Here, as in *Rosenbaum* and *Startzell*, Plaintiffs have not alleged a genuine nexus between the protester's views and Defendants' actions, and thus any claim premised on the audience's reaction to Plaintiffs' speech must be dismissed. The critical fact that Plaintiffs rely on to allege that the University considered the "tastes and criminal actions of a masked mob" is an April 21, 2017 letter from Chief Campus Counsel Christopher Patti to Plaintiffs' counsel, in which Mr. Patti pointed to "mounting intelligence that some of the same groups that previously engaged in local violent action also intended violence at the Coulter Event." (Compl. ¶ 86.) Despite attaching their

earlier communications with the University as Exhibits to the Complaint, Plaintiffs notably do not attach Mr. Patti's letter. In fact, what the letter says in context is that the University was concerned about "serious violence that has occurred at recent events on and around the campus—including most recently, last weekend's clashes *between opposition groups of protesters* in Downtown Berkeley" and that it had received intelligence that "some of the *same groups*"—that is, the groups on *opposing* sides of the political spectrum—would engage in violence at the Coulter event. (Heckenlively Decl. ¶ 8 & Exh. 7 (emphasis added); *see also* RJN at pp. 2-4.) Thus, any suggestion that the University was motivated by a particular protester's message or view is demonstrably false.

(c) *The Alleged Restrictions Were Reasonable*

In a limited public forum, restrictions need only be reasonable in light of the purpose served by the forum; they need not "be the most reasonable or the only reasonable limitation." *Cornelius*, 473 U.S. at 808. When assessing reasonableness, the Supreme Court has declared that

> First Amendment rights . . . must be analyzed in light of the special characteristics of the school environment . . . . Cognizant that judges lack the on-the-ground expertise and experience of school administrators . . . we have cautioned courts in various contexts to resist substitut[ing] their own notions of sound educational policy for those of the school authorities which they review.

Martinez, 561 U.S. at 685-86 (internal quotation marks and citations omitted). Courts have thus upheld restraints that preclude far more protected speech than the modest time, place, and manner restrictions imposed here, for example, a complete ban on outside non-sponsored speakers in limited public forums. *See Bloedorn*, 631 F.3d at 1235.

(d) *The Alleged Restrictions Were Permissible Time-Place-Manner Regulations Even in a Designated Public Forum*

Even if the alleged restrictions had been imposed in a designated public forum like Sproul Plaza (they were not), they would have been constitutional "time, place and manner regulations" because they were content neutral, narrowly tailored to serve an important government interest, and left open ample alternative channels of communication. *Perry Educ. Ass'n*, 460 U.S. at 45-46.

(i) <u>The Alleged Restrictions Were Narrowly Tailored to Serve the Interests of Safety, Education, and Access to Resources</u>

The alleged restrictions were narrowly tailored to serve at least three important interests: public safety, the educational mission of the University, and management of University resources.

First, public safety is a significant governmental interest. *See, e.g.*, *Heffron v. Int'l Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 650 (1981) (recognizing a significant governmental "interest in protecting the 'safety and convenience' of persons"). The interest in public safety is particularly compelling when coupled with the need to provide a safe learning environment for students. *See, e.g.*, *Bowman v. White*, 444 F.3d 967, 980, 982 (8th Cir. 2006) (holding that "education" and "safety" are "fundamental human need[s] without which the desire to speak one's mind becomes moot"); *Pi Lambda Phi Fraternity, Inc. v. Univ. of Pittsburgh*, 58 F. Supp. 2d 619, 625 (W.D. Pa. 1999) (university has "a compelling interest in maintaining a safe educational environment"), *aff'd*, 229 F.3d 435 (3d Cir. 2000).

Second, courts routinely recognize "protecting the educational experience of the students in furtherance of the University's educational mission" as a "significant interest." *Bowman*, 444 F.3d at 980. "This interest is significant because an educated electorate is essential to the vitality of our democracy and a lack of proper education diminishes the value of our free speech rights." *Id*. (citing *Keyishian v. Bd. of Regents of Univ. of State of N.Y.*, 385 U.S. 589, 603 (1967)). Thus, the Supreme Court has expressly noted "a university's authority to impose reasonable regulations . . . upon the use of its campus and facilities" in furtherance of its educational mission. *Widmar v. Vincent*, 454 U.S. 263, 267 n.5 (1981).

Third, courts recognize a significant interest in "access to scarce university facilities," and the need to regulate "'competing uses of that space.'" *Bloedorn v. Grube*, 631 F.3d 1218, 1238-39 (11th Cir. 2011) (quoting *Berger v. City of Seattle*, 569 F.3d 1029, 1041 (9th Cir. 2009)); *see also Bowman*, 444 F.3d at 980-81 (recognizing interest in "diversity of uses of University resources").

The narrow tailoring requirement is satisfied so long as the government's asserted interest "'would be achieved less effectively absent the regulation.'" *Colacurcio v. City of Kent*, 163 F.3d 545, 553 (9th Cir. 1998) (quoting *Ward*, 491 U.S. at 799). Narrow tailoring does not require that the University adopt "the least restrictive or the least intrusive means" of serving its legitimate interests; rather, a regulation is valid "[s]o long as the means chosen are not substantially broader than necessary to achieve the government's interest." *Ward*, 491 U.S. at 798-800. Applying the narrow tailoring test here, each of the alleged time, place, and manner restrictions was sufficiently

tailored to meet one or more of the substantial government interests described above.

The Complaint alleges specific and credible security threats, *see, e.g.*, Compl. ¶¶ 26-29, 35-41, 55-65, 70-74, 86 & Exhs. A, D-E, H, that leave no doubt that the University's interests in safety and protecting the educational experience of its students "would be achieved less effectively absent" the time, place, and manner restrictions imposed. *See Colacurcio*, 163 F.3d at 553. Similarly, the University's interests in furthering its educational mission and regulating its resources would have been "achieved less effectively" had Plaintiffs been permitted to use a venue of their choosing on a day and time of their choosing, without adequate security. The University is not obligated, for example, to cancel class or another scheduled activity to accommodate Plaintiffs' demands, or to host the event in a space it has deemed not securable.

Nor do Plaintiffs plausibly allege that these restrictions burden substantially more speech than necessary to achieve the University's interests. The location restriction did not unconstitutionally burden speech as the Krutch Theater location for the Horowitz event is a similar distance from the main campus dormitories as the Genetics and Plant Biology Building location preferred by Plaintiffs, and the Sproul Plaza location where the University committed to providing a police presence on April 27 for Ms. Coulter was in the center of campus. (Heckenlively Decl., Exhs. 2, 5 & 6.) And, with respect to the time restriction, while some students might be unable to attend an afternoon event, the same is true for all events, as classes and activities are scheduled throughout the day and evening. Notably, Plaintiffs have not alleged that the University prevented Mr. Horowitz or Ms. Coulter from speaking, limited the number of attendees at their events, or imposed any other substantial burden on speech. *See United for Peace & Justice v. City of New York*, 323 F.3d 175, 177 (2d Cir. 2003) (upholding restriction allowing a stationary rally in lieu of march where the city did not limit number of participants and did not impede message conveyed).[4]

[4] The $5,788 fee assessed for the Horowitz event also does not plausibly burden substantially more speech than necessary because the fee was imposed to cover actual security costs. *See Cox v. State of New Hampshire*, 312 U.S. 569, 577 (1941) (affirming license fee designed to meet the expenses incident to the administration of the law and the cost of maintaining public order); *Stonewall Union v. City of Columbus*, 931 F.2d 1130, 1137 (6th Cir. 1991) (upholding fee for processing costs and traffic control where there was no evidence the fees "were excessive or unreasonable").

(ii) The Alleged Restrictions Left Open Ample Alternative Channels for Communication

The alleged restrictions also left open ample alternative channels for communication. A court "generally will not strike down a governmental action for failure to leave open ample alternative channels of communication" unless the action "will foreclose an entire medium of public expression across the landscape of a particular community or setting." *Ctr. for Fair Pub. Policy v. Maricopa Cty*, 336 F.3d 1153, 1170 (9th Cir. 2003); *see also Carew-Reid v. Metro. Transp. Auth.*, 903 F.2d 914, 919 (2d Cir. 1990) (alternative channel requirement does not require providing "access to every or even the best channels or locations for the [plaintiffs'] expression"). The government actor may not "effectively prevent[] a speaker from reaching his intended audience." *Edwards v. City of Couer d'Alene*, 262 F.3d 856, 866 (9th Cir. 2001). Thus, the Eleventh Circuit held that a university policy restricting outside speakers from a designated public forum on campus left open ample alternative channels because plaintiff could "preach his message to [university] community members as they enter and exit [] campus," *Bloedorn*, 631 F.3d at 1241-42, and the Supreme Court held that a rule limiting solicitations to fixed locations at a fairgrounds left open ample alternative channels for communication because plaintiff could conduct the desired activity "at some point within the forum," *Heffron*, 452 U.S. at 654-55.

Plaintiffs do not allege any facts demonstrating that the University's imposition of time, place, and manner restrictions foreclosed an entire medium of public expression to Plaintiffs. The University did not bar Mr. Horowitz or Ms. Coulter or any other conservative speaker from speaking on campus, in large campus venues, or to a large audience of students. Rather the limited restrictions, like those in *Heffron* and *Bloedorn*, allowed Plaintiffs to reach their intended audience.

(e) *Plaintiffs Facial Challenge Also Fails*

Finally, to the extent Plaintiffs challenge what they claim to be a "High-Profile Speaker Policy" on its face, their claim fails. Facial invalidation "is, manifestly, strong medicine" that "has been employed by the Court sparingly and only as a last resort." *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973). To state a facial challenge, Plaintiffs must either demonstrate that "no set of circumstances exists under which [a policy] would be valid," *United States v. Salerno*, 481 U.S. 739, 745 (1987), or demonstrate that "a substantial number of [the policy's] applications are

unconstitutional, judged in relation to the [policy's] plainly legitimate sweep," *United States v. Stevens*, 559 U.S. 460, 473 (2010). *See also S. Or. Barter Fair v. Jackson Cty.*, 372 F.3d 1128, 1140 (9th Cir. 2004) (requiring "pattern of abuse" for facial challenge based on excessive discretion).

Plaintiffs fail to state a cognizable facial challenge to the alleged "High-Profile Speaker Policy" (which is not really a policy). At most Plaintiffs allege that this supposed policy required UCPD to evaluate events involving "high profile speakers" and to require events found to have security risks to be held in "securable" locations and to conclude by 3 p.m. (Compl. ¶¶ 30-31.) As discussed above, these restrictions are content neutral and serve the significant government interests of safety, education, and access to University resources, and Plaintiffs have not alleged a "substantial number of [the policy's] applications are unconstitutional," as required to support a claim of facial overbreadth. *See Stevens*, 559 U.S. at 473. The fact that the challenged policy was unwritten does not make it any easier to strike down. *See Tipton v. Univ. of Haw.*, 15 F.3d 922, 927 (9th Cir. 1994) (rejecting facial overbreadth challenge to alleged unwritten policy because plaintiff failed to show a "systematically unconstitutional operation" of the policy).

2. BCR Has Not Stated a Claim for First Amendment Retaliation

BCR also alleges a claim for retaliation in violation of the First Amendment. On such a claim, a plaintiff must allege that "(1) he was engaged in a constitutionally protected activity, (2) the defendant's actions would chill a person of ordinary firmness from continuing to engage in the protected activity and (3) the protected activity was a substantial or motivating factor in the defendant's conduct." *Pinard v. Clatskanie Sch. Dist. 6J*, 467 F.3d 755, 770 (9th Cir. 2006); *see O'Brien v. Welty*, 818 F.3d 920, 933 (9th Cir. 2016) (applying *Pinard* framework in a university setting). BCR has not plausibly alleged the second or third element.

(a) BCR Has Not Alleged that Its Speech Was a Substantial or Motivating Factor for Defendants' Conduct

The *facts* alleged in the Complaint make clear that the motivating factor for Defendants' actions was the proper law enforcement motive of maintaining security on campus. (*See supra* Parts II, IV.B(1)(b).) There are no facts alleged that, if proven, would establish Defendants' decisions were motivated by anything else. It is not enough that the facts are consistent with a retaliatory or discriminatory purpose, rather, they must plausibly suggest such a purpose and leave

no room for other "more likely explanations"—a showing that is entirely absent here. *See Iqbal*, 556 U.S. at 681-82; *Moss*, 572 F.3d at 970.[5]

The assertions that Defendants "treat[ed] BCR and its members differently from similarly situated students" and retaliated against them "because of their conservative beliefs," (Compl. ¶ 107), are conclusions that are not entitled to an assumption of truth and cannot overcome a motion to dismiss. *See, e.g.*, *Adams v. Small*, 542 F. App'x 567, 568 (9th Cir. 2013) (rejecting retaliation claim where plaintiff did not allege facts to support conclusory allegations of a retaliatory motive).

Plaintiffs' retaliation claim also fails because the facts alleged in the Complaint and incorporated by reference show that Defendants would have taken the same action even in the absence of the protected conduct. *Pinard*, 467 F.3d at 770 (where a plaintiff pleads a prima facie case for retaliation, "the government can escape liability by showing that it would have taken the same action even in the absence of the protected conduct") (quotation marks and citation omitted). Defendants' actions were driven by credible intelligence reporting grave security risks and there is no plausible basis to conclude they would have acted differently in the face of the same security concerns had events had been planned by a student group without conservative viewpoints.

(b) *BCR Has Not Alleged that Defendants' Actions Would Impermissibly Chill Speech*

In addition, Plaintiffs have not alleged that Defendants' conduct chilled their speech. To the contrary, courts have held that reasonable time, place, and manner restrictions, such as those

[5] *See also Air Sunshine, Inc. v. Carl*, 663 F.3d 27, 37 (1st Cir. 2011) (dismissing retaliation claim where there was an "obvious alternative explanation" for the delay); *George v. Rehiel*, 738 F.3d 562, 586 (3d Cir. 2013) (dismissing retaliation claim where "[t]he TSA Officials' suspicion was an obvious alternative explanation for their conduct"); *Pratt v. Rowland*, 65 F.3d 802, 808-09 (9th Cir. 1995) (reversing district court's grant of a preliminary injunction because timing of the transfer decision did not support a finding of retaliatory intent when there was a more likely explanation for the transfer, namely allowing the inmate to be closer to his family); *Walker v. King*, No. 116CV01665EPGPC, 2017 WL 1018295, at *5 (E.D. Cal. Mar. 15, 2017) (dismissing retaliation claim where a more likely explanation for the transfer was to distance plaintiff from a violent inmate); *Valley Surgical Ctr. LLC. v. Cty. of Los Angeles*, No. CV1302265DDPAGRX, 2016 WL 1273158, at *5-6 (C.D. Cal. Mar. 31, 2016) (dismissing retaliation claim upon considering an "obvious alternative explanation"); *Stone v. Becerra*, No. CV-10-138-RMP, 2011 WL 1565299, at *3-4 (E.D. Wash. Apr. 25, 2011), *aff'd*, 520 Fed.Appx. 542 (9th Cir. 2013) (dismissing retaliation claim because timing alone was insufficient evidence of retaliatory motive and the more likely explanation for the cell search was that "it was actually random").

imposed by the University here, do not impermissibly chill speech. *See, e.g., Matney v. Cty. of Kenosha*, 86 F.3d 692, 699 (7th Cir. 1996) (noting that any chill on speech from a permissible time, place, manner restriction is constitutionally tolerable). "[D]e minimis deprivations of benefits and privileges on account of one's speech do not give rise to a First Amendment claim." *Blair v. Bethel Sch. Dist.*, 608 F.3d 540, 544 (9th Cir. 2010). "Rather, for adverse, retaliatory actions to offend the First Amendment, they must be of a nature that would stifle someone from speaking out," with the quintessential examples being "exercises of governmental power that are regulatory, proscriptive, or compulsory in nature and have the effect of punishing someone for his or her speech." *Id.* (quotation marks and citation omitted). Here, as in *Blair*, Defendants have not disciplined or punished BCR or its members for their speech, and any deprivation is de minimis.

3. Plaintiffs Have Not Stated a Violation of the Due Process Clause

Plaintiffs' due process claim fails because they have not alleged deprivation of any due process rights protected by the Fourteenth Amendment. In order to state a due process claim, Plaintiffs must allege a constitutionally-protected liberty or property interest that has been denied. *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 577 (1972). The Supreme Court has held that "a property interest in a benefit" requires "more than an abstract need or desire" or "unilateral expectation" of the benefit; rather, a plaintiff must show "a legitimate claim of entitlement to it." *Id.* Such "legitimate claims of entitlement" must be "created and defined by an independent source, such as state or federal law." *Parks v. Watson*, 716 F.2d 646, 656 (9th Cir. 1983).

Here, Plaintiffs do not allege *any* property right that they have been denied. (*See* Compl. ¶ 111-15.) Nor can they. There is no property interest in attending or hosting a speaker event. *See, e.g., Swany v. San Ramon Valley Unified Sch. Dist.*, 720 F. Supp. 764, 774 (N.D. Cal. 1989) (no due process right to attend graduation ceremony). Indeed, courts have held that due process protections do not even extend to core educational experiences such as extracurricular school activities and interscholastic sports. *See, e.g., Davenport v. Randolph Cty. Bd. of Educ.*, 730 F.2d 1395, 1397 (11th Cir. 1984); *Herbert v. Ventetuolo*, 638 F.2d 5, 6 (1st Cir. 1981) (per curiam);

Ryan v. Cal. Interscholastic Fed'n-San Diego Section, 94 Cal. App. 4th 1048, 1061 (Cal. Ct. App. 2001); *Steffes v. Cal. Interscholastic Fed'n*, 176 Cal. App. 3d 739, 748 (1986).[6]

4. Plaintiffs Have Not Stated a Violation of the Equal Protection Clause

Plaintiffs also allege a claim for violation of the Equal Protection Clause. They must plausibly allege that Defendants' conduct had both a discriminatory purpose and a discriminatory effect. *Rosenbaum*, 484 F.3d at 1152-53. A discriminatory purpose requires that the state actor "selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Id.* (quotation marks and citation omitted). A discriminatory effect means that the state actor treated "differently persons who are *in all relevant respects alike*." *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992) (emphasis added). Plaintiffs allege neither discriminatory purpose nor effect.

First, Plaintiffs have not alleged facts that create a plausible inference that any Defendant acted with an intent or purpose to discriminate against Plaintiffs for their speech or based on any other classification. *See supra*, Part IV.B(1)(b). Conclusory allegations by themselves do not establish an equal protection violation without proof of invidious discriminatory intent. *Village of Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252, 265 (1977).

Second, Plaintiffs have not alleged a discriminatory effect, i.e., that two similarly situated groups were treated differently. Plaintiffs appear to be claiming that Defendants treated their Horowitz and Coulter events differently than other "high profile" speaker events involving Vicente Fox Quesada and Maria Echaveste. (Compl. ¶¶ 78-79.) But this misses the critical distinction that the Fox and Echaveste events did not involve violent protests requiring hundreds

[6] Plaintiffs' due process claim fails for the additional reason that Plaintiffs have not plausibly alleged that the supposed "High-Profile Speaker Policy" was impermissibly vague. *See Williams*, 553 U.S. at 304 (holding that due process vagueness challenge requires that the challenged policy "fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement"). For the reasons stated in Parts IV.A and B(1) and (4), any facial challenge to the "High-Profile Speaker Policy" is moot and fails on the merits, and any as-applied challenge fails because Plaintiffs do not allege that they lacked notice of the restrictions that could be placed on their event or that the policy was discriminatorily enforced against them.

of UCPD officers to secure the premises, and therefore the organizers of those events were not similarly situated in all material respects as required to establish a violation of the Equal Protection Clause. *See, e.g.*, *Van Susteren v. Jones*, 331 F.3d 1024, 1026-27 (9th Cir. 2003) (partisan and independent candidates were not similarly situated because the former must run in a primary election); *Wright v. Incline Vill. Gen. Improvement Dist.*, 665 F.3d 1128, 1140 (9th Cir. 2011) (owners and the general public were not similarly situated with respect to beach access); *Cuviello v. City & Cty. of San Francisco*, 940 F. Supp. 2d 1071, 1097 (N.D. Cal. 2013) (persons who were not engaged "in the same sorts of activities as Plaintiffs, *e.g.*, leafleting, demonstrating, unfurling banners" were not similarly situated).

Third, Plaintiffs' equal protection claim fails because Defendants acted pursuant to a legitimate government interest. Rational basis review applies because Defendants' actions did not implicate a suspect classification or a fundamental right. *Engquist v. Or. Dep't of Agric.*, 553 U.S. 591, 602 (2008). But, even if the Court were to apply more heightened scrutiny, Defendants' actions were necessary to achieve the compelling state interest of ensuring the safety of students and other persons involved in the events or accompanying protests. *See supra* Part IV.B(1)(d).

C. Defendants Are Entitled to Qualified Immunity

Plaintiffs' damages claims must be dismissed because Defendants are entitled to qualified immunity. "State officials are entitled to qualified immunity from suits for damages 'insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Krainski v. Nev. Ex rel. Bd. of Regents of Nev. Sys. of Higher Educ.*, 616 F.3d 963, 968 (9th Cir. 2010) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). Qualified immunity "gives government officials breathing room to make reasonable but mistaken judgments" and "protects all but the plainly incompetent or those who knowingly violate the law." *Ashcroft v. al-Kidd*, 563 U.S. 731, 743 (2011) (internal quotations omitted).

When resolving whether a government official is entitled to qualified immunity, courts ask: (1) whether the facts that a plaintiff has alleged show a violation of a constitutional right and, if so, (2) whether that right was sufficiently clearly established such that a reasonable official would have known the conduct violated the Constitution. *Pearson v. Callahan*, 555 U.S. 223, 232

(2009). "For a constitutional right to be clearly established, its contours must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Hope v. Pelzer*, 536 U.S. 730, 739 (2002) (internal quotation marks omitted).

Here, for the reasons set forth in Part IV.B, *supra*, Plaintiffs have not adequately alleged any constitutional violation. A reasonable official in Defendants' position would, therefore, have had no reason to think that his or her particular conduct in imposing content and viewpoint neutral time-manner-place restrictions violated any clearly established right. Courts have long authorized universities to regulate to time, place and manner of campus speech activities in service of their educational missions, *see Widmar*, 454 U.S. at 267 n.5, and a reasonable official in Defendants' position could not have known that acts taken in pursuit of this mission would be found unconstitutional. This is particularly true where reasonable minds may differ as to Defendants' assessment of security risks or suitable alternatives. *See, e.g., Rock for Life-UMBC v. Hrabowski*, 411 F. App'x 541, 555 (4th Cir. 2010) (granting qualified immunity on free speech claim even though the court concluded "[i]n hindsight" that defendants could have addressed the safety concerns with less restrictive alternatives such as by providing additional security). Plaintiffs point to no case law clearly establishing how University officials must balance the competing interests of safety and free speech on campus, and thus qualified immunity applies.

D. Plaintiffs Have Not Alleged Defendants Acted with the Requisite Intent

"[A] constitutional tort plaintiff must allege that every government defendant . . . acted with the state of mind required by the underlying constitutional provision." *OSU Student Alliance v. Ray*, 699 F.3d 1053, 1070 (9th Cir. 2012); *see also Iqbal*, 556 U.S. at 676. Plaintiffs' viewpoint discrimination, retaliation, and equal protection claims must be dismissed against all Defendants because Plaintiffs have not alleged the requisite discriminatory or retaliatory intent. *See, e.g., OSU*, 699 F.3d at 1070 (noting that "[i]nvidious discrimination claims require specific intent"); *Reynolds v. Barrett*, 685 F.3d 193, 204 (2d Cir. 2012) ("[L]iability for an Equal Protection Clause violation under § 1983 requires personal involvement by a defendant, who must act with discriminatory purpose."). Similarly, Plaintiffs' First Amendment free speech claim must be dismissed against any Defendant who did not possess the requisite mental state of knowledge. *See*

OSU, 699 F.3d at 1073. For example, Plaintiffs have not alleged that any individual Defendant knew and acquiesced in the fee allegedly imposed on the Horowitz event, and thus any damages claims based on the fee allegation must be dismissed. (*See* Compl. ¶ 42 (alleging that "the University and UCPD informed BCR . . . that BCR and YAF would need to pay a security fee").)

E. Plaintiffs' Claims for Punitive Damages Must Be Dismissed

Plaintiffs' claims for punitive damages must be dismissed because Plaintiffs have not alleged that any Defendant's conduct was "motivated by evil motive or intent, or . . . involves reckless or callous indifference to the federally protected rights of others" as required to support a claim for punitive damages under Section 1983. *Smith v. Wade*, 461 U.S. 30, 56 (1983).

F. Plaintiffs' Claims for Declaratory Relief Are Entirely Retrospective and Barred by the Eleventh Amendment

The Eleventh Amendment prohibits a federal court from issuing a declaration on the "past lawfulness" of the actions of a state, or state officials. *Green v. Mansour*, 474 U.S. 64, 73 (1985). "Declaratory relief against a state official may not be premised on a wholly past violation of federal law, because such relief would not serve the federal interest in assuring future compliance with federal law, and would be useful only as a basis for a damage award in a subsequent state proceeding." *Los Angeles Cty. Bar Ass'n v. Eu*, 979 F.2d 697, 704 (9th Cir. 1992).

Here, Plaintiffs seek "a judicial declaration that Defendants *have violated* BCR and YAF's constitutional rights under the First and Fourteenth Amendment, by selectively enforcing the High-Profile Speaker Policy against BCR and YAF. . . ." (Compl. at 26 (emphasis added).) That claim is based on wholly past conduct and it is barred by the Eleventh Amendment.

V. CONCLUSION

Plaintiffs' Complaint should be dismissed in its entirety because the Court lacks subject matter jurisdiction and Plaintiffs have failed to state a claim.

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MUNGER, TOLLES & OLSON LLP
By: */s/ Bryan H. Heckenlively*
Bryan H. Heckenlively
Attorneys for Defendants