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United States District Court  
Central District of California

KEVIN SHAW, an individual,  
Plaintiff,

v.

KATHLEEN F. BURKE, in her individual and official capacities; EARIC DIXON-PETERS, in his individual and official capacities; WILLIAM A. MARMOLEGO, in his individual and official capacities; JUAN C. ASTORGA, in his individual and official capacities; FRANCISCO C. RODRIGUEZ, in his official capacity; SCOTT J. SVONKIN, in his official capacity; SYDNEY K. KAMLAGER, in his official capacity; MIKE FONG, in his official capacity; MIKE ENG, in his official capacity; ANDRA HOFFMAN, in her official capacity; ERNEST H. MORENO, in his official capacity; NANCY PEARLMAN, in her official capacity, and JOHN DOE, in his individual and official capacities,  
Defendants.

Case No 2:17-CV-02386-ODW (PLAx)

**ORDER DENYING, IN PART, AND GRANTING, IN PART, DEFENDANTS’ MOTION TO DISMISS, OR, IN THE ALTERNATIVE, FOR A MORE DEFINITE STATEMENT [22]**

**I. INTRODUCTION**

Kevin Shaw filed his Complaint on March 28, 2017, and seeks an injunction, declaratory relief, and damages for alleged violations of his First Amendment rights, while a student at Los Angeles Pierce College (“Pierce”). (Compl., ECF No. 1.) He

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1 asserts five causes of action pursuant to 28 U.S.C. § 1983, and a sixth for declaratory  
 2 relief. Defendants Kathleen F. Burke, Earic Dixon-Peters, William A. Marmolejo,  
 3 Juan C. Astorga, Francisco C. Rodriguez, Scott J. Svonkin, Sydney K. Kamlager,  
 4 Mike Fong, Mike Eng, Andra Hoffman, Ernest H. Moreno, and Nancy Pearlman  
 5 (“Defendants”) moved to dismiss Shaw’s Complaint on May 24, 2017, arguing that:  
 6 1) Shaw’s claims are barred by the Eleventh Amendment; 2) Shaw has no standing to  
 7 bring the claims; 3) certain defendants are entitled to qualified immunity; and 4) Shaw  
 8 fails to state a claim. (Mot., ECF No. 22.)

9 On October 24, 2017, the United States filed a Statement of Interest, pursuant to  
 10 28 U.S.C. § 517, arguing that Shaw has sufficiently pleaded a claim under the First  
 11 Amendment, but declining to opine on the remaining issues. (Statement of Interest,  
 12 ECF No. 39.) Defendants opposed the United States’ brief, and the Court later  
 13 allowed the United States to file a Supplemental Statement of Interest in response.  
 14 (Supp. Statement of Interest, ECF No. 44.) After considering the papers filed in  
 15 connection with the Motion, the Court deemed the matter appropriate for decision  
 16 without oral argument. Fed. R. Civ. P. 78(b); C.D. Cal. L.R. 7-15. Accordingly, the  
 17 Court **DENIES, in part, and GRANTS, in part,** Defendants’ Motion for the reasons  
 18 set forth below.

## 19 II. FACTUAL BACKGROUND<sup>1</sup>

20 Shaw attends Pierce, which is one of nine community colleges within the Los  
 21 Angeles Community College District (the “District”). (Compl. ¶¶ 1, 3, 14, 28.) Shaw  
 22 brings facial and as-applied challenges to the District and Pierce’s published and  
 23 unpublished speech policies.

### 24 A. The Speech Policies

25 Chapter IX, Article IX of the District’s Rules governs freedom of speech on  
 26 campuses within the District. (*Id.* ¶¶ 31–34.) Some of the rules at issue here include:

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 28 <sup>1</sup> All factual references are allegations taken from Shaw’s Complaint and accepted as true for purposes of this Motion. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

- 1 • Rule 9901, which establishes all of the District’s campuses as non-public  
2 fora that are not open to free speech and expression, except for  
3 designated “Free Speech Areas,” (*Id.* ¶ 35, Ex. A, pg. 31);
- 4 • Rule 9902.11, which provides that students may distribute literature,  
5 including “petitions, circulars, leaflets, newspapers, miscellaneous  
6 printed matter and other materials” *only* in Free Speech Areas, (*Id.* ¶ 37,  
7 Ex. A, pg. 31);
- 8 • Rule 9902.13, which allows each college president to designate “Free  
9 Speech Areas” on campus “for free discussion and expression by all  
10 persons,” subject to content-neutral time, place, and manner restrictions,  
11 including “reasonable time restrictions on the use of Free Speech Areas,”  
12 (*Id.* ¶ 38, Ex. A, pg. 32);
- 13 • Rule 9904, which provides that student use of areas not designated as  
14 “Free Speech Areas” for expressive activities “shall be governed by the  
15 rules and regulations established pursuant to Article X, relating to student  
16 activities and events,” (*Id.*, Ex. A, pg. 34); and
- 17 • Rule 91005, Article X, which provides that “the college president shall  
18 not approve any rules relating to non-Free Speech Areas which would  
19 deny students their free speech rights were they conducting such  
20 activities in Free Speech Areas.” (Defendants’ Request for Judicial  
21 Notice, Ex. 1, ECF No. 23-1.)<sup>2</sup>

22 Pierce requires students to obtain a permit prior to using the Free Speech Area.  
23 (*Id.* ¶ 4.) Shaw claims this “unpublished requirement...severely restrict[s] free speech  
24 and expressive activity.” (*Id.*) The permit contains additional rules and regulations  
25 that are only available by requesting and obtaining a permit. (*Id.* ¶¶ 43–44, Ex. C.)

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27 <sup>2</sup> Shaw does not oppose Defendants’ Request for Judicial Notice, and addresses the contents of the  
28 District’s Board Rules in his Opposition. (Opp’n 18, ECF No. 33.) The Court takes judicial notice  
of the District’s Board Rules, Chapter IX, Article X. *Esquivel v. San Francisco Unified Sch. Dist.*,  
630 F. Supp. 2d 1055, 1057 n.2 (N.D. Cal. 2008) (taking judicial notice of school board policy).

1 As described further below, Shaw first became aware of this requirement after a  
2 school administrator, sued here as John Doe, advised him that he was not permitted to  
3 engage in free speech outside of the Free Speech Area, and that he needed to complete  
4 a permit application prior to doing so. (*Id.* ¶ 60.) Because Pierce does not publish its  
5 free speech rules and regulations, “[s]tudents...have no public, generally accessible  
6 means to discern any restrictions to which they are subject or under which they could  
7 be punished for engaging in speech or expressive activity on Pierce College’s  
8 campus.” (*Id.* ¶ 40.)

9 Upon receiving the permit application, students discover that:

- 10 • “The college has one (1) Free Speech Area” on campus “designated for  
11 free speech and gathering of signatures,” (*Id.* ¶ 40, Ex. C, pgs. 36–37);
- 12 • “Individuals planning to distribute material on campus are required to go  
13 to the Vice President of Student Services Office located on the third floor  
14 of the Student Services Building between the hours of 9:00 a.m. and 4:00  
15 p.m.” (*Id.*, Ex. C, pg. 36);
- 16 • Students must identify the name and address of the organization they  
17 represent, the name(s) of the distributor(s), and the date and time of the  
18 distribution, (*Id.* ¶ 48, Ex. C, pg. 36); and
- 19 • “[D]istribution [of materials] shall take place only within the  
20 geographical limits of the Free Speech Area,” and students may only use  
21 the Free Speech Area from 9:00 a.m. until 7:30 p.m., Monday through  
22 Friday. (*Id.* ¶¶ 36–37, Ex. C, pg. 37.)

23 Shaw claims that, “[o]n its face, the Pierce College Free Speech Area Policy does not  
24 limit the discretion of the Vice President of Student Services Office, or other  
25 administrators responsible for its enforcement, to deny or approve the application  
26 because of the content or viewpoint of the speaker’s intended message.” (*Id.* ¶ 50.)  
27 The Free Speech Area also prohibits “spontaneous or anonymous speech because  
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1 individuals must fill out an application for the use of the space and identify themselves  
2 and their organization prior to accessing it. (*Id.* ¶ 51.)

3 The Free Speech Area is identified on an attachment to Pierce’s Free Speech  
4 Area Policy, which is a map that has an area “on the Mall within...red and black  
5 dotted lines[, and] is approximately 616 square feet, comprising approximately .003%  
6 of the total area of Pierce College’s 426 acres, and approximately .007% of the main  
7 area of campus..., which excludes the approximately 226-acre farm dedicated to  
8 Pierce’s agricultural...programs.” (*Id.* ¶ 46, Exs. B, C.) Shaw alleges that the limited  
9 size of the Free Speech Area is not tied to any legitimate interest because Pierce “has  
10 many open areas and sidewalks beyond the Free Speech Area where student speech,  
11 expressive activity, and distribution of literature would not interfere with or disturb  
12 access to college buildings or sidewalks, impede vehicular or pedestrian traffic, or in  
13 any way substantially disrupt [Pierce’s] operations....” (*Id.* ¶ 54.)

14 Pierce enforces these rules through its Standards of Student Conduct, which it  
15 prints in its schedule of classes. (*Id.* ¶ 55.) A violation of Pierce’s rules, or District  
16 Rule 9803.11, which prohibits a “[v]iolation of college rules and regulations including  
17 those concerning student organizations, the use of college facilities, or the time, place,  
18 and manner of public expression or distribution of materials,” may result in discipline.  
19 (*Id.*)

## 20 **B. The Policies Applied to Shaw**

21 In addition to being facially unconstitutional, Shaw alleges that Pierce enforces  
22 its rules in a way that restricts free speech. On November 2, 2016, Shaw and two  
23 other members of the Young Americans for Liberty organization attempted to  
24 distribute Spanish-language copies of the United States Constitution and discuss  
25 freedom of speech issues with students on Pierce’s campus. (*Id.* ¶ 56.) Shaw and his  
26 cohort set up a small folding table near the “Mall” area of campus, but outside of the  
27 Free Speech Area. (*Id.* ¶ 57.) Shortly afterward, a college administrator advised them  
28 that they were violating Pierce’s free speech policies, and would need to obtain a

1 permit to continue distributing their materials and interacting with students.  
2 (*Id.* ¶¶ 59–60.) Shaw asked what would happen if he did not follow the administrator  
3 to obtain the permit, and the administrator said that he would ask Shaw and the others  
4 to leave campus. (*Id.* ¶ 61.) So, Shaw followed the administrator to the office, and  
5 filled out the permit application, which included the Pierce College Free Speech Area  
6 Policy, which Shaw had now seen for the first time. (*Id.* ¶ 62, Ex. B.) Despite his  
7 request, the administrator refused to provide Shaw with a copy of the completed  
8 permit application. (*Id.* ¶ 63.)

9 On November 11, 2016, Shaw emailed Astorga, the Dean of Student  
10 Engagement, and informed him that he wanted to gather signatures and encourage  
11 students to adopt a different free speech policy in an area outside of the Free Speech  
12 Area, but away from buildings and in an area that would not impede pedestrian traffic.  
13 (*Id.* ¶¶ 18, 64–65.) Shaw also confirmed that he would not use any amplified sound.  
14 (*Id.* ¶ 65.) It is unclear from the Complaint whether Astorga responded.

15 On November 16, 2016, Shaw distributed materials outside the Free Speech  
16 Area “for several hours in an open, grassy area of campus” without encountering any  
17 administrators. (*Id.* ¶ 66.) He also observed a “large protest that formed outside of  
18 the Free Speech Area to protest the election of then-President-Elect Donald Trump.”  
19 (*Id.*) This, he claims, evidences Pierce’s selective and uneven enforcement of its free  
20 speech policies. (*Id.* ¶ 67.)

21 Through the rest of November and December 2016, Shaw attempted on several  
22 occasions to obtain a copy of his signed permit application. (*Id.* ¶¶ 68–85.) After  
23 several rebuffed attempts and correspondence between Shaw and Pierce  
24 administrators who are named Defendants, on December 8, 2016, Jeremy Mason, a  
25 senior secretary in the Associated Student Organization (“ASO”) Office, provided  
26 Shaw with a copy of his application. (*Id.*)

27 Now, Shaw wants to continue gathering signatures, and expressing himself on  
28 Pierce’s campus, without being confined to the small Free Speech Area. (*Id.* ¶ 88.)

1 However, he is afraid to do so because he could run into an administrator who would  
2 discipline him for violating the Standards of Student Conduct or “contact the sheriff’s  
3 office to remove him from campus.” (*Id.*)

### 4 III. LEGAL STANDARD

5 A court may dismiss a complaint under Rule 12(b)(6) for lack of a cognizable  
6 legal theory or insufficient facts pleaded to support an otherwise cognizable legal  
7 theory. *Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th Cir. 1988). A  
8 court may also dismiss a complaint for lack of subject matter jurisdiction, pursuant to  
9 Rule 12(b)(1).

10 To survive a motion to dismiss, a complaint need only satisfy the minimal  
11 notice pleading requirements of Rule 8(a)(2)—a short and plain statement of the  
12 claim. *Porter v. Jones*, 319 F.3d 483, 494 (9th Cir. 2003). The factual “allegations  
13 must be enough to raise a right to relief above the speculative level.” *Bell Atl. Corp.*  
14 *v. Twombly*, 550 U.S. 544, 555 (2007). That is, the complaint must “contain sufficient  
15 factual matter, accepted as true, to state a claim to relief that is plausible on its face.”  
16 *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). These factual allegations must provide  
17 fair notice and enable the opposing party to defend itself effectively. *Starr v. Baca*,  
18 652 F.3d 1202, 1216 (9th Cir. 2011).

19 The determination whether a complaint satisfies the plausibility standard is a  
20 “context-specific task that requires the reviewing court to draw on its judicial  
21 experience and common sense.” *Iqbal*, 556 U.S. at 679. A court is generally limited  
22 to the pleadings and must construe all “factual allegations set forth in the complaint . .  
23 . as true and . . . in the light most favorable” to the plaintiff. *Lee v. City of L.A.*, 250  
24 F.3d 668, 688 (9th Cir. 2001). But a court need not blindly accept conclusory  
25 allegations, unwarranted deductions of fact, and unreasonable inferences. *Sprewell v.*  
26 *Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001).

27 If a pleading is so vague and ambiguous that a party cannot reasonably prepare  
28 a response, the party may ask for a more definite statement of the pleading. Fed. R.

1 Civ. P. 12(e). This request must be made before a response is filed, and it must  
2 explain the defects of the complaint. *Id.* If the pleading party fails to provide this  
3 statement, the court may strike the pleading. *Id.*

#### 4 IV. DISCUSSION

5 Defendants move to dismiss on the grounds that: 1) Shaw does not have  
6 standing; 2) he fails to state any claims on which relief could be granted; 3) his  
7 Second Third, Fourth, and Fifth Causes of Action against Defendants Burke,  
8 Marmolejo, Dixon-Peters, and Astorga (the “Pierce Defendants”) fail to state claims  
9 for individual liability; 4) the Pierce Defendants are entitled to qualified immunity;  
10 and 5) Eleventh Amendment immunity bars all claims for monetary damages against  
11 Defendants in their official capacities.

##### 12 A. Shaw Alleges Facts Establishing Standing

13 “Constitutional challenges based on the First Amendment present unique  
14 standing considerations.” *Arizona Right to Life Political Action Comm. v. Bayless*,  
15 320 F.3d 1002, 1006 (9th Cir. 2003). Thus, in order to “avoid the chilling effect of  
16 sweeping restrictions, the Supreme Court has endorsed what might be called a ‘hold  
17 your tongue and challenge now’ approach rather than requiring litigants to speak first  
18 and take their chances with the consequences.” *Id.* (citing *Dombrowski v. Pfister*, 380  
19 U.S. 479, 486 (1965)). Generally, standing requires an “injury in fact,” causation, and  
20 that the injury may be redressed by a favorable decision by the court. *Lujan v.*  
21 *Defenders of Wildlife*, 504 U.S. 555, 560–62 (1992). A plaintiff’s alleged harm  
22 qualifies as an “injury in fact” where the defendant’s actions invade a legally  
23 protected interest that is: “(a) concrete and particularized; and (b) ‘actual or imminent,  
24 not ‘conjectural’ or ‘hypothetical.’” *Id.* at 560 (citations omitted). Here, Shaw  
25 challenges Pierce’s free speech policies, both facially, and as applied.

##### 26 1. As applied

27 As applied, Shaw alleges that Defendants restricted his speech when Pierce  
28 administrators enforced Pierce’s Free Speech Policy, and required him to obtain a



1 permit before continuing to distribute Spanish-language copies of the U.S.  
2 Constitution. (Compl. ¶¶ 56–62). This sufficiently establishes his standing because  
3 he demonstrates a concrete injury, traceable to Defendants’ conduct that could be  
4 redressed by a favorable ruling. *See, e.g., Preminger v. Peake*, 552 F.3d 757, 764 (9th  
5 Cir. 2008) (holding plaintiff had direct standing to bring an as-applied challenge  
6 where defendant interrupted plaintiff’s registration of voters within defendant’s  
7 facility).

## 8 2. *Facial challenge*

9 With respect to Shaw’s facial challenge, Defendants claim Shaw does not  
10 establish how his “rights have been violated or are immediately threatened by specific  
11 provisions of the District Free Speech Policy and actions of the members of the Board  
12 of Trustees,” as opposed to the Pierce Defendants. (Mot. 7) Shaw alleges, however,  
13 that Pierce developed its Free Speech Policies, which have already restricted his  
14 speech (Compl. ¶¶ 56–62), in accordance with the District’s directive that college  
15 campuses are non-public fora, and that the colleges designate specific free speech  
16 areas. (*Id.* ¶¶ 2–3, 29–39.) Defendants also argue that Shaw does not have standing  
17 because he cannot demonstrate Pierce is likely to enforce the free speech policies.  
18 (Mot. 7–10.)

19 When evaluating a pre-enforcement plaintiff’s standing, courts consider  
20 “whether [a plaintiff] ha[s] failed to show a reasonable likelihood that the government  
21 will enforce the challenged law....” *Lopez v. Candaele*, 630 F.3d 775, 786 (2010).  
22 Next, a plaintiff must establish, “with some degree of concrete detail, that they intend  
23 to violate the challenged law,” and that the law applies to them. *Id.* “[P]ast  
24 enforcement against the same conduct is good evidence that the threat of enforcement  
25 is not “chimerical.” *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2345  
26 (2014) (quoting *Steffel v. Thompson*, 415 U.S. 452, 459 (1974)). Defendants argue  
27 that because college officials did not restrict Shaw’s expressive activity on November  
28 16, 2016, or the anti-Trump protestors’ activity, the threat of future enforcement is

1 low. (Mot. 9.) This, however, does not negate the fact that college administrators  
2 interrupted Shaw’s expressive activity on November 2, 2016, pursuant to the  
3 challenged policies, nor the fact that Pierce also indicates it will enforce its Free  
4 Speech Policies through its Standards of Student Conduct, which can result in  
5 disciplinary action. (Compl. ¶¶ 55–63); *Libertarian Party of Los Angeles Cty. v.*  
6 *Bowen*, 709 F.3d 867, 871 (9th Cir. 2013) (holding threat of enforcement requirement  
7 satisfied where defendant posted challenged regulation on website). Accordingly,  
8 Shaw sufficiently alleges threat of future enforcement.

9 Further, Shaw adequately describes that he intends to violate the challenged  
10 policies. *Lopez*, 630 F.3d at 786. He sets forth the conduct that originally subjected  
11 him to enforcement of the policy, a second episode, where Pierce did not enforce the  
12 policy, or, at least, did not catch him violating it, and that he intends to continue doing  
13 so in the future. (Compl. ¶¶ 56–66, 74, 88.) Astorga also specifically told Shaw that  
14 he should see him “next time [Shaw] would like to distribute any materials” so that  
15 Astorga could provide the appropriate paperwork. (*Id.* ¶ 74.) At this stage, Shaw  
16 sufficiently pleaded his intent to continue engaging in protected activity, such that the  
17 Court is not required to conjure hypotheticals that may lead to enforcement of the  
18 policies in the distant future.

19 Finally, a favorable ruling will redress Shaw’s injury because he will be able to  
20 engage in free speech activities without discipline, interruption from college  
21 authorities, or the chilling effect accompanying the threat of discipline. *Khademi v.*  
22 *South Orange Cty. Cmty. College Dist.*, 194 F. Supp. 2d 1011, 1019 (C.D. Cal. 2002)  
23 (holding that favorable ruling would redress harm where regulation at issue “could  
24 possibly prevent Plaintiffs from engaging in certain constitutionally protected  
25 activities, restrict their manner of expression, and/or expose them to disciplinary  
26 action for engaging in certain protected activities”).

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1 **B. Failure to State a Claim: First Amendment Issues**

2 Defendants argue that Shaw fails to state a claim under the First Amendment.  
3 (Mot. 11.) The extent to which the government may regulate speech at a school  
4 largely depends on how the area at issue is characterized. Courts traditionally  
5 categorize property as either (1) a public forum, (2) a designated public forum, or (3) a  
6 non-public forum. *Perry Educ. Ass'n v. Perry Local Educ. Ass'n*, 460 U.S. 37, 45–  
7 46 (1983). With each of these monikers comes a different standard of review. Shaw  
8 contends that Defendants' regulations violate the First Amendment in at least two  
9 ways: 1) Defendants' limitation of speech to only the Free Speech Area is not a  
10 reasonable time, place, or manner restriction; and 2) despite designating a Free Speech  
11 Area, Defendants' permitting requirement is an unconstitutional prior restraint. (*See*  
12 *Opp'n*, Section C.)

13 *I. Type of Forum*

14 “The college classroom with its surrounding environs is peculiarly ‘the  
15 marketplace of ideas.’” *Healy v. James*, 408 U.S. 169, 180 (1972). However, simply  
16 because the government owns property does not automatically mean that any  
17 individual may use it to express his or her First Amendment rights. *Grayned v. City of*  
18 *Rockford*, 408 U.S. 104, 117–118 (1972) (“Nowhere [have we] suggested that  
19 students, teachers, or anyone else has an absolute constitutional right to use all parts of  
20 a school building or its immediate environs for...unlimited expressive purposes.”).

21 Traditional public fora are places, such as public sidewalks or parks, where  
22 individuals have long been able to freely express their ideas. *Perry*, 460 U.S. at 45.  
23 In public fora, the government may not completely restrict speech. *Id.* “[T]o enforce  
24 a content-based exclusion[, the government] must show that its regulation is necessary  
25 to serve a compelling state interest and that it is narrowly drawn to achieve that end.”  
26 *Id.* (citing *Carey v. Brown*, 447 U.S. 455, 461 (1980)). Where a regulation is content-  
27 neutral, the government may establish reasonable time, place, and manner restrictions,  
28 which are narrowly tailored to achieve a significant government interest, so long as

1 there are ample alternative channels of communication. *Id.* (citing *United States*  
2 *Postal Serv. v. Council of Greenburgh*, 453 U.S. 114, 132 (1981)); *Ward v. Rock*  
3 *Against Racism*, 491 U.S. 781, 791 (1989).

4 Even in places that are not traditionally regarded as a public forum, the  
5 government may designate the area as an area for free discourse, which renders it a  
6 designated public forum. *Perry*, 460 U.S. at 45–46. While not required to maintain  
7 the area open for expression forever, during the period the government maintains the  
8 area as an area for free expression, its regulations are subject to the same level of  
9 scrutiny as those employed in a traditional public forum. *Id.* at 46 (citing *Widmar v.*  
10 *Vincent*, 454 U.S. 263, 269–270 (1981)) (“Reasonable time, place and manner  
11 regulations are permissible, and a content-based prohibition must be narrowly drawn  
12 to effectuate a compelling state interest.”). While not entirely settled,<sup>3</sup> a sub-category  
13 of the “designated public forum” is the “limited public forum.” *Good News Club v.*  
14 *Milford Central Sch.*, 533 U.S. 98, 106–07 (2001); *OSU Student Alliance v. Ray*, 699  
15 F.3d 1053, 1062 (9th Cir. 2012) (quoting *Flint v. Dennison*, 488 F.3d 816, 830–31  
16 (9th Cir. 2007)). A limited forum occurs where the government opens a non-public  
17 forum to certain types of speech. *OSU Student Alliance*, 699 F.3d at 1062. In a  
18 limited public forum, the government may regulate speech as long as the regulations:  
19 “(1) comport with the definition of the forum (for example, the government cannot  
20 exclude election speech from a forum that it has opened specifically for election  
21 speech); (2) are reasonable in light of the purpose of the forum; and (3) do not  
22 discriminate by viewpoint.” *Id.* at 1062.

23 The final category, non-public fora, includes public property that “is not by  
24 tradition or designation a forum for public communication....” *Id.* The government  
25 may impose time, place, and manner restrictions, and “the state may reserve the forum

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27 <sup>3</sup> The Ninth Circuit has explained that “[t]he contours of the terms ‘designated public forum’ and  
28 ‘limited public forum’ have not always been clear.” *Hopper v. City of Pasco*, 241 F.3d 1067, 1074  
(9th Cir. 2001) (citing *DiLoreto v. Downey Unified Sch. Dist. Bd. of Educ.*, 196 F.3d 958, 965 n.4  
(1999)).

1 for its intended purposes, communicative or otherwise, as long as the regulation on  
2 speech is reasonable and not an effort to suppress expression merely because public  
3 officials oppose the speaker's view." *Perry*, 460 U.S. at 46.

4 Shaw maintains that Pierce's entire campus is a traditional public forum, or, at  
5 least, a designated public forum. (Opp'n 10–11.) Defendants claim that the  
6 California community colleges are not public fora because their "primary mission" is  
7 to "provide academic and vocational education to younger and older students." (Mot.  
8 13.) Defendants also rely on the District Board Rules, which declare its campuses to  
9 be non-public fora, except the Free Speech Area, which Defendants claim is a limited  
10 public forum. (*Id.*, Compl. ¶ 35, Ex. A, pg. 30.) On the other hand, Shaw argues that  
11 California Education Code section 76120 affirmatively designates community college  
12 campuses as public fora. (Opp'n 11.)

13 Section 76120 provides that the rules implemented by the governing board of a  
14 community college:

15 shall not prohibit the right of students to exercise free  
16 expression...except that expression which is obscene,  
17 libelous or slanderous according to current legal standards,  
18 or which so incites students as to create a clear and present  
19 danger of the commission of unlawful acts on [campus], or  
20 the violation of lawful community college regulations, or the  
substantial disruption of the orderly operation of the  
community college, shall be prohibited.

21 Cal. Educ. Code § 76120. Shaw analogizes this statute to the one at issue in *OSU*  
22 *Alliance v. Ray*, where the Ninth Circuit held that an Oregon state regulation that  
23 opened universities for speech activities, with the exception of certain areas marked  
24 authorized access only, indicated that the campus was "at least a designated public  
25 forum." *OSU Alliance*, 699 F.3d at 1062. While the Section 76120 evinces an intent  
26 of the California legislature to open community college campuses to "the right of  
27 students to exercise free expression," it also explicitly excludes expression that is in  
28 "violation of lawful community college regulations." Cal. Educ. Code § 76120. The

1 District's regulations here seem to be at odds with the spirit of Section 76120.  
2 Because Section 76120 excludes activities that violate "lawful community college  
3 regulations," and Defendants claim Shaw's actions violate Pierce's regulations, the  
4 Court must evaluate the nature of the property Shaw seeks to use in categorizing it.

5 "[T]he intent of a government to create a nonpublic forum has no direct bearing  
6 upon traditional public forum status." *ACLU of Nevada v. City of Las Vegas*, 333  
7 F.3d 1092, 1104 (9th Cir. 2003). Instead, in evaluating whether an area is a traditional  
8 public forum, courts evaluate:

- 9 1) the actual use and purposes of the property, particularly  
10 status as a public thoroughfare and availability of free public  
11 access to the area; 2) the area's physical characteristics,  
12 including its location and the existence of clear boundaries  
delimiting the area; and 3) traditional or historic use of both  
the property in question and other similar properties.

13 *Id.* at 1100. The Court must also keep in mind that "[a] modern university contains a  
14 variety of fora." *Bowman v. White*, 444 F.3d 967, 976 (8th Cir. 2006).

15 On Pierce's campus, there are "open areas and sidewalks beyond the Free  
16 Speech Area where student speech, expressive activity, and distribution of literature  
17 would not interfere with or disturb access to college building or sidewalks...."  
18 (Compl. ¶ 54.) At the time administrators stopped Shaw from distributing Spanish-  
19 language copies of the U.S. Constitution, he was alongside a "large thoroughfare  
20 called 'the Mall'" and was not "disrupting campus operations or interfering with foot  
21 traffic." (*Id.* ¶¶ 57–58.) These facts tend to establish the open areas of Pierce's  
22 campus are a public forum.

23 In *Widmar v. Vincent*, the Supreme Court noted in a footnote that "the campus  
24 of a public university, at least for its students, possesses many of the characteristics of  
25 a public forum." 454 U.S. at 267 n.5 (citing *Police Dept. of Chicago v. Mosley*, 408  
26 U.S. 92 (1972) and *Cox v. Louisiana*, 379 U.S. 536 (1965)). This characterization  
27 makes sense, because after all, what is a university's purpose but to expose students to  
28 new ideas and spark dialogue? However, the Supreme Court recognized, that a

1 university's first priority is education and that any First Amendment analysis must  
2 consider this purpose. *Id.* All this means, however, is that a campus need not "make  
3 all of its facilities equally available to students and nonstudents alike," nor "grant free  
4 access to all of its grounds or buildings." *Id.* Given the traditional purpose of the  
5 open, outdoor areas of universities, such as the "Mall" on Pierce's campus, the Court  
6 finds that these areas are traditional public fora, regardless of Pierce's regulations  
7 naming them non-public fora. *Id.*; *Bowman*, 444 F.3d at 979 ("College campuses  
8 traditionally and historically serve as places specifically designated for the free  
9 exchange of ideas."). This does not eviscerate Defendants' ability to regulate speech  
10 in these areas with reasonable time, place, and manner restrictions, narrowly tailored  
11 to serve their interests; it simply limits their ability to create content-based restrictions.  
12 *See OSU Student Alliance*, 699 F.3d at 1062–63 (permitting content-based, viewpoint  
13 neutral restrictions in non-public or limited fora).

14 In distinguishing the legal authority cited by Shaw and the United States,  
15 Defendants argue that there should be some distinction between Pierce and "public  
16 universities." (Reply 8, ECF No. 35.) According to Defendants, because Pierce is a  
17 community college, and not a "public university," the cases finding that open areas are  
18 traditional public fora are not applicable. (*Id.*) Simply because a community college  
19 attracts students who are more likely to commute and less likely to live on campus,  
20 does not mean that community college students should be precluded from expressing  
21 themselves in traditionally free, open areas such as the Mall on Pierce's campus. One  
22 would hope that community colleges strive to provide a certain caliber of education,  
23 with which also comes the opportunity to express oneself in the same manner as a  
24 student at a "public university." Accordingly, the Court does not find this argument  
25 persuasive.

26 Defendants also criticize Shaw for ignoring Board Rule 9903 in his Complaint.  
27 (Reply 2.) Board Rule 9903 provides: "The president of each college may designate  
28 areas outside of the Free Speech Areas where students...may exercise freedom of

1 expression subject only to reasonable time, place and matter restrictions.” (Compl.,  
2 Ex. A, pg. 33.) This Rule shows that the District contemplated designating areas  
3 outside of the Free Speech Area as public fora. The Rule allows the college president  
4 to determine where to designate additional areas of expression, given the unique  
5 considerations applicable to a specific campus layout, i.e. location of classrooms vis-  
6 à-vis open spaces or thoroughfares. This supports a finding that the District  
7 designated, or at least provided authority to designate, certain areas of Pierce’s  
8 campus outside of the Free Speech Area as public fora. Indeed, Shaw alleges that he  
9 and others engaged in expressive activity outside of the Free Speech Area on other  
10 occasions, despite the policies prohibiting such conduct. (Compl. ¶ 66.) These  
11 actions, if proven true, could also nullify the policies declaring the entire campus a  
12 non-public forum. *See OSU Student Alliance*, 699 F.3d at 1063 (holding that  
13 university must consistently apply policies designed to establish an area as a non-  
14 public forum). In any event, the scrutiny the Court applies to regulations governing  
15 public or designated fora is the same. *Perry*, 460 U.S. at 45–46. Thus, the Court must  
16 evaluate the nature of Defendants’ policies. *Id.*

17       2. *Significant interests and avenues of communication*

18       The parties do not dispute that Defendants have a significant interest in  
19 “avoiding disruption, insuring safety, comfort, or convenience of the public, and  
20 maintaining grounds that are attractive and intact...” (Opp’n 16.) The question is  
21 whether Defendants narrowly tailored their regulations, and whether students have  
22 alternate avenues of communication. *Perry*, 460 U.S. at 45–46.

23       “The requirement of narrow tailoring means that a time, place or manner  
24 restriction on First Amendment activity may not ‘burden substantially more speech  
25 than is necessary to further the government’s legitimate interests.’” *Grossman v. City*  
26 *of Portland*, 33 F.3d 1200, 1205 (9th Cir. 1994) (quoting *Ward*, 491 U.S. at 799).  
27 Defendants argue their regulations are narrowly tailored because without designating  
28 free speech areas, students “would be able to congregate on walkways outside of



1 doors and buildings, compete for use of college grounds, create safety and sanitation  
2 issues, and impose even greater administrative burdens....” (Mot. 14.) However,  
3 Defendants’ literally “narrow” free speech area, comprising 616 square feet on a  
4 campus spanning hundreds of acres (Compl. ¶ 46), does not achieve Defendants’  
5 stated goals without unnecessarily impeding students’ First Amendment rights. *See*  
6 *Kuba v. I-A Agric. Ass’n*, 387 F.3d 850, 862 (9th Cir. 2004) (citations omitted)  
7 (holding that a policy that “relegates communication activity to three small, fairly  
8 peripheral areas, does not sufficiently match the stated interest of preventing  
9 congestion and so is not narrowly tailored”). There are ample ways for Defendants to  
10 achieve their stated goals without precluding so much protected speech: Defendants  
11 could limit expression to areas away from classrooms or impose restrictions on the  
12 time students are able to express themselves. Instead, Defendants preclude all speech  
13 in substantial portions of the campus, such as the Mall, without any discernable  
14 connection to their stated interests. Accordingly, Shaw sufficiently alleges that  
15 Defendants’ regulations are not narrowly tailored.

16 Defendants must also leave open alternative channels of communication.  
17 *Perry*, 460 U.S. at 45–46. Defendants argue that because the free speech area must be  
18 in a place “where there is a normal flow of student traffic with unlimited accessibility”  
19 (Compl. ¶ 36), students are provided “extensive access to their intended audience.”  
20 (Mot. 15.) Because the one place Pierce allows expressive activity to occur is  
21 centralized does not detract from the fact that Defendants ostensibly close all other  
22 channels of communication outside of the Free Speech Area by designating it non-  
23 public. (Compl. ¶ 35.) Defendants also argue that Pierce’s billboards permit students  
24 sufficient alternate methods of expressing themselves. (Mot. 16.) Placing a pamphlet  
25 on a billboard is a different medium of expression, and does not sufficiently permit  
26 students alternative channels of expression. *See Galvin v. Hay*, 374 F.3d 739, 750  
27 (9th Cir. 2004) (“The Court has recognized that location of speech, like other aspects  
28 of presentation, can affect the meaning of communication and merit First Amendment

1 protection for that reason.”). Last, Defendants argue that Board Rule 91005, which  
2 prevents the president of the college from approving rules that “would deny students  
3 their free speech rights were they conducting such activities in Free Speech Areas,”  
4 provides students another avenue of communication. (Mot. 16.) However, this Rule  
5 is at odds with the Pierce policy, which does not provide any additional areas of  
6 expression, and, thus does allow Shaw other ways to express himself. Accordingly,  
7 Shaw adequately pleads this element, too, and the Court **DENIES** Defendants’  
8 Motion on these grounds.

9           3. *Prior Restraint*

10           The government may regulate expressive activity through reasonable permitting  
11 requirements to ensure equal access, and to maintain order. *See generally Forsyth*  
12 *Cty., Ga.*, 505 U.S. at 129–30. However, prior restraints come with a “heavy  
13 presumption” of invalidity. *Id.* at 130. Courts typically find permitting schemes  
14 unconstitutional where they are “contingent upon the uncontrolled will of an  
15 official—as by requiring a permit or license which may be granted or withheld in the  
16 discretion of such official.” *Shuttlesworth v. Birmingham*, 394 U.S. 147, 151 (1969)  
17 (quoting *Staub v. City of Baxley*, 355 U.S. 313, 322 (1958)).

18           As described above, Shaw alleges that Pierce requires students to complete a  
19 permit application prior to using the Free Speech Area, and that the policy “does not  
20 limit the discretion of...administrators responsible for its enforcement, to deny or  
21 approve an application because of the content or viewpoint of the speaker’s intended  
22 message.” (Compl. ¶¶ 48–52.) Defendants claim that “the Pierce College  
23 administrators who process forms for use of the [Free Speech Area] *do not have any*  
24 *discretion* to deny a permit, other than on the grounds that the [Free Speech Area] has  
25 already been reserved by another speaker or group at the time requested.” (Mot. 19  
26 (emphasis in original).) Yet, Defendants cannot point to allegations in the Complaint,  
27 or anywhere in the regulations themselves that substantiate this argument. To the  
28 extent Pierce College actually has articulated standards for its administrators to follow

1 in deciding whether to grant students use of the Free Speech Area, Shaw has alleged  
2 otherwise (Compl. ¶¶ 48–52, 111, 122, 129), and the Court must take his allegations  
3 as true. *Lee*, 250 F.3d at 688. Thus, to the extent Pierce’s policy does not provide  
4 “narrow objective, and definite standards to guide the licensing authority,” it is invalid  
5 on its face. *Forsyth Cty., Ga*, 505 U.S. at 131.

6 The permitting requirement also impermissibly restricts speech because it  
7 applies to all speakers regardless of whether applicants intend to speak alone or as part  
8 of a group. (*See* Compl., Ex. C.) Courts strike permitting requirements where they  
9 indiscriminately apply regardless of the number of speakers. *Grossman*, 33 F.3d at  
10 1206–07 (holding permitting ordinance overbroad where it swept in actions of single  
11 protestors). These types of regulations are impermissible because they are not  
12 legitimately tied to the government’s interests. Where a large group of protestors may  
13 disrupt class, or impede foot traffic, the likelihood that a single protestor would do the  
14 same is low. Furthermore, there are other, less restrictive avenues for the government  
15 to achieve its goals. Accordingly, Shaw states a claim under this theory, too.

16 Finally, Shaw argues that having to identify himself during the permitting  
17 process is improper because it interferes with his right to anonymity. (Compl. ¶¶ 48,  
18 109; Opp’n 21.) “[T]he requirement that potential speakers identify themselves to the  
19 government, and the concomitant loss of anonymity, is one of the primary *evils* the  
20 Supreme Court cited when it struck down the permitting requirement in *Watchtower*  
21 *Bible*.” *Berger v. City of Seattle*, 569 F.3d 1029, 1045 (9th Cir. 2009) (emphasis in  
22 original) (citing *Watchtower Bible & Tract Society v. Village of Stratton*, 536 U.S.  
23 150, 166–67 (2002)). Defendants argue that only administrators know of his identity,  
24 and therefore he maintains his anonymity with respect to individuals who may happen  
25 upon him while he is exercising his rights. (Mot. 20.) These facts are not contained  
26 in the Complaint, and thus not before the Court on this Motion. Furthermore, in  
27 addition to anonymity, the permitting process precludes spontaneous speech because  
28 students must obtain a permit before speaking, even within the Free Speech Area.

1 (See Compl., Ex. C.) Spontaneous speech is protected by the First Amendment. See  
2 *Watchtower*, 536 U.S. at 167. Accordingly, Shaw adequately pleaded the permitting  
3 process constitutes an unlawful prior restraint.

4 **C. Failure to State a Claim: Section 1983 Causation**

5 Defendants also move to dismiss on the grounds that Shaw's Second through  
6 Fifth causes of action do not sufficiently allege that Defendants caused Shaw's injury.  
7 (See Mot. 8, 16–17.) Defendants also argue these points in attacking Shaw's standing.

8 In an action under 28 U.S.C. § 1983, “[t]he requisite causal connection can be  
9 established not only by some kind of direct personal participation in the deprivation,  
10 but also by setting in motion a series of acts by others which the actor knows or  
11 reasonably should know would cause others to inflict the constitutional injury.”  
12 *Johnson v. Duffy*, 588 F.2d 740, 743–44 (9th Cir. 1978). A supervisor may also be  
13 liable under section 1983 where the supervisor's actions in implementing,  
14 promulgating, or advancing policies proximately cause plaintiff's harm. See *OSU*  
15 *Student Alliance*, 699 F.3d at 1076–77; see also *Starr v. Baca*, 652 F.3d 1202, 1205–  
16 06 (9th Cir. 2011).

17 Here, Shaw alleges facts establishing each individual defendant's alleged role in  
18 violating his rights:

- 19 • Burke is the President of Pierce College, and is responsible for  
20 designating the Free Speech Area (Compl. ¶¶ 15, 36);
- 21 • Dixon-Peters is Vice President of Student Services, and students are  
22 required to consult him prior to distributing materials on campus to  
23 obtain a permit (*Id.* at ¶ 16, Ex. C, pg. 36);
- 24 • Marmolejo is Dean of Student Services, and was aware of Shaw's search  
25 for a copy of the free speech policy, and is responsible for  
26 “policymaking, administration, and enforcement of the college's policies  
27 and procedures, including those that were applied to...Shaw” (*Id.* at  
28 ¶¶ 17, 70–74); and

- 1           • Astorga is Dean of Student Engagement and specifically told Shaw that  
2           “[t]he use of the Speech area [was] under [his] purview.” (*Id.* at ¶¶ 17,  
3           74, 79–80.)

4           Shaw also argues that because he seeks injunctive relief, he “need only identify  
5           the law or policy challenged as a constitutional violation and name the official within  
6           the entity who can appropriately respond to injunctive relief.” *Hartmann v. Cal. Dep’t*  
7           *of Corr. & Rehab.*, 707 F.3d 1114, 1127 (9th Cir. 2013) (citations omitted). He has  
8           done so here. (Compl. ¶¶ 15–18.) Defendants do not respond to this argument.  
9           Accordingly, the Court **DENIES** Defendants’ Motion on these grounds.

#### 10   **D.    Eleventh Amendment**

11           Defendants move to dismiss Shaw’s claims for monetary damages against the  
12           individuals in their official capacities. (Mot. 3–4.) Shaw concedes that he may not  
13           assert monetary claims against the individuals in their *official* capacities (Opp’n 9),  
14           but maintains he may pursue damages against them in their *individual* capacities.  
15           *Hafer v. Melo*, 502 U.S. 21, 30–31 (1991) (citing *Ex parte Young*, 209 U.S. 123, 238  
16           (1908)) (“[T]he Eleventh Amendment does not erect a barrier against suits to impose  
17           ‘individual and personal liability’ on state officials under § 1983.”). Accordingly,  
18           while Shaw may not pursue monetary damages against the individuals in their official  
19           capacities, he may do so to the extent his claims are against them in their individual  
20           capacities. However, as described below, the Court finds Defendants are entitled to  
21           qualified immunity, precluding a claim for monetary damages.

#### 22   **E.    Qualified Immunity**

23           Defendants next argue that the Pierce College Defendants are entitled to  
24           qualified immunity to the extent they are sued in their individual capacities. (Mot.  
25           22.) “Qualified immunity involves a two-step inquiry: (1) whether the [defendant’s]  
26           conduct violated a constitutional right; and (2) whether that right was clearly  
27           established when viewed in the context of this case.” *Ctr. for Bio-Ethical Reform, Inc.*  
28           *v. Los Angeles Cty. Sheriff Dep’t*, 533 F.3d 780, 793 (9th Cir. 2008) (citing *Ganwich*

1 *v. Knapp*, 319 F.3d 1115, 1119 (9th Cir. 2003)). The Court addressed the alleged  
2 violation of Shaw’s constitutional rights in the sections above, so the only remaining  
3 issue is whether Shaw’s rights were “clearly established.” *Id.* While there need not  
4 be “a case directly on point[,]. . .existing precedent must have placed the statutory of  
5 constitutional question beyond debate.” *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011)  
6 (citing *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)).

7 Given the range of cases addressing the status of universities as public or non-  
8 public fora, and the differing classifications attributed to different aspects of a  
9 university’s campus, the Court cannot make that finding here. Furthermore, while not  
10 determinative, as cited by Defendants, these regulations were litigated previously,  
11 albeit in a different context, with different results. *See Guengerich v. Baron*, No. 10-  
12 cv-01045-JHN-PLAx, 2011 WL 13116612, at \*7 (C.D. Cal. May 5, 2011) (granting  
13 summary judgment and finding community college district’s free speech policy did  
14 not violate the First Amendment rights of non-students). Accordingly, the Court  
15 **GRANTS** Defendants’ Motion inasmuch as it requests dismissal of Shaw’s claims for  
16 monetary damages against the individual defendants, Burke, Marmolejo, Dixon-  
17 Peters, and Astorga, in their individual capacities; Shaw’s claim for injunctive relief,  
18 however, survives. *See, e.g., Hydrick v. Hunter*, 669 F.3d 937, 939–40 (9th Cir.  
19 2012).

## 20 **F. Motion for More Definite Statement**

21 Defendants request a more definite statement, pursuant to Federal Rule of Civil  
22 Procedure 12(e), in their Notice of Motion. (Not. of Mot. 2.) However, they do not  
23 address this request in any detail in their papers. “A motion for more definite  
24 statement pursuant to Rule 12(e) attacks the unintelligibility of the complaint, not  
25 simply the mere lack of detail, and therefore, a court will deny the motion where the  
26 complaint is specific enough to apprise the defendant of the substance of the claim  
27 being asserted.” *Beery v. Hitachi Home Elecs. (Am.), Inc.*, 157 F.R.D. 477, 480 (C.D.  
28 Cal. 1993). Shaw adequately pleads his Complaint such that Defendants will be able

1 to frame a responsive pleading, and therefore the Court **DENIES** Defendants’ Motion  
2 on these grounds. *Famolare, Inc. v. Edison Bros. Stores*, 525 F. Supp. 940, 949 (E.D.  
3 Cal. 1981) (“A motion for a more definite statement should not be granted unless the  
4 defendant cannot frame a responsive pleading.”).

5 **V. CONCLUSION**

6 As set forth more fully above, the Court **DENIES, in part, and GRANTS, in**  
7 **part,** Defendants’ Motion to Dismiss, and for a more definite statement. (ECF No.  
8 22.)

9 **IT IS SO ORDERED.**

10  
11 January 17, 2018

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15 **OTIS D. WRIGHT, II**  
16 **UNITED STATES DISTRICT JUDGE**  
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