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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 STRIKE PUNITIVE DAMAGES**

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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 respectfully submit the following Opposition to Defendants' Motion to Strike Punitive Damages.

INTRODUCTION

In their Rule 12(f) Motion to Strike Punitive Damages, Defendants reprise arguments made in, and more appropriate for, their Rule 12(b)(6) Motion to Dismiss. Defendants may not use Rule 12(f) to dismiss punitive damages as a matter of law. Regardless, Plaintiffs sufficiently pleaded entitlement to punitive damages, and Defendants are not immune from punitive liability in their individual capacities. Thus, the Motion to Strike must be denied even if construed as a motion to dismiss.

STATEMENT OF FACTS

In the interest of brevity, Plaintiffs refer the Court to their concurrently filed Opposition to Defendants' Motion to Dismiss (ECF No. 33) at pages 2–4 and incorporate those pages by reference.

ARGUMENT

I. Rule 12(f) May Not Be Used to Strike Punitive Damages Based on Claims of Immunity.

Federal Rule of Civil Procedure 12(f) authorizes courts to "strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." Fed. R. Civ. P. 12(f). Motions to strike are disfavored and "should not be granted unless it is clear that the matter to be stricken could have no possible bearing on the subject matter of the litigation." *Gonzalez v. Calif. Highway Patrol*, No. 1:20-cv-01422-DAD-JLT, 2021 WL 3287717, slip copy at *3 (E.D. Cal. Aug. 2, 2021) (quoting *Neveu v. City of Fresno*, 392 F. Supp. 2d 1159, 1170 (E.D. Cal. 2005)) (quotation marks omitted). Defendants, as the moving party, bear the burden of demonstrating that "the allegedly offending material is 'redundant, immaterial, impertinent, or scandalous,'" and "how such material will cause prejudice." *Greene v. Sanders*, No. 1:09-CV-336-MJS-PC, 2010 WL 3271398, at *1 (E.D. Cal. Aug. 18, 2010); *see also N.Y.C. Emps.' Ret. Sys. v. Berry*, 667 F. Supp. 2d 1121, 1128 (N.D. Cal. 2009) ("Where the moving party cannot adequately demonstrate . . .

prejudice, courts frequently deny motions to strike even though the offending matter was literally within one or more of the categories set forth in Rule 12(f).” (citation omitted)); *McClellan v. City of Sacramento*, No. 220CV00560TLNKJN, 2021 WL 1164487, at *4 (E.D. Cal. Mar. 26, 2021) (“Given the disfavored status of motions to strike and the apparent absence of any prejudice to defendants in denying the motion, the court denies the motion to strike [references to settlement discussions] without prejudice.” (quoting *Swanson v. Yuba City Unified Sch. Dist.*, No. 2:14-cv-01431-KJM-DAD, 2015 WL 2358629, at *6 (E.D. Cal. May, 15, 2015)) (quotation marks omitted)). In their Motion to Strike, Defendants say nothing about how Plaintiffs’ pleas for punitive damages are ‘redundant, immaterial, impertinent, or scandalous,’” or “how such material will cause prejudice,” *Greene*, 2010 WL 3271398, at *1. Defendants fail to meet their burden and their motion should be denied.

In addition, courts cannot determine disputed and substantial legal or factual questions on a motion to strike. *McGuire v. Recontrust Co*., No. 2:11-CV-2787-KJM, 2013 WL 5883782, at *2 (E.D. Cal. Oct. 30, 2013) (quoting *Whittlestone, Inc. v. Handi-Craft Co.*, 618 F.3d 970, 973 (9th Cir. 2010)); *Duenez v. City of Manteca*, No. CIV. S-11-1820 LKK, 2011 WL 5118912, at *4–5 (E.D.Cal. Oct. 27, 2011) (“If the court is in doubt as to whether the challenged matter may raise an issue of fact or law, the motion to strike should be denied, leaving an assessment of the sufficiency of the allegations for adjudication on the merits.” (citing *Whittlestone*, 618 F.3d 970)). Thus, “Rule 12(f) does not authorize a district court to strike a claim for damages on the ground that such damages are precluded as a matter of law.” *Whittlestone*, 618 F.3d at 971.

Specifically, pleas for damages are not the type of material that can be stricken under Rule 12(f)’s limited categories. *Id.* at 973–74 (noting that interpretation must begin with Rule 12(f)’s plain meaning and that pleas for damages do not fit within the rule’s criteria). Moreover, allowing pleas for damages to be stricken under Rule 12(f) as a matter of law would create illogical “redundancies” within the Federal Rules, potentially subjecting the same substantive action to different standards of review on appeal depending on whether the action was performed under Rule 12(f) or Rule 12(b)(6). *Id.* at 974. A defendant’s motion to strike a plaintiff’s claim for damages as a matter of law, therefore, is “really . . . a Rule 12(b)(6) motion or a Rule 56 motion, not a Rule

12(f) motion." *Id*. Here, Defendants' Rule 12(f) motion, arguing that punitive damages are precluded as a matter of law due to Eleventh Amendment immunity and qualified immunity, clearly runs afoul of *Whittlestone*. Consequently, the motion should be ignored.

II. Plaintiffs Sufficiently Pleaded Entitlement to Punitive Damages.

Even if Defendants' Motion to Strike is instead construed as a Rule 12(b)(6) motion to dismiss, Plaintiffs have pleaded sufficient facts to allow the award of § 1983 punitive damages because Defendants' conduct "involves reckless or callous indifference to the federally protected rights of others." *Smith v. Wade*, 461 U.S. 30, 56 (1983). At the pleading stage, Plaintiffs seeking punitive damages need only allege facts sufficient for a court to reasonably infer that Defendants acted with the requisite level of intent and knowledge when violating Plaintiffs' constitutional rights. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007) (holding that at the pleading stage plaintiffs need allege only those facts necessary to state their claim and grounds showing entitlement to relief); *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *cf. Cook v. City of Fairfield*, No. 215CV02339KJMKJN, 2017 WL 4269991, at *12 (E.D. Cal. Sept. 26, 2017) (holding that "complaint must include 'factual allegations from which fraudulent, malicious or oppressive conduct could possibly be inferred'" to overcome Rule 12(b)(6) motion to dismiss punitive damages under state statutory standard) (quoting *Endurance Am. Specialty Ins. Co. v. Lance-Kashian & Co.*, CV F 10-1284 LJO DLB, 2010 WL 36129476, at *17 (E.D. Cal. Sept. 13, 2010)).

"It is well-established that a jury may award punitive damages . . . *either* when a defendant's conduct was driven by evil motive or intent, *or* when it involved a reckless or callous indifference to the constitutional rights of others." *Morgan v. Woessner*, 997 F.2d 1244, 1255 (9th Cir. 1993) (emphasis added) (quoting *Davis v. Mason Cnty*., 927 F.2d 1473, 1485 (9th Cir. 1991)). "Conduct is in reckless disregard of the plaintiff's rights if, under the circumstances, it reflects complete indifference to the plaintiff's safety or rights, or if the defendant acts in the face of a perceived risk that its actions will violate the plaintiff's rights under federal law." Model Civ. Jury Instr. 9th Cir. 5.5 (2021). A showing of actual intent or malice is unnecessary. *Wade*, 461 U.S. at 56.

Plaintiffs' allegations that Defendants acted in violation of their rights, despite knowing that

their actions could violate Plaintiffs' constitutional rights, are sufficient to state a claim for reckless indifference. *See Ryan v. Putnam*, No. 217CV05752CASRAOX, 2022 WL 845574, at *23 (C.D. Cal. Mar. 22, 2022) (denying defendants' motion for summary judgment on punitive damages because defendants took adverse employment actions against plaintiff despite knowledge that their actions could be considered First Amendment retaliation); *Ruiz v. Laguna*, No. 05CV1871WQH, 2007 WL 1120350, at *29 (S.D. Cal. Mar. 28, 2007) (holding that defendants' direct refusal to assist plaintiff by making photocopies, in light of their knowledge of plaintiff's court deadline, could constitute "reckless or callous indifference" as required for punitive damages on a claim alleging violation of plaintiff's right to access the courts). For example, *Ryan* determined that medical disciplinary board leaders could be subject to punitive damages for punishing a doctor, allegedly in retaliation for his First Amendment-protected whistleblowing activities. After denying summary judgment on the substantive claim, the court noted the "reckless or callous indifference" standard for § 1983 punitive damages and that defendants voted for punishment despite being present for board meeting discussions of how the plaintiff "considered himself a whistleblower" and punishing him "could be considered retaliation." *Ryan*, 2022 WL 845574, at *23. As a result, the court denied the defendants' summary judgment motion on punitive damages because a jury could find the defendants retaliated "in the face of a perceived risk that [their] actions [would] violate the plaintiff's rights under federal law." *Id*.

Plaintiffs have sufficiently pleaded that Defendants' conduct was—at least—in reckless disregard of their rights under federal law and thus have met their burden at the pleading stage. In particular, Plaintiffs allege that Defendants "*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. For example, Defendant Stumpf acknowledged to another staff member that removing the flyers because of their viewpoint implicated Plaintiffs' free speech rights but said that he would "gladly" remove the Freedom Week Flyers if so instructed. *Id.* ¶ 65. Upon receiving that order, he directed the flyers removal. *Id.* ¶ 74.

Additionally, Defendant Bennet decided to remove the Freedom Week Flyers and then furnished Defendant De La Garza and Defendant Hébert with a pretext for the decision to hide that

it was based on viewpoint. *Id.* ¶¶ 70–71. Defendant De La Garza participated in the decision to remove the Freedom Week Flyers, created the post-hoc pretextual justification with Defendant Bennett, and suggested amending the Flyer Policy because it otherwise allowed Plaintiffs to express views that made others uncomfortable. *Id.* ¶¶ 66, 70, 71. Defendant Hébert also participated in the decision to remove the Freedom Week Flyers, ordered Defendant Stumpf to remove the flyers, and used Defendants Bennett and De La Garza's pretextual justification to deny Plaintiffs' application to post the Pro-Life Flyers on the Academic Centers' bulletin boards. *Id.* ¶¶ 68, 73, 97–98. Defendant Hébert understood that Defendant Bennett's justification was pretextual, and nevertheless sent it to Defendant Stumpf to justify the flyers' removal, while directing him to keep it a secret: "Between you and me. Please don't share this email. Flyers need to come down per administration." *Id.* ¶¶ 77, 174.

Plaintiffs sufficiently allege Defendants' knowledge that their actions implicated Plaintiffs' rights and Defendants' creation of a post-hoc pretextual justification to cover up the viewpoint discriminatory reason for removing Plaintiffs' flyers. Defendants' knowledge and actions show, at the very least, that Defendants acted "in the face of a perceived risk that [their] actions [would] violate the plaintiff's rights under federal law." Model Civ. Jury Instr. 9th Cir. 5.5 (2021). Therefore, Plaintiffs sufficiently pleaded Defendants' reckless indifference to their constitutional rights, and their pleas for punitive damages must be allowed to proceed against all Defendants.

III. Plaintiffs Are Entitled to Seek Punitive Damages Under § 1983.

Plaintiffs may seek monetary damages, including punitive damages, and Defendants' arguments to the contrary are baseless. First, it is well-established that plaintiffs may sue state officials in their individual capacities for damages. Second, qualified immunity does not attach where, as here, Defendants "knew or should have known" their actions violated clearly established law. *Campbell-Ewald Co. v. Gomez*, 577 U.S. 153, 167–68 (2016).

A. State officials sued in their individual capacities may be subject to punitive damages.

Defendants are not entitled to Eleventh Amendment immunity from punitive liability under § 1983 because they are state officials sued in their individual capacities. First, Defendants

repeatedly misstate the allegations of Plaintiffs' Verified Complaint, asserting that Plaintiffs seek damages against them in both their official and individual capacities, Defs.' Mot. to Strike Punitive Damages (ECF No. 14) at 4, 5. Defendants also argue Plaintiffs' claims arise from Defendants' enforcement of "an SCCCD policy on where and when to post materials on a school wall." *Id.* at 8. Neither statement is true. Plaintiffs' fifth cause of action[1] alleges that enforcing the *Flyer Policy* to remove and reject Plaintiffs' Freedom Week and Pro-Life Flyers is unconstitutional as-applied viewpoint discrimination. Verified Compl. ¶¶ 163–79. On that basis, it requests "injunctive relief against all Defendants in their official capacities," *id.* ¶ 176, and "monetary damages, including punitive damages, against all Defendants in their individual capacities." *Id.* ¶ 179. Nowhere in the Verified Complaint do Plaintiffs either challenge SCCCD policy or claim monetary relief against Defendants in their official capacities.

Second, Defendants argue that Plaintiffs' claim for punitive damages is improper because Defendants are not "final policy makers for the local government." Defs.' Mot. to Strike Punitive Damages at 4. But "final policy maker" analysis pertains only to whether a local governmental entity "is liable under § 1983 for policies that cause constitutional torts." *McMillan v. Monroe Cnty., Ala.*, 520 U.S. 781, 784 (1997). Plaintiffs' claims do not rely on Defendants acting as municipal officials, nor have Plaintiffs alleged that Defendants acted as final policymakers for the local government. Plaintiffs sue state officials in their official capacities for maintaining and enforcing the Flyer Policy in violation of their constitutional rights. Verified Compl. ¶¶ 21–25, 179. It is irrelevant whether Defendants are "final policy makers."

Finally, because Plaintiffs' claim for punitive damages is limited to Defendants in their individual capacities, it is axiomatic that the Eleventh Amendment offers no protection from suit. The Eleventh Amendment shields state entities, and state officials sued in their official capacities, from liability for monetary damages, *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 71 (1989), but it confers no such defense on state officials sued in their individual capacities, *Wade*, 461 U.S. at 35; s*ee also Hafer v. Melo*, 502 U.S. 21, 30–31 (1991) ("[T]he Eleventh Amendment does not

[1] Plaintiffs' first four causes of action seek only declarative and injunctive relief against Defendants in their official capacities. Verified Compl. ¶¶ 118–162.

erect a barrier against suits to impose 'individual and personal liability' on state officials under § 1983.") (citing *Scheur v. Rhodes*, 416 U.S. 232, 238 (1974)). Thus, Defendants' argument that they are entitled to Eleventh Amendment immunity has no bearing on the availability of punitive damages for Plaintiffs' claim against Defendants in their individual capacities.

B. Defendants are not entitled to qualified immunity.

Defendants' assertion that qualified immunity shields them from punitive liability fails because Defendants are not entitled to qualified immunity for actions that violate clearly established law. "[Q]ualified immunity shields officials from civil liability so long as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Mullenix v. Luna*, 577 U.S. 7, 11 (2015) (citation omitted). Qualified immunity may not be granted at the pleading stage if 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." *Keates v. Koile*, 883 F.3d 1228, 1235 (9th Cir. 2018) (citing *Mullenix*, 577 U.S. at 11). As explained in Part II of Plaintiffs' concurrently filed Opposition to Defendants' Motion to Dismiss (ECF No. 33), Plaintiffs have established a prima facie case of a violation of their constitutional rights under the First and Fourteenth Amendments.

A right is "clearly established" when "the contours of the right [are] sufficiently clear that a reasonable official would understand that what he is doing violates that right," *Anderson v. Creighton*, 483 U.S. 635, 640 (1987), such that the official had "fair warning" that their conduct violated individual rights. *Hope v. Pelzer*, 536 U.S. 730, 741 (2002). Courts typically look to analogous cases of officials acting under similar circumstances, *White v. Pauly*, 580 U.S. ——, 137 S. Ct. 548, 552 (2017) (per curiam), but "even if there is no closely analogous case law, a right can be clearly established on the basis of common sense," *Giebel v. Sylvester*, 244 F.3d 1182, 1189 (9th Cir. 2001).

Because decades-old precedent clearly establishes that viewpoint discrimination by college officials against students' speech violates the students' constitutional rights, Defendants had "fair warning" that their actions were unconstitutional. "It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys." *Rosenberger v. Rector*

and Visitors Of Univ. of Va., 515 U.S. 819, 828 (1995); *Metro Display Advert., Inc. v. City of Victorville*, 143 F.3d 1191, 1195–96 (9th Cir. 1998) (denying officials qualified immunity because it was "self-evident" and a "universally recognized truth" that government may not discriminate against private speech based on viewpoint in any type of forum) (citing *Rosenberger*, 515 U.S. at 827–29).

In a similar 2001 case, *Giebel v. Sylvester*, the Ninth Circuit held that a professor who removed the handbills announcing another professor's upcoming speech from campus bulletin boards was not protected by qualified immunity for the violation of constitutional rights. 244 F.3d at 1189. The court determined that it was clearly established "long before" 1996—on the basis of both common sense and closely analogous case law—that the removal of the plaintiff's handbills from bulletin boards violated the First Amendment. *Id.* at 1189–90. More recently, the Ninth Circuit found that university officials discriminated based on viewpoint and violated a plaintiff's First Amendment rights by applying an unwritten and previously unenforced policy selectively to remove their newspaper distribution bins from campus. *OSU Student All. v. Ray*, 699 F.3d 1053, 1075 (9th Cir. 2012). Defendants here knew or should have known that removing and rejecting Plaintiffs' flyers on the basis of viewpoint discrimination violated their constitutional rights. As a result, Defendants are not entitled to qualified immunity.

CONCLUSION

For the reasons stated above, the Court should deny Defendants' Motion to Strike Punitive Damages.

DATED: September 29, 2022

Respectfully submitted,

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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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