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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
FRESNO DIVISION

ALEJANDRO FLORES, ET AL., Plaintiffs, v. DR. LORI BENNETT, ET AL., Defendants.	Civil Action No. 1:22-cv-01003-JLT-HBK **PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO DISMISS**

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Pursuant to Local Rule 230(c) and the Court's September 12, 2022 Order Granting Plaintiffs' Unopposed Motion to Extend (ECF No. 20), Plaintiffs Alejandro Flores, Daniel Flores, Juliette Colunga, and Young Americans for Freedom at Clovis Community College (YAF-Clovis) respectfully submit the following Opposition to Defendants' Motion to Dismiss.

INTRODUCTION

Alejandro, Daniel, and Juliette are officers of YAF-Clovis, a conservative student organization. They wish to post their flyers on interior campus bulletin boards just like all other student groups. But Defendants, administrators at Clovis, removed YAF-Clovis's flyers from those bulletin boards after receiving complaints that the flyers made others "uncomfortable." Although the flyers were fully protected under the First Amendment, Clovis administrators deemed them "inappropriate" or "offens[ive]" under their Flyer Policy and invented a pretextual, post-hoc justification for removing the flyers—that they "aren't club announcements." Administrators later used that same justification to reject another set of Plaintiffs' flyers, instead banishing them to a so-called "Free Speech Kiosk" that students typically do not use because it sits too far from the only entrances to the academic buildings.

Defendants chose to adopt, maintain, and enforce an arbitrary and unconstitutional ban on "offens[ive]" flyers. This ban is unlawful both facially and as applied to Plaintiffs. In fact, it violates the Constitution in at least five ways: It is viewpoint discriminatory on its face, viewpoint discriminatory as applied to Plaintiffs, a prior restraint on Plaintiffs' speech, overbroad, and void for vagueness. Each of these claims is legally viable and well-supported by allegations in Plaintiffs' Verified Complaint.

But now, Defendants seek to deflect responsibility by moving to dismiss Plaintiffs' case under Rules 12(b)(1) and 12(b)(6). In doing so, Defendants misstate the law and improperly seek to introduce facts to contest those laid out in Plaintiffs' Verified Complaint. Defendants argue that this Court lacks jurisdiction, but Plaintiffs meet Article III's standing requirements. Defendants are sued in both their official and individual capacities, and Plaintiffs properly seek both prospective relief (declaratory judgment and an injunction) and retrospective relief (compensatory and punitive damages), respectively. And because Defendants blatantly violated Plaintiffs' clearly established

First Amendment rights—rights of which any reasonable public college administrator would have been well-aware—qualified immunity cannot shield them from accountability.

STATEMENT OF FACTS

Alejandro, Daniel, and Juliette are founding members and student officers of YAF-Clovis, a conservative student organization. To promote their political views and recruit new members to YAF-Clovis, Plaintiffs create and post flyers on campus for other students to see. Verified Compl. ¶ 43. Plaintiffs want to post their flyers on the interior Academic Center bulletin boards that all other student clubs are permitted to use. *Id.* ¶¶ 48, 49. Posters are only permitted on these bulletin boards with a stamp of approval from Clovis Community College (Clovis) staff. *Id.* ¶¶ 49–53.

Clovis's Flyer Policy expressly prohibits "[p]osters with inappropriate or offens[ive] language or themes." *Id.* ¶ 53. It neither defines "inappropriate or offens[ive] language or themes," nor provides guidance to administrators about how to apply these terms. *See id.*

In early November 2021, Plaintiffs obtained approval from the Clovis Student Center to post flyers with three different designs criticizing communism and leftist regimes and promoting a national campaign called Freedom Week (the Freedom Week Flyers) on bulletin boards in the halls of the two main academic buildings. *Id.* ¶¶ 58–62, Exs. A–C. After the students posted the flyers, Defendants received an email from a staff member claiming that the conservative political views on the flyers made "several people . . . very uncomfortable," and that one person threatened to file a harassment claim if Defendants did not remove the flyers. Verified Compl. ¶ 63; Hahn Decl. Ex. 1 at 1.

Following this email, Defendants orchestrated the removal of the Freedom Week Flyers even though they had allowed the same flyers in previous years. Verified Compl. ¶¶ 64–69. Specialist Stumpf declared that he would "gladly" take down the Freedom Week Flyers under the Flyer Policy's prohibition of "inappropriate or offens[ive] language or themes" *Id.* ¶¶ 65, 67; Hahn Decl. Ex. 4. President Bennett, in consultation with Vice President De La Garza, ordered Dean Hébert to remove the Freedom Week Flyers and created a pretextual, post-hoc justification for doing so: "If you need a reason, you can let them know that Marco [De La Garza] and I agreed they

aren't club announcements." *Id*. ¶¶ 70, 71; Hahn Decl. Ex. 7 at 1.[1] Dean Hébert ordered Specialist Stumpf to remove the flyers, and Stumpf had student workers remove the flyers that day, without notice to the student Plaintiffs. Verified Compl. ¶¶ 73–76. Dean Hébert also ordered Specialist Stumpf to keep the justification secret: "Between you and me. Please don't share this email. Flyers need to come down per administration." *Id*. ¶ 77.

One month later, Defendants used the same secret post-hoc pretextual justification to banish Plaintiffs' Pro-Life Flyers to a remote outdoor area of campus. In late November 2021, Alejandro, Daniel, and Juliette created a set of five Pro-Life Flyers in anticipation of the U.S. Supreme Court's oral argument in the controversial case of *Dobbs v. Jackson Women's Health Organization,* 142 S. Ct. 2228 (2022). *Id*. ¶ 80. On the day of the Supreme Court argument, Plaintiffs sought approval from Specialist Stumpf and Dean Hébert to post the Pro-Life Flyers on the Academic Centers' bulletin boards. *Id.* ¶¶ 81–82. Based on prior experience, Plaintiffs anticipated that Student Center staff would approve the flyers within minutes. *Id.* ¶ 84. This time, however, Alejandro and Daniel waited on campus for nearly nine hours without a decision. *Id.* ¶ 85. The next day, Dean Hébert denied Plaintiffs' request without explanation, advising Plaintiffs they could post the flyers on an outdoor "Free Speech Kiosk," a small, remote box students seldom, if ever, visit. *Id.* ¶¶ 87–95. Ten days later, Dean Hébert finally informed the students that she rejected the flyers under the same pretextual, post-hoc justification invented by President Bennett and Vice President De La Garza to justify removing the Freedom Week Flyers a month before. *Id.* ¶¶ 97–98.

ARGUMENT

This Court has subject matter jurisdiction over the student Plaintiffs' claims. Defendants are the proper Defendants for Plaintiffs' challenge to the Flyer Policy and Plaintiffs properly seek both prospective injunctive relief and monetary damages (including punitive damages). Plaintiffs also have alleged all the facts needed to satisfy Article III's standing requirements. The extraneous

[1] Clovis has no rule, policy, or consistent pattern or practice that requires student flyers to contain "club announcements." Verified Compl. ¶ 72. The rule against "inappropriate or offens[ive] language or themes" is the only enumerated basis for denying student flyers. *See id*. ¶¶ 53, 57.

facts relied on by Defendants are improper and, in any event, do not undercut the well-pleaded allegations in Plaintiffs' Verified Complaint.

Plaintiffs have also properly alleged that Defendants' Flyer Policy violates their First Amendment rights in five ways: It is viewpoint discriminatory on its face, viewpoint discriminatory as applied to Plaintiffs, a prior restraint on Plaintiffs' speech, overbroad, and void for vagueness. Each of the student Plaintiffs' claims is legally viable and well-supported by allegations in Plaintiffs' Verified Complaint. Finally, Defendants cannot avail themselves of qualified immunity because their actions violated clearly established rights of which any reasonable public college administrator would be aware.

I. The Court Has Subject-Matter Jurisdiction.

Defendants claim that this Court lacks jurisdiction and that this case must be dismissed under Rule 12(b)(1). "A Rule 12(b)(1) jurisdictional attack may be facial or factual." *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004) (citation omitted), cert denied, 544 U.S. 1018 (2005). A facial challenge "asserts that the allegations contained in a complaint are insufficient on their face to invoke federal jurisdiction." *Id.* This court "resolves a facial attack as it would a motion to dismiss under Rule 12(b)(6): Accepting the plaintiff's allegations as true and drawing all reasonable inferences in the plaintiff's favor, the court determines whether the allegations are sufficient as a legal matter to invoke the court's jurisdiction." *Leite v. Crane Co.*, 749 F.3d 1117, 1121 (9th Cir. 2014) (citation omitted).

Most of Defendants' jurisdictional arguments are facial in nature. Defendants first argue that Plaintiffs should have sued the government officials responsible for adopting State Center Community College District (SCCCD) regulation AR 5550. But as discussed in Section I.A., *infra*, this policy has not injured Plaintiffs and they do not challenge it. Defendants also argue they are immune from suit for prospective relief and for monetary damages (including punitive damages) under the Eleventh Amendment. Plaintiffs properly seek prospective relief under *Ex parte Young*, *see infra* Section I.B., and compensatory and punitive damages from Defendants in their individual capacities, *see infra* Section I.C. These arguments hinge on whether Plaintiffs' Verified Complaint

is legally sufficient on its face. Therefore, the Court must assume Plaintiffs' factual allegations are true and draw all reasonable inferences in their favor.

By contrast, in questioning Plaintiffs' Article III standing, Defendants raise a factual attack. "When the defendant raises a factual attack, the plaintiff must support her jurisdictional allegations with competent proof, under the same evidentiary standard that governs in the summary judgment context." *Leite*, 749 F.3d at 1121 (citations and quotation marks omitted). Thus, the plaintiff must prove "by a preponderance of the evidence that" the standing requirements are met, with the district court resolving any factual disputes. *Id*. at 1121–22. As discussed in Section I.D., *infra*, Plaintiffs easily satisfy the tenets of Article III standing.

A. Defendants are the proper defendants.

Plaintiffs brought this action against the named Defendants because they are the Clovis administrators responsible for maintaining and enforcing Clovis's Flyer Policy. Defendants' Flyer Policy and their enforcement of it has caused and continues to cause Plaintiffs' constitutional injuries. In an unavailing attempt to distract from this fact, Defendants baselessly assert that they are not the proper Defendants because SCCCD policy AR 5550 somehow requires them to discriminate against Plaintiffs' viewpoint. But AR 5550 was not referred to in Plaintiffs' Verified Complaint and is irrelevant to Plaintiffs' claims. This Court should therefore pay no heed to AR 5550.

To the extent the Court takes judicial notice of AR 5550, the policy supports the student Plaintiffs' position. While AR 5550 specifically requires Clovis to provide bulletin boards for student postings, it nowhere requires administrators to screen flyers based on viewpoint, impose prior restraints, or banish "offensive" flyers to an isolated outdoor area of campus. Nor does it require that student postings be limited to "club announcements." The policy's plain meaning, obvious on its face, supports the students' arguments that Defendants violated their rights. Defendants' unconstitutional actions (and Plaintiffs' resulting constitutional injuries) begin and end with their maintenance and enforcement of Clovis's Flyer Policy—the policy that Plaintiffs challenge. Plaintiffs have sued the proper defendants.

B. Plaintiffs properly sued Defendants in their official capacities for prospective injunctive relief under *Ex parte Young*.

Defendants are the proper state officials in this case. It is axiomatic that state officials can be sued in their official capacity for prospective injunctive relief. *Ex parte Young*, 209 U.S. 123, 159–61 (1908). Following *Ex parte Young*, numerous cases have recognized that college presidents and administrators may be enjoined from enforcing campus policies. *See, e.g.*, *Koala v. Khosla*, 931 F.3d 887, 894–95 (9th Cir. 2019); *Cohen v. San Bernardino Valley Coll.*, 92 F.3d 968, 970 (9th Cir. 1996); *Jackson v. Hayakawa*, 682 F.2d 1344 (9th Cir. 1982); *Speech First, Inc. v. Cartwright*, 32 F.4th 1110, 1128 (11th Cir. 2022); *Speech First, Inc. v. Fenves*, 979 F.3d 319, 338 (5th Cir. 2020), *as revised* (Oct. 30, 2020). The only requirement is that the defendant have "some connection with the enforcement of the [challenged] act." *Ex parte Young*, 209 U.S. at 157.[2] Defendants pick only one district court case, *Wells v. Bd. of Trustees of Cal. State Univ.*, 393 F. Supp. 2d 990 (N.D. Cal. 2005), and fundamentally misread it as preventing any § 1983 suit against university administrators. *See* Defs.' Mot. to Dismiss at 5. But *Wells* affirms that Plaintiffs are entitled to seek injunctive relief. The decision clarifies that the plaintiff coach's Section 1983 action against university officials in their official capacity was dismissed because he did "not request prospective injunctive relief." *Wells*, 393 F. Supp. 2d at 995 ("The Eleventh Amendment *does* permit suits for prospective injunctive relief against State officials in their official capacities." (emphasis added) (citations omitted)). This is the precise relief that Alejandro, Daniel, and Juliette seek against Defendants in their official capacities.[3]

[2] Although not necessary to thwart Defendants' facial attack on jurisdiction, Plaintiffs have explicitly alleged Defendants' connection to the Flyer Policy's enforcement, Verified Compl. ¶¶ 22-28, and the Defendants do not disagree. *See* Bennett Decl. ¶¶ 2, 8–9 (Bennett is responsible for "ensuring all employees follow all policies" and was closely involved in removal of Freedom Week Flyers); De La Garza Decl. ¶¶ 3, 12–13, 15–16 (De La Garza is responsible for "leadership for the Student Services Division" and "[e]nsuring compliance with federal, state, local and district regulations"); Hébert Decl. ¶¶ 3, 7–9. (Hébert "manage[s] and provide[s] leadership for" the Student Center); Stumpf Decl. ¶¶ 3, 8–9, 13–14 (Stumpf provides "day-to-day lead work guidance and direction to [] program staff," and "information, instruction and training on work procedures and technical, legal and regulatory requirements.").

[3] Defendants also argue that Plaintiffs' official capacity claims are improper because Defendants are not "final policy makers for the local government." Defs.' Mot. to Dismiss, ECF No. 15, at 6. But "final policy maker" analysis is relevant only to determine whether a local governmental entity, such as a county or city, "is liable under § 1983 for its policies that cause constitutional torts." *McMillian v. Monroe Cnty., Ala.*, 520 U.S. 781, 784 (1997). Here, Plaintiffs sue *state* officials in their official capacity for maintaining and

C. Plaintiffs properly sued Defendants in their individual capacities for money damages—including punitive damages.

Section 1983 authorizes suit against government officials in their individual capacity for monetary damages, including punitive damages. *Smith v. Wade*, 461 U.S. 30, 51 (1983) (holding that a jury may award punitive damages under § 1983 for "reckless or callous disregard for the plaintiff's rights, as well as intentional violations of federal law"). In addition to explaining Eleventh Amendment immunity in official capacity suits, *Wells* also noted that "the Eleventh Amendment does *not* prohibit individual capacity suits" and accordingly allowed the coach's two causes of action "for damages" against university officials "in their individual capacities." 393 F. Supp. 2d at 995–96 (emphasis added). *Wells* similarly explained that "punitive damages are available in an individual capacity suit against a State official." *Id.* at 999.[4] Plaintiffs seek the same relief here and thus sued each Defendant in their individual capacity for monetary damages. Verified Compl. ¶¶ 22–25 (noting that Defendants are sued "in [their] individual capacity for money damages, including punitive damages").

D. Plaintiffs have Article III standing for all claims.

Plaintiffs sufficiently pleaded the elements of Article III standing, while Defendants raise improper factual arguments that should not be considered. In any event, Defendants' factual arguments do not contradict the allegations in Plaintiffs' Verified Complaint.

1. Plaintiffs meet the necessary elements of standing.

Plaintiffs must satisfy the three well-established requirements of Article III standing by demonstrating: (1) a concrete and particularized injury (2) "fairly traceable" to Defendants' actions,

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enforcing the Flyer Policy in violation of Plaintiffs' constitutional rights. Verified Compl. ¶¶ 21–25, 179. It is irrelevant whether Defendants are "final policy maker[s]."

[4] Defendants challenge punitive damages in one sentence, claiming the issue "is more fully developed" in their Motion to Strike. Defs.' Mot. to Dismiss at 8. Plaintiffs address Defendants' unavailing arguments against punitive damages in their Opposition to Defendants' Motion to Strike, filed concurrently. ECF No. 34. In brief, Defendants' attempts to dismiss or strike punitive damages are meritless because Plaintiffs pleaded sufficient allegations that Defendants displayed, at least, "reckless or callous indifference" to the Plaintiffs' constitutional rights. The "internal communications between Defendants demonstrate that they *knew* their actions implicated Plaintiffs' rights to free speech and that Defendants fabricated a pretext for removing and rejecting Plaintiffs' flyers to hide their blatant viewpoint discrimination." Verified Compl. ¶ 11.

and (3) a "likelihood" that the injury will be "redressed by a favorable decision." *Lujan v. Defs. Of Wildlife*, 504 U.S. 555, 560–61 (1992). The elements of standing "must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, i.e., with the manner and degree of evidence required at the successive stages of the litigation." *Id*. at 561 (citations omitted). "At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice." *Id.* In addition, in the First Amendment context, there are "unique standing considerations such that the inquiry tilts dramatically toward a finding of standing" because "a chilling of the exercise of First Amendment rights is, itself, a constitutionally sufficient injury." *Libertarian Party of L.A. Cnty. v. Bowen*, 709 F.3d 867, 870 (9th Cir. 2013) (citations and quotation marks omitted); *see Virginia v. Am. Booksellers Ass'n*, 484 U.S. 383, 383 (1988) (recognizing "self-censorship" as "a harm that can be realized without an actual prosecution"). Therefore, the Court must "appl[y] the requirements of . . . standing less stringently in the context of First Amendment claims . . . to guard [against] the risk that protected conduct will be deterred." *Wolfson v. Brammer*, 616 F.3d 1045, 1058 (9th Cir. 2010) (citations omitted).

Plaintiffs' Verified Complaint easily satisfies Article III's requirements: injury, causation, and redressability. *Duke Power Co. v. Carolina Env't Study Grp., Inc.*, 438 U.S. 59, 72 (1978). First, Defendants violated Plaintiffs' First Amendment rights, a concrete and particularized injury. *Elrod v. Burns*, 427 U.S. 347, 373 (1976) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."). A First Amendment injury satisfies this Article III requirement so long as it is not of an "abstract and indefinite nature," *Jewel v. Nat'l Sec. Agency*, 673 F.3d 902, 909 (9th Cir. 2011), but instead impacts the plaintiffs in a "personal and individualized way," *Preminger v. Peake*, 552 F.3d 757, 763 (9th Cir. 2008) (citing *Lujan*, 504 U.S. at 561 n.1).

Defendants' actions injured Plaintiffs in a "personal and individualized way." As discussed in Part II, *infra*, public college administrators cannot suppress student speech in a public forum because of the expressed viewpoint. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 837 (1995); *Widmar v. Vincent*, 454 U.S. 263, 269–70 (1981). Nevertheless, Defendants continue to enforce an unconstitutional policy, preventing the posting of flyers with "inappropriate

or offens[ive] language or themes." Verified Compl. ¶¶ 53, 65–67, 111. Defendants do not deny that they maintain this prohibition on "inappropriate or offens[ive]" flyers, and expressly defend the constitutionality of such a policy. Defs.' Mot. to Dismiss at 13–14. Enforcing this policy, Defendants removed Plaintiffs' Freedom Week Flyers from the bulletin boards, rejected their Pro-Life Flyers from the Academic Centers' bulletin boards, and relegated the Pro-Life Flyers to the "Free-Speech Kiosk"—a box in a little-used outdoor area of campus. Verified Compl. ¶¶ 63–67, 80–98.

By enforcing, through a regime of prior restraint, the overbroad, vague, and viewpoint discriminatory Flyer Policy against Plaintiffs, in a manner not "capable of reasoned application," Defendants caused a "personal and individualized" First Amendment injury. *Minn. Voters Alli. v. Mansky*, 585 U.S. ___, 138 S. Ct. 1876, 1888, 1892 (2018) (striking down law against wearing political apparel at polling places because "[i]t does not define the term 'political,'" and therefore provided no "sensible basis for distinguishing what may come in from what must stay out"). Plaintiffs were also personally injured by Defendants' prior restraint on their speech, by being unable to post their Pro-Life Flyers in a timely manner on the day of the Supreme Court's *Dobbs* argument—the peak of their messages' relevance. Verified Compl. ¶ ¶ 80–95; *see Santa Monica Food Not Bombs v. City of Santa Monica*, 450 F.3d 1022, 1046 (9th Cir. 2006) (explaining that prior restraints are especially pernicious because "[f]or speech that is truly time sensitive, the precise spontaneous moment will be lost").

Second, Plaintiffs' injuries are "fairly traceable" to Defendants' conduct. *Duke Power Co.*, 438 U.S. at 72. An injury is "fairly traceable" so long as the connection to the defendants' actions is "not tenuous or abstract." *Ocean Advocs. v. U.S. Army Corps of Eng'rs*, 402 F.3d 846, 860 (9th Cir. 2005). In this case, Defendants enforced the Flyer Policy to remove and reject student Plaintiffs' flyers. Verified Compl. ¶ 107. Defendants removed the Freedom Week Flyers pursuant to the Flyer Policy's prohibition of "inappropriate or offens[ive] language or themes." *Id*. ¶¶ 65–67. This same policy led Defendants to prohibit the posting of the Pro-Life Flyers on the Academic Centers' bulletin boards. *Id.* ¶¶ 97–98. The Verified Complaint also details Defendants' emails invoking the Flyer Policy to justify the removal of the Freedom Week Flyers, inventing a pretextual

post-hoc justification for their removal, and attempting to cover up the justification's use. *Id*. ¶¶ 70–78. The link between Plaintiffs' injuries and Defendants' enforcement of the Flyer Policy is "not tenuous or abstract," *Ocean Advocs.*, 402 F.3d at 860.

Third, Plaintiffs' requested remedies satisfy the "relatively modest" requirement of redressability because there is a "substantial likelihood' that the relief sought would redress the injury." *M.S. v. Brown*, 902 F.3d 1076, 1083 (9th Cir. 2018) (citation and quotation marks omitted). Enjoining Defendants from enforcing their unconstitutional Flyer Policy and providing compensation for past injuries would provide sufficient redress of Plaintiffs' claims. *See Jewel*, 673 F.3d at 912 (finding that the redressability prong was "easily met[]" in a First Amendment case where plaintiffs sought an injunction and damages). Specifically, an injunction would ensure Plaintiffs can post their Freedom Week Flyers for this year's Freedom Week, starting in early November, and end the chilling effect on their desire to disseminate political messages on Academic Center bulletin boards. Verified Compl. ¶¶ 7, 111. Plaintiffs' Verified Complaint establishes their Article III standing to sue the Defendants for declaratory, injunctive, and monetary relief for the alleged constitutional violations.

2. Defendants' dubious factual contentions cannot defeat Plaintiffs' standing.

Even if the Court accepts Defendants' dubious factual contentions, which it should not, Plaintiffs still have standing. "In resolving a factual attack on jurisdiction, the district court may review evidence beyond the complaint without converting the motion to dismiss into a motion for summary judgment." *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004) (citations omitted). But this must be a limited and cautious inquiry because "jurisdictional fact-finding by the court deprives litigants of the protections otherwise afforded by Rule 56," *Sun Valley Gasoline, Inc. v. Ernst Enters., Inc.*, 711 F.2d 138, 139 (9th Cir. 1983); *accord Acevedo v. C & S Plaza Ltd. Liab. Co.*, No. 20-56318, 2021 WL 4938124, at *1 (9th Cir. Oct. 22, 2021), and "risks premature dismissals of plausible claims that may turn out to be valid after discovery." *Khoja v. Orexigen Therapeutics, Inc.*, 899 F.3d 988, 998 (9th Cir. 2018).

Furthermore, when Rule 12(b)(1) "factual issues [] also go to the merits," *Young v. United States*, 769 F.3d 1047, 1052 (9th Cir. 2014), "the jurisdictional determination should await a determination of the relevant facts on either a motion going to the merits or at trial." *Mecinas v. Hobbs*, 30 F.4th 890, 896 (9th Cir. 2022) (citations and quotation marks omitted). In that case, "the moving party should prevail only if the material jurisdictional facts are not in dispute and the moving party is entitled to prevail as a matter of law." *Augustine v. United States*, 704 F.2d 1074, 1077 (9th Cir. 1983).

Defendants' factual attacks on Plaintiffs' standing include only "factual issues which also go to the merits," *Young*, 769 F.3d at 1052. Although somewhat difficult to discern from their briefing, Defendants appear to raise multiple factual arguments that go to the merits: whether Plaintiffs' posters were actually approved, whether their activity was constitutionally protected, whether Defendants enforced and continue to enforce the Flyer Policy in a viewpoint discriminatory manner, and whether Defendants applied their prohibition on "inappropriate or offens[ive] language or themes" or the unevidenced "club announcements" policy. Each of these factual issues goes to the merits of Plaintiffs' claims. These are not issues of standing and the Court should swiftly dispatch of them.

However, even if Defendants' factual contentions presented jurisdictional questions, the facts weigh decisively in favor of standing. For example, Defendants' policy prohibiting "inappropriate or offens[ive] language or themes" is a formal written policy that can be found on Clovis's website.[5] By contrast, there is no evidence of Defendants' purported club announcement requirement, on the Clovis website or elsewhere. Defendants' only mentions of the purported club announcements "policy" are in their correspondence where they explicitly instruct each other to keep that "policy" a secret and when they deny Plaintiffs' Pro-Life Flyers. Verified Compl. ¶¶ 71, 72, 77, 97, 98. Plaintiffs have sufficiently pleaded and supported standing while the Defendants have no evidence opposing it. Plaintiffs' case must be allowed to proceed.

[5] Club Handbook, CLOVIS COMMUNITY COLLEGE, https://www.cloviscollege.edu/campus-life/clubs-organizations/club-handbook.html [https://perma.cc/92SR-5BDQ].

II. Plaintiffs Sufficiently Plead Claims of Prior Restraint, Viewpoint Discrimination, Overbreadth, and Vagueness.

Accepting Plaintiffs' allegations as true, the Court should deny Defendants' Rule 12(b)(6) motion. Plaintiffs have amply alleged that Defendants' Flyer Policy violates their constitutional rights. The Flyer Policy, using prior restraint, unconstitutionally imposes facial and as-applied viewpoint discrimination against Plaintiffs' speech. It is also overbroad and void for vagueness.

Defendants wholly ignore Plaintiffs' arguments regarding prior restraint, overbreadth, and vagueness. The arguments Defendants make concerning facial and as-applied viewpoint discrimination are equally unavailing. Plaintiffs' claims must be allowed to proceed.

A. The Court must accept Plaintiffs' well-pleaded allegations as true.

Dismissal under Rule 12(b)(6) for failure to state a claim is proper only where there is either "a lack of a cognizable legal theory" or "the absence of sufficient facts alleged under a cognizable legal theory." *Johnson v. Riverside Healthcare Sys.*, 534 F.3d 1116, 1121 (9th Cir. 2008). When reviewing a Rule 12(b)(6) motion to dismiss, courts "accept all well-pleaded allegations of material fact as true and construe them in the light most favorable to the nonmoving party." *Sateriale v. R.J. Reynolds Tobacco Co.*, 697 F.3d 777, 783 (9th Cir. 2012) ("When ruling on a motion to dismiss, we may generally consider only allegations contained in the pleadings, exhibits attached to the complaint, and matters properly subject to judicial notice." (quotation marks and citation omitted)). A motion to dismiss must be denied if the complaint contains "sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quotation marks and citation omitted). This Court "may generally consider *only* allegations contained in the pleadings, exhibits attached to the complaint, and matters properly subject to judicial notice." *Shrem v. Southwest Airlines Co.*, 747 F. App'x 629, 630 (9th Cir. 2019) (emphasis added).[6]

[6] Defendants have filed a request for judicial notice and Plaintiffs filed an omnibus opposition to that request. ECF No. 13-5; ECF No. 15 at 32–34; ECF No. 14 at 12–14; ECF No. 22.

B. Defendants' Flyer Policy facially discriminates against viewpoints.

As alleged in the Second Cause of Action, the Flyer Policy's ban on "inappropriate" or "offens[ive]" speech is facially unconstitutional because it discriminates on the basis of viewpoint and is incapable of reasoned application. Defendants argue the bulletin boards are not public forums and therefore are under their complete control, but fundamentally misunderstand what constitutes a "public forum." Taking Plaintiffs' allegations as true, Clovis's Academic Centers' bulletin boards are open for use by student groups. Verified Compl. ¶¶ 33, 36, 40, 46. Consequently, they are, at a minimum, a limited public forum, which is what the government creates when it provides "selective access based on the speaker or subject matter." *Koala*, 931 F.3d at 900.

1. The Flyer Policy discriminates based on viewpoint and is unreasonable.

It is well-established that a public college cannot limit students' access to a limited public forum because of the viewpoint that their speech expresses. *Rosenberger*, 515 U.S. at 820; *Widmar*, 454 U.S. at 267–70. "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Texas v. Johnson*, 491 U.S. 397, 414 (1989) (citations omitted). A government regulation violates the First Amendment if it favors some viewpoints and discriminates against others, including those messages that it deems offensive. *Matal v. Tam*, 137 S. Ct. 1744, 1757 (2017) (plurality).

In *Matal*, the Supreme Court held that the U.S. Patent and Trademark Office's prohibition on trademarks that may "disparage . . . or bring . . . into contemp[t] or disrepute" any "persons, living or dead" violates the First Amendment. 137 S. Ct. at 1751. As the Ninth Circuit later explained, "all eight Justices (Justice Gorsuch was recused) held that offensive speech *is, itself, a viewpoint*," and therefore suppressing such speech is viewpoint discrimination. *Am. Freedom Def. Initiative v. King Cnty.*, 904 F.3d 1126, 1131 (9th Cir. 2018) (emphasis added) (citing *Matal*, 137 S. Ct. at 1751, 1763 (plurality op.) and *id*. at 1766 (Kennedy, J., concurring)). A Supreme Court majority has since held that a prohibition on "immoral or scandalous" trademarks was viewpoint-based and unlawful. *Iancu v. Brunetti*, 139 S. Ct. 2294, 2299 (2019).

Similarly, Defendants' Flyer Policy unconstitutionally restricts, on its face, student speech based on "offens[ive]" or "inappropriate" viewpoints. Government cannot suppress such speech. *Am. Freedom Def. Initiative*, 904 F.3d at 1131; *Matal*, 137 S. Ct. at 1751; *Rodriguez v. Maricopa Cnty. Cmty. Coll. Dist.*, 605 F.3d 703, 708 (9th Cir. 2010) ("[I]t is axiomatic that the government may not silence speech because the ideas it promotes are thought to be offensive."); *Papish v. Bd. Of Curators Of the Univ. of Mo.*, 410 U.S. 667, 670 (1973) ("[T]he mere dissemination of ideas—no matter how offensive to good taste—on a state university campus may not be shut off in the name alone of 'conventions of decency.'"). Because viewpoint discrimination is unconstitutional in any forum, Plaintiffs have sufficiently alleged that the Flyer Policy violates the Constitution.

To defend their mistaken position, Defendants cite to inapplicable and distinguishable cases involving high school student speech. *See* Defs.' Mot. to Dismiss at 10–11 (citing *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 262 (1988) and *Planned Parenthood of S. Nev., Inc. v. Clark Cnty. Sch. Dist.*, 941 F.2d 817 (9th Cir. 1991)). The Supreme Court has repeatedly distinguished between grade school speech—which is limited in light of the age and maturity of students and the state's *in loco parentis* role—and speech on college campuses, emphasizing that there is "no room for the view that, because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses than in the community at large." *Healy v. James*, 408 U.S. 169, 180, (1972) *accord Mahanoy Area Sch. Dist. v. B. L.*, 141 S. Ct. 2038, 2044 (2021). Further, *Hazelwood* concerned a high school journalism course publication that was not a public forum, 484 U.S. 267–70, while *Planned Parenthood* involved external organization advertisements in high school newspapers and yearbooks, also not public forums. 941 F.2d at 821. In contrast, Defendants' bulletin boards are public forums for college student use. Verified Compl. ¶¶ 33, 36, 40, 46.

The Flyer Policy also violates Plaintiffs' First Amendment rights because it is not capable of reasoned application. "[T]he State must be able to articulate some sensible basis for distinguishing what may come in from what must stay out" or else its restrictions on speech are not "capable of reasoned application." *Minn. Voters All. v. Mansky*, 138 S. Ct. 1876, 188–1892 (2018).

In *Mansky*, the Court found that a state regulation banning "political" apparel from polling locations, without defining that term, violated the First Amendment. *Id.* at 1888. Without "objective, workable standards . . . [an official's] own politics may shape his views on what counts as 'political.'" *Id.* at 1891. Following *Mansky*, courts have consistently concluded that bans on "inappropriate" or "offens[ive]" speech, without definitions or workable standards, fail the reasonableness test. *See, e.g.*, *Ogilvie v. Gordon*, 540 F. Supp. 3d 920, 930–31 (N.D. Cal. 2020) ("Because there is no objective, workable standard of what is 'offensive to good taste and decency,' different reviewers can reach opposing conclusions on whether a certain configuration should be rejected based on their judgment of what might be 'offensive' or not in 'good taste.'"); *PETA, Inc. v. Shore Transit*, --- F. Supp. 3d ---, No. JKB-21-02083, 2022 WL 170645, at *8–9 (D. Md. Jan. 18, 2022) (applying *Mansky* and finding unreasonable a ban on speech that is "controversial, offensive, objectionable, or in poor taste").

The Flyer Policy's prohibition on "inappropriate or offens[ive] language" provides no sensible basis for distinguishing "what may come in from what must stay out" of the public forum. *Mansky*, 138 S. Ct. at 1888. Specifically, the Flyer Policy provides no definition for "inappropriate" or "offens[ive]," and no guidance for administrators regarding what may be and what cannot be posted on the bulletin boards. Verified. Compl. ¶¶ 53–57. Without definitions or objective standards, the Flyer Policy is incapable of reasoned application, and therefore "[i]t is self-evident that [the] prohibition carries with it [an] opportunity for abuse" too great to pass constitutional muster. *Mansky*, 138 S. Ct. at 1891 (quotation marks omitted).

2. The availability of the so-called "Free Speech Kiosk" does not save Defendants' unconstitutional Flyer Policy.

Plaintiffs have alleged that the Free Speech Kiosk is an inadequate alternative location for students to express themselves, and regardless determining which flyers must go on the kiosk based on their viewpoint violates the First Amendment.

First, the availability of alternative avenues of communication is relevant only when evaluating time, place, or manner restrictions that are "justified without reference to the content of the regulated speech." *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984). Here,

Defendants banished the Plaintiffs' Pro-Life Flyers to the kiosk because they were "inappropriate" and/or "offens[ive]"—an explicit regulation on the content of Plaintiffs' speech.

Second, alternative avenues must be "ample," but "[a]n alternative is not ample if the speaker is not permitted to reach the intended audience." *Bay Area Peace Navy v. United States*, 914 F.2d 1224, 1229 (9th Cir. 1990) (quotation marks omitted). Courts regularly find such limited "free speech zones" to be constitutionally inadequate. *See, e.g., Bair v. Shippensburg Univ.,* 280 F. Supp. 2d 357, 366 (M.D. Pa. 2003) (refusing to grant a motion to dismiss because there was no basis to "determine whether or not the alternative channels of communication are adequate"); *see also Roberts v. Haragan*, 346 F. Supp. 2d 853 (N.D. Tex. 2004) (finding that a limited free speech area was inadequate); *Shaw v. Burke*, No. 2:17-CV-02386-ODW, 2018 WL 459661 (C.D. Cal. Jan. 17, 2018) (same); *Univ. of Cincinnati Chapter of Young Ams. for Liberty v. Williams*, No. 1:12-CV-155, 2012 WL 2160969 (S.D. Ohio June 12, 2012) (same).

The Free Speech Kiosk is in a "remote, infrequently visited location outdoors" and "sits at the edge of a walkway students virtually never use because it does not lead to any building entrances or parking lots." Verified Compl. ¶ 4. Requiring Plaintiffs' flyers be posted on the kiosk is not an "ample" alternative and is the equivalent of banning them outright because the flyers' messages cannot reach their "intended audience."

3. The government-speech doctrine does not shield Defendants' unlawful Flyer Policy from scrutiny.

Defendants also argue that flyers posted by student groups on the bulletin boards are Clovis's own speech and thus their content is within Clovis's control. The government-speech doctrine is a narrow First Amendment exception that is "susceptible to dangerous misuse" because "[i]f private speech could be passed off as government speech by simply affixing a government seal of approval, government could silence or muffle the expression of disfavored viewpoints." *Matal*, 137 S. Ct. at 1757–58. As a result, when the government invites private expression—as Clovis does by opening up the bulletin boards for student speech—it is government speech only when the government "maintain[s] direct control over the messages conveyed." *Shurtleff v. City of Boston*, 142 S. Ct. 1583, 1590 (2022).

In *Shurtleff*, the Supreme Court rejected Boston's argument that private flags flown on a city flagpole were government speech. Because Boston sought "to accommodate all applicants" and had not closely scrutinized flags' messages, the messages could not be considered government speech. As a result, barring a flag portraying "a red [Christian] cross on a blue field against a white background" because of its religious content was viewpoint discrimination. *Id.* at 1588, 1593.

Here, like in *Shurtleff*, Plaintiffs allege that Defendants created a public forum for private speech.[7] Then, Defendants enforced their Flyer Policy's viewpoint discriminatory "inappropriate or offens[ive]" provision to remove Plaintiffs' Freedom Week Flyers and relegate Plaintiffs' Pro-Life Flyers to a little-used outdoor area of campus. The government-speech doctrine does not shield Defendants' unconstitutional Flyer Policy because it does not apply here.

C. The Flyer Policy is unconstitutional as applied to Plaintiffs' speech.

As alleged in the Fifth Cause of Action, the Flyer Policy is also unconstitutional as applied to Plaintiffs. The terms "inappropriate" and "offensive" are not viewpoint neutral as applied to Plaintiffs' speech. *Am. Freedom Def. Initiative*, 904 F.3d at 1131; *see also Papish*, 410 U.S. at 670. Defendants singled out Plaintiffs' flyers because they express disfavored viewpoints that Defendants and others deemed offensive. Verified Compl. ¶¶ 65–67.

That others may have been "uncomfortable" with the Freedom Week Flyers, *id*. ¶ 63, does not create a constitutionally defensible reason for Defendants to remove the student Plaintiffs' protected speech from the Academic Centers' bulletin boards. Defendants' capitulation to this criticism served no purpose but to effectuate a heckler's veto by ordering removal of the Freedom Week Flyers because of others' hostile reactions to Plaintiffs' viewpoints. *See, e.g., Brown v. Louisiana*, 383 U.S. 131, 133 n.1 (1966) (recognizing that the state must not allow a heckler's veto to strip peaceful speakers of their speech rights). Furthermore, Defendants' approval and subsequent removal of YAF-Clovis flyers, Verified Compl. ¶¶ 60–78, and Defendant Stumpf's apparent inability to determine whether a "political type" student organization's content should rather be classified as "offens[ive]," *id*. ¶¶ 67, 69, demonstrate that Defendants have no "sensible

[7] As discussed in Section II.C.1., *supra*, Defendants' citation to *Hazelwood* is inapplicable because it relates to a high school journalism class publication, not a public forum. *See Hazelwood*, 484 U.S. at 267–70.

basis for distinguishing what may come in from what must stay out" of this public forum. *Mansky*, 138 S. Ct. at 1888. No other student group has been treated this way. Verified Compl. ¶¶ 51, 99; *see also Rosenberger*, 515 U.S. at 831–32 (rejecting the argument that there needed to be evidence that atheistic viewpoints were permitted before a policy barring religious speech could be deemed viewpoint-based). Defendants' enforcement of their Flyer Policy unconstitutionally discriminated against Plaintiffs' viewpoint.

D. Defendants enforce the Flyer Policy through a regime of prior restraint.

As alleged in the First Cause of Action, by requiring preapproval of the content of Clovis student speech in a public forum, the Flyer Policy enacts a prior restraint on student speech. Prior restraints cause "special injury" because they "represent a departure from our tradition of public discourse" *Cuviello v. City of Vallejo*, 944 F.3d 816, 832 (9th Cir. 2019) and therefore, carry "a heavy presumption against [their] constitutional validity." *Epona v. Cnty. of Ventura*, 876 F.3d 1214, 1222 (9th Cir. 2017).

Prior restraint schemes can be constitutional only when including "narrow, objective, and definite standards to guide the licensing authority." *Epona*, 876 F.3d at 1222 (citing *Shuttlesworth v. City of Birmingham, Ala.*, 394 U.S. 147, 150–51 (1969)). Similarly, preapproval must "take[] place under procedural safeguards designed to obviate the dangers of a censorship system." *Freedman v. Maryland*, 380 U.S. 51, 58 (1965). *Freedman* requires three safeguards: (1) the state must bear the burden of proving that the speech is unprotected; (2) an adversarial proceeding and judicial determination of whether the speech is protected; and (3) the state must "within a specified brief period, either issue a license or go to court to restrain" the speech. *See id.* at 58–59.

Defendants' Flyer Policy requires preapproval based on vague terminology without any procedural safeguards. Verified Compl. ¶ 53. The Flyer Policy contains no definitions of the terms "offens[ive]" or "inappropriate," no specified timelines for approval, and no appeal process. *See id.* It dictates that Defendants review student flyers and determine whether they will be approved; Defendants' content- and viewpoint-based determination is final. Plaintiffs have sufficiently alleged that the Flyer Policy enacts a presumptively unconstitutional prior restraint.

E. The Flyer Policy is unconstitutionally overbroad.

As alleged in the Third Cause of Action, the Flyer Policy is unconstitutionally overbroad because its prohibition on "inappropriate" or "offens[ive]" speech, sweeps a "substantial number" of applications to protected speech, "as judged in relation to" its minimal, if not nonexistent, "legitimate sweep." *See Comite de Jornaleros de Redondo Beach v. City of Redondo Beach*, 657 F.3d 936, 944 (9th Cir. 2011) (quoting *United States v. Stevens*, 559 U.S. 460, 473 (2010)). Administrators could apply the Flyer Policy's ban on "offens[ive]" speech to innumerable other instances of protected expression that Clovis wishes to suppress no matter the viewpoint. For example, administrators could block student flyers that say "Blue Lives Matter" or "Black Lives Matter." They could block student flyers that carry LGBTQ Pride flags or flyers that exhort students to "Support Traditional Marriage." Any flyer that expresses a viewpoint on a matter of public concern could be deemed offensive by adherents to the opposing view. Such a policy plainly sweeps far beyond any category of unprotected speech and restricts expression far beyond any conceivable "legitimate sweep." *Stevens*, 559 U.S. at 473.

Courts confronting such overbroad policies in higher education have routinely declared them unconstitutional and enjoined their enforcement. *See, e.g.*, *McCauley v. Univ. of the V.I.*, 618 F.3d 232, 250, 252 (3d Cir. 2010) (holding that a ban on "offensive" speech was overbroad); *DeJohn v. Temple Univ.*, 537 F.3d 301, 317–18 (3d Cir. 2008) (same); *Coll. Republicans at S.F. State Univ. v. Reed*, 523 F. Supp. 2d 1005 (N.D. Cal. 2007) (enjoining enforcement of civility policy). Defendants' Flyer Policy is similarly susceptible to an overbreadth challenge.

F. The Flyer Policy is unconstitutionally vague.

As alleged in Plaintiffs' Fourth Cause of Action, the Flyer Policy, by prohibiting "inappropriate or offens[ive] language or themes," is also unconstitutionally vague, in violation of the Due Process Clause of the Fourteenth Amendment. "A statute can be impermissibly vague for either of two independent reasons. First, if it fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits. Second, if it authorizes or even encourages arbitrary and discriminatory enforcement." *Hill v. Colorado*, 530 U.S. 703, 732 (2000). Vagueness is of special concern in the First Amendment context because when a vague regulation

"abut[s] upon sensitive areas of First Amendment freedoms, it operates to inhibit the exercise of [those] freedoms." *Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972) (citation omitted). Accordingly, a policy that reaches protected expression must contain "a greater degree of specificity than in other contexts." *Smith v. Goguen*, 415 U.S. 566, 573 (1974). When government censors control access to a forum pursuant to the "specter of a standardless standard," First Amendment freedoms are abridged. *Am. Freedom Def. Initiative*, 904 F.3d at 1133 (internal quotation marks and citations omitted); *see also City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 756–57 (1988) (holding unconstitutional a permitting scheme that gave a government censor unbridled discretion).

Because the Flyer Policy offers no definition of "inappropriate or offens[ive]" and those terms do not carry any reasonably objective plain meaning, the Flyer Policy fails to provide students with "fair warning" of what expression the policy prohibits. *Grayned*, 408 U.S. at 108. The Flyer Policy's opacity results in a "chilling effect on the exercise of First Amendment freedoms." *Foti v. City of Menlo Park*, 146 F.3d 629, 638 (9th Cir. 1998); *see United States v. Wunsch*, 84 F.3d 1110, 1119 (9th Cir. 1996) (invalidating as unconstitutionally vague statute that prohibited attorneys from engaging in "offensive personality").

The Flyer Policy is also void for vagueness because it fails to provide "explicit standards" to prevent "arbitrary and discriminatory enforcement" by administrators, while expressly requiring viewpoint discrimination. *See Grayned*, 408 U.S. at 108–09. The terms "inappropriate" and "offens[ive]" are so vague they could be employed to prohibit nearly any student speech. Different administrators will come to different conclusions as to whether the same speech falls within those terms. The same administrator may even change his mind arbitrarily. Here, Defendant Stumpf approved the Freedom Week Flyers in previous years, was then "on the fence" about them, and then said he would "gladly" remove them in the face of complaints. Verified Compl. ¶¶ 65, 67, 69. Defendants' failure to enforce the Flyer Policy in a consistent manner exemplifies the arbitrary discretion it provides. The Fourteenth Amendment does not permit such a result. *See, e.g.*, *Dambrot v. Cent. Mich. Univ.*, 55 F.3d 1177, 1184–85 (6th Cir. 1995) (holding that university policy was

vague where it prohibited "offensive" speech since there was no objective way to determine what speech was offensive).

III. Defendants Are Not Entitled to Qualified Immunity.

Defendants are ineligible for qualified immunity because they violated the Plaintiffs' clearly established rights. The Supreme Court's qualified immunity test requires plaintiffs to show that (1) the defendant violated a statutory or constitutional right, and (2) the right was clearly established at the time of the challenged conduct.[8] *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Additionally, "[d]etermining claims of qualified immunity at the motion to dismiss stage raises special problems for legal decision making." *Keates v. Koile*, 883 F.3d 1228, 1234 (9th Cir. 2018). Therefore, this Court should "consider whether the complaint alleges sufficient facts, taken as true, to support the claim that the officials' conduct violated clearly established constitutional rights of which a reasonable officer would be aware." *Id.* 883 F.3d at 1235. Plaintiffs' Verified Complaint must be "liberally construed" and if it "contains even one allegation of a harmful act that would constitute a violation of a clearly established constitutional right," Defendants' motion to dismiss must be denied. *Pelletier v. Fed. Home Loan Bank of S.F.*, 968 F.2d 865, 872 (9th Cir. 1992); *accord Keates*, 883 F.3d at 1235.

Although Defendants raise the specter of a qualified immunity defense, they make no argument as to why they are entitled to it. As argued in Section II.A., *supra*, Defendants facially, through their Flyer Policy, and as applied to the student Plaintiffs, have violated Plaintiffs' constitutional rights. Plaintiffs overcome the first prong of *Harlow's* qualified immunity test.

As to *Harlow's* second prong, the rights at issue were "clearly established," because Defendants had "fair warning," that their conduct was unlawful, *Hope v. Pelzer*, 536 U.S. 730, 741 (2002), and "knew or should have known" that their conduct violated Plaintiffs' rights. *Campbell-Ewald Co. v. Gomez*, 577 U.S. 153, 167–68 (2016). In light of the Supreme Court decisions in *Matal*, *Iancu*, and the Ninth Circuit's decision in *American Freedom Defense Initiative* discussed

[8] While it is in the Court's discretion, Plaintiffs agree with Defendants that the Court should first determine the substantive legal issue and then consider whether the rights were "clearly established." *See* Defs.' Mot. to Dismiss at 7 (citing *Saucier v. Katz*, 533 U.S. 194, 201 (2001)). Doing so would "promote[] the development of constitutional precedent." *Pearson v. Callahan*, 555 U.S. 223, 236 (2009).

above, "it would be clear to a reasonable officer that" removing student flyers because they are "inappropriate or offens[ive]" is unlawful viewpoint discrimination. *Papish*, 410 U.S. at 670 ("[T]he mere dissemination of ideas—no matter how offensive to good taste—on a state university campus may not be shut off in the name alone of 'conventions of decency.'"); s*ee also Rosenberger*, 515 U.S. at 836; *Widmar*, 454 U.S. at 277. Particularly after *Mansky*, "all but the plainly incompetent or those who knowingly violate the law," *Brewster v. Bd. of Educ.*, 149 F.3d 971, 977 (9th Cir. 1988), would understand that maintaining and enforcing a policy giving college administrators unbridled discretion to determine what speech is "offensive" would be unconstitutional viewpoint discrimination,[9] incapable of "reasoned application," overbroad, *see generally Reed*, 523 F. Supp. 2d at 1012–16, and vague, *cf. Wunsch*, 84 F.3d at 1119. *Freedman* and *Epona* similarly established that a system of prior restraint without objective standards and procedural safeguards is unlawful. 380 U.S. at 58; 876 F.3d at 1222. Defendants are not entitled to qualified immunity on any of Plaintiffs' well-pleaded claims.

CONCLUSION

For the reasons stated above, the Court should deny Defendants' Motion to Dismiss.

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Respectfully submitted,

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[9] Plaintiffs discuss other closely analogous Ninth Circuit precedent related to their as-applied viewpoint discrimination claim in their concurrently filed Opposition to Defendants' Motion to Strike. *See* Pls.' Opp'n to Defs.' Mot. to Strike at 8-9, ECF No. 34 (discussing *Giebel v. Sylvester,* 244 F.3d 1182 (9th Cir. 2001) and *OSU Student Alliance v. Ray*, 699 F.3d 1053 (9th Cir. 2012)).

**Pro Hac Vice*

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CERTIFICATE OF SERVICE

I, Daniel M. Ortner, hereby certify that on September 29, 2022, a copy of the foregoing was filed electronically. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated below and parties may access this filing through the Court's electronic filing system.

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