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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

YOUNG AMERICA'S
FOUNDATION and BERKELEY
COLLEGE REPUBLICANS,

Plaintiffs,

v.

JANET NAPOLITANO, in her
official capacity as the President of
the University of California, et al.,

Defendants.

No. 3:17-cv-02255-MMC

**UNITED STATES' STATEMENT OF
INTEREST**

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UNITED STATES' STATEMENT OF INTEREST

INTRODUCTION

The United States respectfully submits this Statement of Interest pursuant to 28 U.S.C. § 517, which authorizes the Attorney General “to attend to the interests of the United States in a suit pending in a court of the United States.” In particular, the Department of Education is committed to ensuring that “institution[s] of higher education . . . facilitate the free and open exchange of ideas.” 20 U.S.C. § 1011a(a)(2)(C). In the United States’ view, Plaintiffs have properly pleaded that speech regulations imposed by the University of California, Berkeley (“UC Berkeley” or “University”), violated their First Amendment rights.

INTEREST OF THE UNITED STATES

The United States has an interest in protecting the individual rights guaranteed by the First Amendment. The right to free speech lies at the heart of a free society and is the “effectual guardian of every other right.” Virginia Resolutions (Dec. 21, 1798), *in* 5 THE FOUNDERS’ CONSTITUTION, 135, 136 (Philip B. Kurland & Ralph Lerner, eds., 1987). State-run colleges and universities are no exception from this rule, especially since “[t]he Nation’s future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth ‘out of a multitude of tongues, (rather) than through any kind of authoritative selection.’” *Keyishian v. Bd. of Regents of Univ. of State of N.Y.*, 385 U.S. 589, 603 (1967) (citation omitted). Thus, public universities have “an obligation to justify [their] discriminations and exclusions under applicable constitutional norms.” *Widmar v. Vincent*, 454 U.S. 263, 267 (1981).

The United States has a significant interest in the vigilant protection of constitutional freedoms in institutions of higher learning. As the Supreme Court has noted, “[t]eachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization

1 will stagnate and die.” *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957). In
2 recent years, however, many institutions of higher education have failed to answer
3 this call, and free speech has come under attack on campuses across the country.
4 Such failure is of grave concern because freedom of expression is “vital” on
5 campuses. *Shelton v. Tucker*, 364 U.S. 479, 487 (1960). Indeed, “our history says
6 that it is this sort of hazardous freedom—this kind of openness—that is the basis of
7 our national strength and of the independence and vigor of Americans who grow
8 up and live in this relatively permissive, often disputatious, society.” *Tinker v. Des*
9 *Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 508–509 (1969). Accordingly, it is
10 in the interest of the United States to ensure that State-run colleges and universities
11 do not trample on individuals’ First Amendment rights.

12 **FACTUAL AND PROCEDURAL BACKGROUND**

13 This case is before the Court on a motion to dismiss. Accordingly, the Court
14 must accept all of Plaintiffs’ well-pleaded allegations as true. *See Bell Atlantic*
15 *Corp. v. Twombly*, 550 U.S. 544, 555–556 (2007). For purposes of this Statement
16 of Interest, the United States also accepts Plaintiffs’ allegations as true. The
17 United States takes no view regarding whether Plaintiffs will succeed in proving
18 these allegations at trial.

19 Berkeley College Republicans (BCR), a registered student organization at
20 the University of California, Berkeley, and Young America’s Foundation (YAF), a
21 national non-profit organization that provides financial and logistical support to
22 conservative student groups, challenge the University’s written and unwritten
23 speech policies. They allege that UC Berkeley, “the ‘birthplace of the Free Speech
24 Movement,’” Doc. 32 (Amended Complaint) ¶ 1, adopted a double standard
25 toward campus speech, applying a restrictive set of rules to BCR while applying a
26 permissive set of rules to other campus groups. These policies burdened and, in
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1 some cases, shut out BCR’s speakers from campus while welcoming other
2 viewpoints.

3 The challenged policies were adopted in the wake of violent disturbances in
4 downtown Berkeley on February 1, 2017, the day that BCR was scheduled to host
5 a lecture by Milo Yiannopolis at the University. Doc. 32 ¶ 52. According to
6 Plaintiffs, University police were present as dozens of masked individuals
7 committed arson and vandalism in protest of the scheduled event. Yet “few arrests
8 were made, and all police officers, including both [University] and Berkeley city
9 police appeared to obey a stand-down order that required the officers not to
10 intervene or make arrests in the many physical altercations that occurred between
11 the violent mob and those seeking to attend the [speech].” *Id.* ¶ 53. In response to
12 the violent protests, University administrators canceled the lecture. *Id.* ¶ 55.

13 Plaintiffs allege that the University further responded to the protests by
14 adopting an unwritten High-Profile Speaker Policy (“Policy”) that suppressed
15 constitutionally protected political speech “simply because that expression [might]
16 anger or offend students, UC Berkeley administrators, and/or community members
17 who do not share Plaintiffs’ viewpoints.” Doc. 32 ¶ 1. According to a University
18 of California Police Department (“UCPD”) Lieutenant, on or about March 1, 2017,
19 “a meeting . . . occurred involving UC (Admin and UCPD), the City of Berkeley
20 Mayor’s Office and Berkeley Police Dept. in which it was agreed that events
21 involving high profile speakers would be conducted during daytime hours.”
22 *Id.*, Ex. B. However, the University did not notify Plaintiffs of the Policy’s
23 existence until April 6, 2017, even though it had been applying the Policy to BCR
24 for weeks. *Id.* ¶ 85.

25 Under the Policy, events featuring “high-profile” speakers could not run
26 past a 3 p.m. “curfew,” thereby lowering student turnout due to class conflicts.
27 Doc. 32 ¶¶ 3, 70, 87. Additionally, the Policy required covered events to be held in
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1 a “securable” location, even though it did not define what made a location
2 “securable.” *Id.* ¶ 56. Critically, University administrators enjoyed full discretion
3 to determine who constituted a “high-profile speaker” and thus when to enforce the
4 Policy. According to the Plaintiffs, the University did not define “high-profile
5 speakers” in accordance with any objective criteria, but rather in accordance with
6 administrators’ “subjective beliefs that the anticipated content of the speaker’s
7 speech is likely to spark ‘public outrage.’” *Id.* ¶ 93. Consequently, while other
8 student organizations’ events were subject to purely ministerial formalities,
9 University administrators subjected BCR’s events to a highly discretionary,
10 unpublished set of rules. *Id.* ¶ 45.

11 According to the Complaint, Defendants first applied the Policy to BCR
12 while Plaintiffs were attempting to organize a campus event featuring David
13 Horowitz, to be held in April 2017. BCR had been working with University
14 administrators for weeks before the University even disclosed that it was applying
15 a new approach to the student organization. On April 6, 2017, the University’s
16 Interim Vice Chancellor notified BCR that “increased security measures in and
17 around high-profile events featuring potentially controversial speakers”
18 necessitated a special approach to the Horowitz event. Doc. 32 ¶ 67. After weeks
19 of vacillation by UC Berkeley administrators as to the time and venue of the event,
20 the Vice Chancellor explained that the event would have to take place
21 approximately one mile from the center of campus from 1 to 3 p.m., a time that
22 coincided with peak class hours. *Id.* ¶ 62. Because the University “strongly
23 recommended that BCR and YAF limit attendance . . . to students only,” *id.* ¶ 66,
24 many of whom could not attend due to class conflicts, BCR found itself with no
25 logical alternative but to cancel the speaking engagement, *id.* ¶ 70.

26 At the same time Plaintiffs were attempting to schedule the Horowitz event,
27 they were also trying to schedule a guest lecture by Ann Coulter. The Coulter
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1 event was to be part of a speaker series on illegal immigration jointly sponsored by
2 Plaintiffs and BridgeCal, the University's chapter of BridgeUSA, "a national
3 nonpartisan organization that aims to reinvigorate the practice of open and frank
4 political discussions on university campuses, and to challenge people's opinions
5 through exposure to contrary points of view." Doc. 32 ¶ 72. Previously,
6 BridgeCal had hosted two other speakers in this same series—a former president of
7 Mexico and a former White House adviser. The University administrators did not
8 apply the High-Profile Speaker Policy to these events, which they permitted as
9 evening lectures open to the general public. *Id.* ¶¶ 160–161. However, the
10 University administrators did apply the Policy to Plaintiffs when BCR attempted to
11 invite Coulter to speak.

12 According to the Complaint, BCR informed administrators that they wished
13 to host Coulter on April 27, 2017, from 7 to 9 p.m. in a room that could
14 accommodate at least 500 people. Doc. 32 ¶ 79. But when Plaintiffs met with
15 University police and administrators on April 6, 2017, "UCPD instructed BCR that
16 the event must conclude by 3:00 p.m., and that the University and UCPD would
17 select a 'securable' venue on campus. UCPD also informed BCR that if these
18 requirements were not met, the event could not proceed." *Id.* ¶ 85. Plaintiffs
19 allege that UCPD officials encouraged them not to disclose the location of the
20 event until hours before it began and to restrict attendance to students only.
21 *Id.* ¶ 86. Plaintiffs objected to the timing requirements because they would conflict
22 with peak class hours, and instead proposed an end time of 5 p.m. *Id.* ¶¶ 87–88.
23 But on April 13, 2017, University police responded with a non-negotiable 3:30
24 p.m. end time, citing the likely "outrage" and "security threats" Coulter's speech
25 would spark. *Id.* ¶¶ 90–92.

26 Plaintiffs agreed to this earlier (and suboptimal) end time, along with all the
27 University's other conditions. However, one week before Coulter was to speak on
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1 campus, University administrators informed Plaintiffs that they could not provide
2 BCR with a room for the event. They advised Plaintiffs that the Coulter lecture
3 would have to be postponed for five months, at which time it would still be subject
4 to the High-Profile Speaker Policy. Doc. 32 ¶ 98.

5 According to the Complaint, “under mounting pressure from UC Berkeley
6 students, faculty, and staff, and the public, including national media commentators
7 and noted First Amendment lawyers and politicians,” University administrators
8 informed Plaintiffs they could host Coulter on May 2, 2017, from 1 to 3 p.m.
9 Doc. 32 ¶ 103. However, this date fell squarely within “dead week”—a week
10 when no classes are held and many students leave campus to prepare for final
11 exams. *Id.* ¶ 104. As a result, Plaintiffs rejected this date and requested an indoor
12 venue for the original date of April 27, 2017, which administrators once again
13 rejected. *Id.* ¶ 107.

14 In April 2017, Plaintiffs filed this lawsuit alleging that the High-Profile
15 Speaker Policy violated their constitutional rights under the First and Fourteenth
16 Amendments. *See* Doc. 1 (Complaint). Soon thereafter, UC Berkeley began
17 developing an interim policy on “Major Events Hosted by Non-Departmental
18 Users” (“Major Events Policy”). Doc. 32 ¶ 117. The Major Events Policy has
19 been applied on an interim basis and is expected to be finalized in January 2018.
20 *Id.*

21 Under this policy, an event is “major” if one or more of the following
22 conditions apply: (1) more than 200 people are anticipated to attend; (2)
23 administrators decide the “complexity of the event requires involvement of more
24 than one campus administrative unit”; (3) administrators decide the event is “likely
25 to significantly affect campus safety and security” or campus services; (4)
26 administrators decide the event “has a substantial likelihood of interfering with
27 other campus functions or activities”; (5) the event is a dance or concert; (6)
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1 alcohol will be served; or (7) outdoor amplified sound is requested. Doc. 32, Ex.
2 L, at 2. According to the policy, administrators must exercise their discretion
3 without considering the content or viewpoints that may be expressed at the event.
4 *Id.* The policy does not apply to events hosted by “Departmental Users,” such as
5 University faculty. *Id.* at 3.

6 Plaintiffs allege that, under this policy, events that are characterized as major
7 are subject to specific restrictions. For example, they must end “at a time
8 determined by the campus administration” based on a security assessment. Doc.
9 32, Ex. L, at 6. Campus administrators also have discretion to impose security
10 measures, including (but expressly not limited to) “adjusting the venue, date, and
11 time of the event; providing additional law enforcement presence at the event;
12 imposing controls or security checkpoints at the event; and creating buffer zones
13 around the event venue.” *Id.* at 8. Moreover, event organizers must generally
14 provide eight weeks’ notice to campus administrators and agree to reimburse any
15 security fees. *Id.* at 5, 9.

16 Plaintiffs allege that the University applied the Major Events Policy to a
17 speech by Ben Shapiro that they hosted on September 14, 2017. Specifically,
18 Plaintiffs allege that they were initially told that no venue was available, and later,
19 after a venue had been secured, they were charged a significant security fee.
20 Doc. 32 ¶¶ 134, 143. In addition, administrators required attendees to collect
21 tickets in person by 5:30 p.m. the day before the event, a restriction that had not
22 previously been placed on events at the same venue. *Id.* ¶ 147. Plaintiffs allege
23 that through these and other actions, University administrators unreasonably
24 restricted the event, resulting in monetary damages to Plaintiffs. *Id.* ¶ 158.

25 As a result of the hurdles Plaintiffs faced in bringing speakers of their choice
26 to campus, Plaintiffs filed this lawsuit alleging that the High-Profile Speaker
27 Policy violated their constitutional rights under the First and Fourteenth
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1 Amendments. *See* Doc. 1. The University moved to dismiss, contending, *inter*
2 *alia*, that Plaintiffs’ claims were moot as a result of the adoption of the Major
3 Events Policy. *See* Doc. 13 (Motion to Dismiss). This Court agreed, but afforded
4 Plaintiffs leave to amend with additional facts regarding both policies. *See* Doc. 27
5 (Order). Plaintiffs did so and filed an amended complaint challenging both the
6 High-Profile Speaker Policy and Major Events Policy (“Policies”) and seeking
7 monetary and injunctive relief. Doc. 32; *see id.* ¶ 180. The University again
8 moved to dismiss. Doc. 38 (Motion to Dismiss).

9 The United States does not advance any position as to whether the
10 University’s interim adoption of the Major Events Policy moots Plaintiffs’ claims.
11 Nor does the United States take a position as to whether the Defendants are entitled
12 to qualified immunity. Rather, the United States is satisfied that, taking the facts
13 alleged as true, Plaintiffs have stated claims that both policies violate the First
14 Amendment by granting unfettered discretion to campus administrators.

15 DISCUSSION

16 The free speech protections of the First Amendment are as applicable to
17 State-run colleges as they are to any other government institution. *Healy v. James*,
18 408 U.S. 169, 180 (1972). Plaintiffs’ allegations, if proven, demonstrate that the
19 University’s High-Profile Speaker Policy and Major Events Policy are
20 unconstitutional because they grant administrators unchecked discretion to restrict
21 protected speech.

22 I. PLAINTIFFS ADEQUATELY PLEADED THAT THE 23 UNIVERSITY’S HIGH-PROFILE SPEAKER POLICY AND 24 MAJOR EVENTS POLICY VIOLATE THE FIRST 25 AMENDMENT.

26 The power of the government to regulate speech on the campuses of public
27 colleges and universities is contingent on the character of the forum in question.
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1 *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 44 (1983) (“The
2 existence of a right of access to public property and the standard by which
3 limitations upon such a right must be evaluated differ depending on the character
4 of the property at issue.”) “[T]he Supreme Court has broadly discerned three
5 distinct (although not airtight) categories of government property for First
6 Amendment purposes: traditional public fora, designated public fora, and limited
7 public fora.” *Bloedorn v. Grube*, 631 F.3d 1218, 1230 (11th Cir. 2011). The
8 parties to this case dispute the nature of UC Berkeley’s speaker facilities.
9 Plaintiffs contend that they are designated public fora, but the University claims
10 that they are limited public fora. While this is a question properly left for later
11 stages of the litigation, one thing is clear: the University’s High-Profile Speaker
12 Policy and Major Events Policy would be unconstitutional in *either* type of forum.

13 A “public forum” is “public property which the state has opened for use by
14 the public as a place for expressive activity,” either by tradition or designation.
15 *Perry Educ. Ass’n*, 460 U.S. at 45. In a “public forum,” the government may
16 impose “[r]easonable time, place, and manner restrictions . . . but any restriction
17 based on the content of the speech must satisfy strict scrutiny, that is, the
18 restriction must be narrowly tailored to serve a compelling government interest and
19 restrictions based on viewpoint are prohibited.” *Pleasant Grove City, Utah v.*
20 *Sumnum*, 555 U.S. 460, 469 (2009) (citations omitted); *see also Ward v. Rock*
21 *Against Racism*, 491 U.S. 781, 791 (1989); *Perry Educ. Ass’n*, 460 U.S. at 45. In
22 such a forum, even content-neutral time, place, and manner restrictions must be
23 narrowly tailored to achieve a significant government interest and “leave open
24 ample alternative channels of communication.” *Perry Educ. Ass’n*, 460 U.S. at 45;
25 *Ward*, 491 U.S. at 791.

26 By contrast, a limited public forum is government property that “is limited to
27 use by certain groups or dedicated solely to the discussion of specific subjects.”
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1 *Pleasant Grove*, 555 U.S. at 470. In limited public fora, “the government may
2 impose restrictions that are ‘reasonable in light of the purpose served by the
3 forum,’ so long as the government does not ‘discriminate against speech on the
4 basis of its viewpoint.’” *Alpha Delta Chi-Delta Chapter v. Reed*, 648 F.3d 790,
5 797 (9th Cir. 2011) (quoting *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515
6 U.S. 819, 829 (1995)). Speech restrictions are permissible “as long as the
7 regulation on speech is reasonable and not an effort to suppress expression merely
8 because public officials oppose the speaker’s view.” *Perry Educ. Ass’n*, 460 U.S.
9 at 46.

10 This Circuit has held that “[s]peech in a designated public forum has
11 significantly greater protection than speech in a limited public forum—restrictions
12 on speech in a designated public forum are subject to strict scrutiny and, ‘therefore,
13 must be narrowly tailored to serve a compelling government interest.’” *Alpha*
14 *Delta Chi-Delta Chapter*, 648 F.3d at 797 (quoting *Christian Legal Soc’y of the*
15 *Univ. of Cal., Hastings Coll. of Law v. Martinez*, 561 U.S. 661, 679 n.11).
16 However, if a regulation of speech discriminates on the basis of viewpoint or
17 creates a high risk of viewpoint discrimination, it is immaterial whether the forum
18 is a designated or limited public forum; under longstanding precedent, the
19 regulation is unconstitutional. *See Rosenberger*, 515 U.S. at 829.

20 For the reasons explained below, Plaintiffs have adequately alleged that the
21 High-Profile Speaker Policy and the Major Events Policy constitute prior restraints
22 whose capacious conferral of discretion on University administrators invites
23 viewpoint discrimination and are not justified by strict scrutiny.
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1 **A. The High-Profile Speaker Policy And The Major Events Policy Are**
2 **Prior Restraints On Protected Speech That Invite Viewpoint**
3 **Discrimination.**

4 When a government official has the discretionary power to determine where
5 and when individuals may speak, or what they may say, there is effectively a prior
6 restraint that “makes the peaceful enjoyment of freedoms which the Constitution
7 guarantees contingent upon the uncontrolled will of an official.” *Shuttlesworth v.*
8 *Birmingham*, 394 U.S. 147, 151 (1969). Accordingly, policies that confer
9 discretionary power on government officials to regulate speech must contain
10 “narrowly drawn, reasonable and definite standards for the officials to follow.”
11 *Niemotko v. Maryland*, 340 U.S. 268, 271 (1951) (citation omitted); *see also*
12 *Forsyth Cty., Ga. v. Nationalist Movement*, 505 U.S. 123, 131 (1992) (holding that
13 speech policies “must contain narrow, objective, and definite standards to guide the
14 licensing authority” (internal quotation marks and citation omitted)).

15 Courts have routinely struck down regulations of protected speech that
16 confer unbridled discretion upon authorities and fail to identify objective and
17 narrow standards for the regulating authority to apply. *See City of Lakewood v.*
18 *Plain Dealer Publishing Co.*, 486 U.S. 750, 757 (1988) (“[I]n the area of free
19 expression a licensing statute placing unbridled discretion in the hands of a
20 government official or agency constitutes a prior restraint and may result in
21 censorship”) (citations omitted). The absence of such standards creates a risk of
22 unconstitutional viewpoint discrimination that is subject to facial challenge. *See*
23 *Southworth v. Bd. of Regents of Univ. of Wis. Sys.*, 307 F.3d 566, 581 (7th Cir.
24 2002) (recognizing facial challenges under the First Amendment to policies that
25 confer too much discretion to government officials).

26 Accordingly, in determining whether Plaintiffs have stated a claim, it is
27 inconsequential whether officials have in fact exercised that discretion in a
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viewpoint discriminatory manner.¹ This is because “viewpoint neutrality requires not just that a government refrain from explicit viewpoint discrimination, but also that it provide adequate safeguards to *protect* against the improper exclusion of viewpoints.” *Child Evangelism Fellowship of MD v. Montgomery Cty. Pub. Sch.*, 457 F.3d 376, 384 (4th Cir. 2006); *see also Kaahumanu v. Hawaii*, 682 F.3d 789, 807 (9th Cir. 2012) (holding that even though there was no actual evidence of viewpoint discrimination in officials’ exercise of discretion, the “discretionary power is inconsistent with the First Amendment” because “the potential for the exercise of such power exists”) (citation omitted).

Plaintiffs’ allegations, taken as true, sufficiently state a claim that the High-Profile Speaker Policy and Major Events Policy contained insufficient safeguards to protect against the improper exclusion of certain viewpoints from discourse at the University. Rather, both Policies suffer from the same constitutional defect: they grant University administrators unbridled discretion to decide when, how, and against whom to apply the Policies.

Plaintiffs allege that the unwritten High-Profile Speaker Policy “d[id] not rely on any objective criteria (e.g. anticipated crowd size) . . . to determine whether an invited speaker is considered ‘high-profile.’” Doc. 32 ¶ 93. Instead, it relied on a doubly subjective criterion: administrators’ subjective assessment of a potential audience’s subjective response to the speaker. As the Interim Vice Chancellor admitted, the Policy applied only to “high-profile events featuring *potentially controversial* speakers.” *Id.* ¶ 67 (emphasis added). Thus, according to the University, the former President of Mexico, while high-profile, was presumably not a potentially controversial speaker warranting a 3 p.m. curfew, a distant venue,

¹ The United States takes no position on whether Plaintiffs have adequately alleged that the University applied the challenged policies in a viewpoint discriminatory manner in this case.

1 and a substantial security bill for the student organization that hosted him; David
2 Horowitz, on the other hand, was. *Supra* pp. 4–5.

3 The Supreme Court has held that when a regulation of speech “involves
4 appraisal of facts, the exercise of judgment, and the formation of an opinion by the
5 licensing authority, the danger of censorship and of abridgment of our precious
6 First Amendment freedoms is too great to be permitted.” *Forsyth Cty.*, 505 U.S. at
7 131 (internal quotation marks and citations omitted). The University’s approach to
8 the planning of the Horowitz event illustrates the danger of vesting unbounded
9 discretion to regulate protected speech in university administrators. Under the
10 facts as alleged, it appears that the University repeatedly moved the goal posts for
11 BCR, making it all but impossible for the event to take place. For example, on
12 March 23, 2017, an administrator offered Plaintiffs a range of acceptable dates and
13 times for the event, writing, “would anytime Tues, 4/11 bet. noon to 6pm or Wed.
14 4/12 bet. 11am and 6pm work?” Doc. 32 ¶ 62. Plaintiffs confirmed that April 12,
15 2017, from 4 to 6 p.m. would be agreeable. *Id.* ¶ 64. But one week later, on
16 March 30, 2017, the University of California Police Department and University
17 officials reneged, informing BCR that Horowitz’s presentation could not run past 3
18 p.m. “due to purported security reasons.” *Id.* ¶ 66. They also urged Plaintiffs to
19 “limit attendance at the Horowitz event to students only.” *Id.* Three days later—
20 and six days before the Horowitz event was to take place—the University moved
21 the goal posts once again, informing BCR for the first time that it would have to
22 pay a \$5,788 security fee if it wished to hold the event. *Id.* ¶¶ 68–69. Thus, after
23 weeks of vacillation, the University offered Plaintiffs a remote venue at an
24 unfavorable time for a prohibitive “security fee,” which caused BCR to cancel the
25 event.

26 This is similarly true of the Coulter event. While BridgeCal’s speakers were
27 able to address both Berkeley students and the general public during evening
28 hours, Doc. 32 ¶¶ 160–161, the High-Profile Speaker Policy all but straitjacketed
BCR in its attempts to host Coulter as a speaker in the same lecture series, on the

1 same subject. For example, after more than a week of negotiations with campus
2 officials regarding the time and venue of the Coulter event, BCR accepted all of
3 the University’s restrictions, including a 3:30 p.m. end time that conflicted with
4 class hours. *Id.* ¶ 90. This cut-off would not only “make it impractical for
5 thousands of students to attend, who might otherwise wish to do so,” but also make
6 it “extremely difficult, if not impossible, for the event to be held in a sufficiently
7 large room to seat the hundreds of expected attendees.” *Id.* ¶ 87. Nevertheless,
8 administrators summarily canceled the event, stating that “Coulter’s speech was
9 likely to spark outrage” and invite security threats. *Id.* ¶ 92.

10 The Major Events Policy does little to cure the defects of the High-Profile
11 Speaker Policy. While it does contain some objective criteria defining a “major
12 event,” other criteria grant administrators the unfettered discretion to designate
13 events “major.” Doc. 32, Ex. L, at 2. For example, under the Major Events Policy,
14 the University can designate an event “major” if “[a]uthorized campus officials
15 determine that the event has a substantial likelihood of interfering with . . . campus
16 functions or activities,” “is likely to significantly affect campus safety and
17 security,” or is so complex as to require “the involvement of more than one campus
18 administrative unit.” *Id.* However, the Major Events Policy offers no guidance on
19 how to interpret and apply any of these terms. Indeed, it is difficult to imagine a
20 student-sponsored event that could *not* be characterized to satisfy one of these
21 criteria and thus subject it to the differential barriers of an eight-week notice
22 requirement, “security fee,” and so forth.

23 Furthermore, neither of the Policies hold administrators accountable for the
24 way they exercise their wide discretion—even though numerous courts have found
25 that requiring officials to articulate the reasons for their decisions makes it less
26 likely that a policy will run afoul of the First Amendment. *See Epona v. Cty. of*
27 *Ventura*, 876 F.3d 1214, 1224 (9th Cir. 2017) (noting that a requirement of specific
28 factual findings “provides an important check on official discretion by facilitating

1 effective review of the official’s determination and ensuring that the determination
2 is properly limited in scope” (internal quotation marks, alterations, and citations
3 omitted)); *Seattle Affiliate of Oct. 22nd Coal. to Stop Police Brutality, Repression*
4 *& Criminalization of a Generation v. City of Seattle*, 550 F.3d 788, 802 (9th Cir.
5 2008) (striking down an ordinance because the “absence of clear standards in the
6 Parade Ordinance, the lack of any decision-making trail for us to review and the
7 absence of any administrative appeals process underscore the obvious risk that
8 officials could engage” in unconstitutional discrimination); *Desert Outdoor*
9 *Advert., Inc. v. City of Moreno Valley*, 103 F.3d 814, 819 (9th Cir. 1996) (striking
10 down an ordinance in part because “officials can deny a permit without offering
11 any evidence to support the conclusion that a particular structure or sign is
12 detrimental to the community”).

13 Thus, Plaintiffs have sufficiently alleged that both the High-Profile Speaker
14 Policy and Major Events Policy are unconstitutional because they require
15 administrators to engage in appraisal of facts, exercise of judgment, and formations
16 of opinion absent any clear guidelines or discernable standards, and absent any
17 accountability mechanisms. Furthermore, Plaintiffs’ allegations, if proven, would
18 sufficiently demonstrate the high risk of viewpoint discrimination inherent in the
19 Policies’ grant to administrators of unchecked discretion over student-sponsored
20 speech.

21 **B. The University’s Interest In Campus Safety Does Not Outweigh**
22 **Plaintiffs’ First Amendment Rights.**

23 Public colleges and universities have a legitimate and important interest in
24 ensuring that expressive activities do not compromise security and discipline on
25 campus. *Healy*, 408 U.S. at 189 (“Associational activities need not be tolerated
26 where they infringe reasonable campus rules, interrupt classes, or substantially
27 interfere with the opportunity of other students to obtain an education.”).
28

1 However, “undifferentiated fear or apprehension of disturbance is not enough to
2 overcome the right to freedom of expression.” *Tinker*, 393 U.S. at 508; *see also*
3 *Norton v. Discipline Committee of East Tenn. State Univ.*, 399 U.S. 906, 908
4 (1970) (applying *Tinker* in the university context). There is no presumption that
5 university officials will exercise their discretion in good faith to further that
6 interest. In fact, the Supreme Court has held that the very doctrine that prohibits
7 state officials from exercising unbridled discretion over expressive activities also
8 prohibits such a presumption. Therefore, any limits on officials’ discretion must
9 “be made explicit by textual incorporation, binding judicial or administrative
10 construction, or well-established practice.” *City of Lakewood*, 486 U.S. at 770; *see*
11 *also Kunz v. New York*, 340 U.S. 290, 293 (1951).

12 California law contains an explicit requirement that time, place, and manner
13 regulations on guest speakers “shall be content neutral and specified in advance,”
14 Doc. 32 ¶ 33 (quoting Cal. Code Regs. tit. 5, § 100004). The Major Events Policy
15 likewise provides that it is to be applied “without regard for perspectives or
16 positions expressed in connection with those events.” *Id.*, Ex. L, at 1. However,
17 without any discernable limits on administrative discretion, these commitments are
18 empty promises. As the Second Circuit noted in striking down a university speech
19 policy, “the bare statement [of viewpoint neutrality] without meaningful
20 protections is inadequate to honor its commands.” *Amidon v. Student Ass’n of*
21 *State Univ. of New York at Albany*, 508 F.3d 94, 104 (2d Cir. 2007). Mere good
22 intention does not save an unconstitutional policy. Accordingly, the mere recitation
23 of viewpoint neutrality “does nothing to help courts identify covert viewpoint
24 discrimination, nor does it prevent self-censorship by timid speakers who are
25 worried that officials will discriminate against their unorthodox views
26 notwithstanding constitutional proscriptions.” *Id.*; *cf. Southworth*, 307 F.3d at 590
27 (upholding a policy because the viewpoint-discrimination prohibition in the policy
28 was bolstered by procedural safeguards and an appeal process).

1 In sum, Plaintiffs have adequately alleged that neither the unwritten High-
2 Profile Speaker Policy nor the written Major Events Policy meaningfully restricts
3 the discretion of administrators in deciding which speakers and events are subject
4 to those policies and the onerous restrictions that attach to them. Because
5 Plaintiffs have alleged that there are no narrow and objective criteria restricting
6 that discretion and that there are no meaningful procedural protections to ensure
7 that the discretion is appropriately exercised, they have stated a First Amendment
8 claim.

9 CONCLUSION

10 Plaintiffs' amended complaint adequately pleads that the University's
11 speech restrictions violate the First Amendment, and therefore, at least to that
12 extent, the Court should deny Defendants' motion to dismiss.

13
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15 Respectfully submitted,

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