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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Roy E. Spears,
Plaintiff,
vs.
Arizona Board of Regents, et al.,
Defendants.

No. CIV 18-126-TUC-CKJ

ORDER

Pending before the Court is the Motion to Dismiss ("MTD") (Doc. 48) filed by State Defendants seeking to dismiss the Second Amended Complaint (Doc. 44) filed by Plaintiff Roy E. Spears ("Spears"). The parties have thoroughly presented the facts and briefed the legal issues. Therefore, the Court declines to set this matter for oral argument. See LRCiv 7.2(f); 27A Fed.Proc., L. Ed. § 62:367 (March 2016) ("A district court generally is not required to hold a hearing or oral argument before ruling on a motion.").

I. Factual and Procedural Background¹

Spears attended the 2017 Festival ("Festival") on the University of Arizona ("UA") campus mall ("UA Mall") on March 17, 2017. ¶ 15. He was soon immersed by the amplified sound of the festival. ¶ 45. Spears put on his GoPro, amplification system, headset microphone, placed Gospel signs around a tree, held one Gospel sign, and began to speak at approximately 12:20 p.m. ¶ 46. Within several minutes, Rebekah Salcedo ("Salcedo"), a UA

¹Unless otherwise stated, the facts are taken from Spears' Second Amended Complaint, (Doc. 44).

1 "First Amendment Monitor," approached and asked Spears to turn off his microphone
2 explaining that amplification can only be used on the sound stages and with a permit. ¶ 47.
3 She clarified that, under the Festival's policy, he could stay and speak as long as he did not
4 use amplification. *Id.* Spears disagreed with the policy claiming that it was arbitrary. ¶ 48.
5 Salcedo replied that it was not arbitrary because the Festival had reserved the stages and
6 sound licenses for the weekend through UA. ¶¶ 49-50.

7 Dean of Students Kathy Adams Riester ("Riester") arrived several minutes later. ¶
8 51. Riester told Spears his amplifying sound was disruptive to the Festival of Books and that
9 volunteers from the Festival had complained. ¶ 52. University of Arizona Police Department
10 ("UAPD") Officer Ian Theel ("Theel") arrived and advised Spears that, if he continued to
11 speak using amplification, he would face arrest if he failed to obey Riester. ¶ 55. After
12 Spears continued to speak using amplification, he was arrested. ¶ 55.

13 On March 8, 2018, Spears filed a civil rights Complaint (Doc. 1) with this Court. On
14 May 29, 2018, Spears filed his First Amended Complaint. (Doc. 7). On July 5, 2018,
15 Defendants filed a Motion to Dismiss (Doc. 27). The Motion to Dismiss was granted with
16 leave to amend. (Doc. 41). Spears has filed his Second Amended Complaint ("SAC").
17 (Doc. 44). State Defendants filed a MTD the SAC asserting Spears has not stated a claim.
18 (Doc. 48). Spears has responded (Doc. 49) and Defendants have replied (Doc. 50).

19 Spears argues that he has stated a claim because:

20 (1) The Festival was a traditional public forum.

21 (2) Defendants' restriction was unreasonable because he was not disrupting the
22 festival.

23 (3) Therefore, Defendants restricted his constitutionally protected speech in an
24 unconstitutional way.

25 Defendants argue that Spears has failed to state a claim as he does not allege any illegal
26 conduct because:

27 (1) The Festival was a limited public forum so the scrutiny for restriction is lower.

1 (2) However, even if the scrutiny for restriction was higher, the time, place, and
2 manner restriction is still constitutional.

3 (3) Therefore, Spears claim must be dismissed because his speech was restricted
4 in a constitutional manner making his claim implausible.

5 This Court finds Defendants' arguments persuasive and will grant their MTD for the
6 reasons stated below.

7
8 II. *Analysis*

9 With the exception of the A.R.S. § 15-1861, the Court extensively discussed the issues
10 presented in the original Motion to Dismiss, response, and reply in its March 7, 2019, Order
11 (Doc. 41). As a number of these issues are duplicative, the Court will not repeat those
12 discussions in depth.

13
14 III. *Plausibility Requirement*

15 A complaint must contain a "short and plain statement of the claim showing that the
16 pleader is entitled to relief[.]" Fed.R.Civ.P. 8(a). The United States Supreme Court has found
17 that a plaintiff must allege "enough facts to state a claim to relief that is plausible on its face."
18 *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). The Court considers the SAC in
19 light of *Twombly* and must determine if Spears has "nudge[d] [the] claims across the line
20 from conceivable to plausible." *Id.* at 570. This Court must take as true all allegations of
21 material fact and construe them in the light most favorable to Spears. *See Cervantes v.*
22 *United States*, 330 F.3d 1186, 1187 (9th Cir. 2003). In general, a complaint is construed
23 favorably to the pleader. *See Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974), overruled on
24 other grounds, 457 U.S. 800. Nonetheless, the Court does not accept as true unreasonable
25 inferences or conclusory legal allegations cast in the form of factual allegations. *Western*
26 *Mining Council v. Watt*, 643 F.2d 618, 624 (9th Cir. 1981).

1 IV. *Materials Outside of Pleadings*

2 When deciding a Rule 12(b)(6) motion, the court generally looks only to the face of
3 the complaint and documents attached thereto. *Van Buskirk v. Cable News Network, Inc.*,
4 284 F.3d 977, 980 (9th Cir. 2002). A court must normally convert a Rule 12(b)(6) motion
5 into a Rule 56 motion for summary judgment if it "considers evidence outside the pleadings
6 . . . A court may, however, consider certain materials-documents attached to the complaint,
7 documents incorporated by reference in the complaint, or matters of judicial notice-without
8 converting the motion to dismiss into a motion for summary judgment." *United States v.*
9 *Ritchie*, 342 F.3d 903, 907-08 (9th Cir. 2003); *see also Tellabs, Inc. v. Makor Issues &*
10 *Rights, Ltd.*, 551 U.S. 308, 322 (2007); *Branch v. Tunnell*, 14 F.3d 449, 453 (9th Cir. 1994)
11 (noting that a court may consider a document whose contents are alleged in a complaint, so
12 long as no party disputes its authenticity) (overruled on other grounds).

13 The SAC references and incorporates several documents and links outside of his
14 pleading. Spears does not dispute their authenticity. The Court finds it may consider those
15 documents and videos in determining the MTD without converting it into a motion for
16 summary judgment.

17
18 V. *A.R.S. § 15-1861*

19 The parties disagree as to the effect of A.R.S. § 15-1861 on the plausability of Spears'
20 claims. Defendants assert the A.R.S. § 15-1861 in effect at the time of the incident is not
21 applicable because Spears was not a UA student. In responding to this argument, Spears
22 purports to cite to the A.R.S. § 15-1861 that was enacted in 2018; however, he is actually
23 referring to the A.R.S. § 15-1864 that was enacted in 2018. However, the version in effect
24 in 2017 at the time of the incident did not include the language relied upon by Spears. *See*
25 *A.R.S. § 15-1864 (eff. 8/6/2016)*.

26 Moreover, since the original enactment of A.R.S. § 15-1861, which became effective
27 on July 20, 2011, the only significant modification of the statute has been to include a
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1 designated public forum within the definition of public forum:

2 2. “Public forum” includes any open, outdoor area on the campus of a university or
3 community college and any facilities, buildings or parts of buildings that the
4 university or community college has opened to students or student organizations for
5 expression.

6 A.R.S. § 15-1861 (eff. 7/20/2011).

7 2. “Public forum” includes both a traditional public forum, which is any open, outdoor
8 area on the campus of a university or community college, and a designated public
9 forum, which is any facility, building or part of a building that the university or
10 community college has opened to students or student organizations for expression.

11 A.R.S. § 15-1861 (eff. 8/6/2016).² Although the 2016 version included the phrase
12 “traditional public forum,” the definition itself (i.e., open, outdoor area . . .) was not
13 modified.

14 A review of the legislative history of the 2016 version of the statute indicates the
15 Arizona Legislature contemplated language that permitted a university or community college
16 to restrict a student's speech in a public forum only if it demonstrated the burden to the
17 student was both in furtherance of a compelling governmental interest and the least restrictive
18 means of furthering that compelling governmental interest, but rejected that language. *See*
19 *Arizona House Amendment, 2016 Reg. Sess. H.B. 2615 (Mar. 22, 2016); see also*
20 *Kaahumanu v. Hawaii, 682 F.3d 789, 799 (9th Cir. 2012)* (“The government can exclude a
21 speaker from a traditional public forum ‘only when the exclusion is necessary to serve a
22 compelling state interest and the exclusion is narrowly drawn to achieve that interest.’”)
23 (citation omitted). Rather, without the inclusion of the language requiring a compelling
24 government interest with the least restrictive means furthering that interest, it does not appear
25 the Arizona Legislature sought to redefine the nature of university property. As the version
26 adopted does not mandate a traditional public forum analysis, the legislative history of the
27 version of the statute in effect when the incident occurred does not indicate any intention to

28 ²The version of this subsection which became effective on August 3, 2018, modified the
subsection only to renumber it as (3).

1 override First Amendment law. The Court finds A.R.S. § 15-1861 does not affect the First
2 Amendment analysis of Spears' claims.

3
4 VI. *First Amendment – Forum Analysis*

5 A. *Limited Public Forum*

6 Determining the type of forum is a matter of law. *See Heffron v. International Soc.*
7 *for Krishna Consciousness, Inc.*, 452 U.S. 640, 650-51 (1981); *OSU Student All. v. Ray*, 699
8 F.3d 1053, 1062 (9th Cir. 2012). A limited public forum is a type of designated public forum
9 where the government opens a non-public forum but limits it to certain groups of categories
10 of speech. *Flint v. Dennison*, 488 F.3d 816, 832 (9th Cir. 2007). For example, in *Flint*, the
11 Court concluded that a student election was a limited public forum because the election had
12 certain regulations on who could become a candidate, like a minimum GPA, and on who
13 could vote, like minimum credit hours. *Id.* Moreover, there were regulations on how a
14 candidate could campaign: e.g. (1) only during a certain time, (2) no door-to-door
15 campaigning, and (3) no campaigning in class or a residence hall without permission from
16 the professor or hall office, respectively. *Id.*

17 By contrast, a traditional public forum is a "place[] which by long tradition ... [has]
18 been devoted to assembly and debate." *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*,
19 460 U.S. 37, 45 (1983). For example, in *Gathright v. City of Portland*, the court found that
20 a public park was a traditional public forum because parks and street corners are traditionally
21 where street preachers go to express themselves. 439 F.3d 573, 576 (9th Cir. 2006). Similar
22 to the election in *Flint* that regulated categories of people and speech, the Festival and UA
23 have regulations that only permit certain organizations or people to speak with amplification
24 during the event. (Doc. 48 Ex. A-C). Spears argues that based on the Festival and UA's own
25 policies (included in Doc. 48 Ex. A-C and at <http://tucsconfestivalofbooks.org/?id=242>) that
26 the Mall is a traditional public forum because it traditionally is open to the public and all
27 kinds of speech similar to *Gathright*. (Doc. 44 30-38).

1 Although the Mall is akin to a park and traditionally open to the public, the Supreme
2 Court has "never denied a university's authority to impose reasonable regulations compatible
3 with that mission upon the use of its campus and facilities... [or required] a campus [to]
4 make all of its facilities equally available to students and nonstudents alike, or that a
5 university must grant free access to all of its grounds or buildings." *Widmar v. Vincent*, 454
6 U.S. 263, 268, n. 5 (1981). In this case, UA created a limited public forum by hosting an
7 event with specific regulations on the manner of speech, namely amplification.

8 B. *Traditional Public Forum*

9 However, even if the UA Mall during the Festival was a traditional public forum, the
10 restriction would pass the higher scrutiny required for speech restrictions and would therefore
11 pass the lower scrutiny of a limited public forum. In a traditional public forum, the
12 government can impose reasonable time, place, and manner restrictions on speech if they are
13 (1) content neutral, (2) narrowly tailored to serve a significant government interest, and (3)
14 permit ample alternatives. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). Parts
15 (1) and (3) are not at issue in this case because (a) the restriction was only on whether he
16 could use amplification, it was indifferent to the content of his speech, and (b) Spears was
17 offered ample alternatives: (i) move outside of the festival or (ii) continuing speaking
18 without the microphone. (Doc. 44 ¶ 70) (It appears that Spears was most effective speaking
19 without his amplification because he was able to sustain a conversation without it for at least
20 five minutes before the incident. Doc. 44 ¶ 66).

21 Focusing on part (2), the restriction must be narrowly tailored to serve a significant
22 government interest. This requirement is satisfied if the "regulation promotes a substantial
23 government interest that would be achieved less effectively absent the regulation." *Ward v.*
24 *Rock Against Racism*, 491 U.S. 781, 799 (1989). The restriction does not have to be the least
25 restrictive means. *Id.* at 798. Controlling noise levels and avoiding undue intrusion into a
26 reserved event is reasonable. *See e.g. Grayned v. City of Rockford*, 408 U.S. 104, 116 (1972)
27 (speech is subject to reasonable regulation, and "[if] overamplified loudspeakers assault the
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1 citizenry, government may turn them down"). For example, in *Ward*, the court held that a
2 restriction requiring performers to use the city's amplification equipment satisfied this
3 requirement because the city had a substantial interest in ensuring its citizens' enjoyment of
4 whatever benefits the park offered, like high quality amplified music. *Ward*, 491 U.S. at 797.

5 Like in *Ward*, UA is seeking to ensure a high-quality event narrowly tailored to their
6 interests. The Festival is a registered non-profit seeking to fund literacy advancement in
7 southern Arizona. (Doc. 48, pg. 6). Advancing literacy is certainly a substantial interest of
8 a school like the enjoyment of a city park for a city. Moreover, the restriction on
9 amplification was to ensure that everyone in attendance could enjoy the event and prevent
10 unreasonable interferences with scheduled uses of University property, namely the Festival,
11 similar to the city seeking to ensure the enjoyment of band shell concert attendees. For the
12 purposes of part (2), if a city can regulate which sound equipment is used, who, and when
13 they use it at a band shell event in a park, then a University can regulate who uses
14 amplification at their on campus events.

15 In effect, however, Spears argues that the restriction was an unreasonable interference
16 because his amplification was not disruptive. However, whether Spears' amplification was
17 disruptive or not does not affect the Court's conclusion. Rather, the restrictions on sound
18 amplification were content-neutral. *Virginia Pharmacy Board v. Virginia Citizens Consumer*
19 *Council, Inc.*, 425 U.S. 748, 771 (1976) (the restriction was "without reference to the content
20 of the regulated speech"). The restriction was not an unreasonable interference because, if
21 any person could have constitutionally used amplified speech at the Festival, then the UA
22 could not have prohibited anyone from amplifying their speech. The restriction was
23 reasonable to prevent the chaos and combined disruption that may have resulted without
24 reasonable restrictions. As summarized by Defendants, the "restriction on unauthorized
25 amplification at the Festival allows all to be heard, and prohibits persons like [Spears] from
26 drowning out the speech of others." Reply (Doc. 50, p. 5).

27 Moreover, in the circumstances of this case, the Court agrees Spears' amplification
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1 was per se disruptive. More than 130,000 people attended the Festival on the UA Mall.
2 (Dkt.44, ¶ 17.) Thousands of people were moving among the booths and exhibits and Spears
3 was seeking to amplify his voice to people 10-15 yards from him; i.e., “to effectively
4 communicate with the throngs of Festival attendees.” SAC (Doc. 44, pp. 5, 9). As stated by
5 Defendants, “a human voice intended to grab the attention of passers-by up to 15 yards away
6 is not speaking in a ‘normal conversational’ tone, but is tantamount to shouting.” Reply
7 (Doc. 50, p. 6). In light of the number of people, booths, and exhibits in a limited space, any
8 amplification would disrupt passers-by and the people attempting to discuss the event
9 functions, exhibits, or products.

10
11 VII. *Due Process*

12 Spears also alleges that Defendants violated his right to due process. However,
13 Spears’ alleged infringement of the right to free speech does not provide the basis for a due
14 process violation. The Supreme Court has determined that, “where a particular amendment
15 ‘provides an explicit textual source of constitutional protection’ against a particular sort of
16 government behavior, ‘that Amendment, not the more generalized notion of “substantive due
17 process,” must be the guide for analyzing these claims.’” *Albright v. Oliver*, 510 U.S. 266,
18 273 (1994) (Rehnquist, C.J., for plurality) (quoting *Graham v. Connor*, 490 U.S. 386, 395
19 (1989)); *Hufford v. McEnaney*, 249 F.3d 1142, 1151 (9th Cir. 2001). As the First
20 Amendment provides for free speech protection, Spears may not additionally base a due
21 process claim on a violation of his right to free speech.

22 Moreover, the amplification policy was not unconstitutionally vague or overly broad.
23 The policy provided that persons not affiliated with the Festival were not allowed to amplify
24 sound within and during the Festival. This policy and its enforcement is clear and certain.
25 *See e.g. Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972) (“It is a basic principle of due
26 process that an enactment is void for vagueness if its prohibitions are not clearly defined.”).
27 The policy provided notice to persons of ordinary intelligence a reasonable opportunity to
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1 know what was prohibited, *id.* at 108; *Sessions v. Dimaya*, — U.S. —, 138 S. Ct. 1204, 1212
2 (2018), and it is “unlikely . . . that speakers [would] be compelled to steer too far clear” of
3 forbidden speech or conduct because of this policy. *Nat’l Endowment for the Arts v. Finley*,
4 524 U.S. 569, 588 (1998). The public was not left to guess what is proscribed by the policy.
5 *Edge v. City of Everett*, 929 F.3d 657, 665 (9th Cir. 2019).

6 Further, under the facts of this case, the policy does not reach “a substantial amount
7 of constitutionally protected conduct.” *Vill. of Hoffman Estates v. Flipside, Hoffman Estates,*
8 *Inc.*, 455 U.S. 489, 494 (1982) (“[i]n a facial challenge to the overbreadth ... of a law, a
9 court's first task is to determine whether the enactment reaches a substantial amount of
10 constitutionally protected conduct. If it does not, then the overbreadth challenge must fail.”);
11 *see also N.Y. State Club Ass’n v. City of New York*, 487 U.S. 1, 14 (1988) (“[t]he overbreadth
12 doctrine is ‘strong medicine’ that is used ‘sparingly and only as a last resort.’”). While the
13 policy prohibited amplified speech, it did not prohibit speech in general. Additionally, the
14 policy advanced a legitimate purpose of preventing unreasonable interference or disruption
15 of campus activities and “it is at least fairly debatable” that the decision to adopt [the
16 policy]...was rationally related to those interests. *Kawaoka v. City of Arroyo Grande*, 17 F.3d
17 1227, 1234 (9th Cir.1994) (citations omitted). The Court finds the SAC fails to state a due
18 process claim upon which relief may be granted.

19 20 VIII. *Qualified Immunity*

21 Government officials are entitled to qualified immunity "insofar as their conduct does
22 not violate clearly established statutory or constitutional rights of which a reasonable person
23 would have known." *Liston v. County of Riverside*, 120 F.3d 965, 975 (9th Cir. 1997), citing
24 *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). The Court must determine "whether, in
25 light of clearly established principles governing the conduct in question, [defendants]
26 objectively could have believed that [their] conduct was lawful." *Watkins v. City of Oakland*,
27 145 F.3d 1087, 1092 (9th Cir. 1998).

1 Here, the alleged facts do not show Defendants' conduct violated a constitutional
2 right. *Saucier v. Katz*, 533 U.S. 194, 201 (2001); *see also Billington v. Smith*, 292 F.3d 1177,
3 1183 (9th Cir. 2002). Furthermore, a right to amplify sound in these circumstances was not
4 "sufficiently clear that a reasonable official would understand that what he [was] doing
5 violate[d] that right." *Anderson v. Creighton*, 483 U.S. 637, 640 (1987). The Court finds,
6 even if Spears had stated either a First Amendment or due process claim, Defendants would
7 be entitled to qualified immunity.

8
9 *IX. Miscellaneous Issues*

10 Defendants raise additional issues in their MTD. As the Court has found Spears has
11 not stated a claim upon which relief may be granted and Defendants are entitled to qualified
12 immunity, the Court declines to address the additional issues.

13
14 *X. Conclusion*

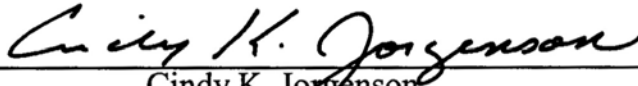
15 The Court finds Spears has not stated a claim upon which relief may be granted.
16 Further, based on the allegations and arguments presented to the Court, the Court finds there
17 is no basis to conclude a more carefully drafted complaint *might* state a claim. *Bank v. Pitt*,
18 928 F.2d 1108, 1112 (11th Cir. 1991). The Court, therefore, will dismiss the claims and this
19 action with prejudice.

20 Accordingly, IT IS ORDERED:

21 1. The Motion to Dismiss (Doc. 48) is GRANTED. Counts I and II of the Second
22 Amended Complaint and this action are DISMISSED WITH PREJUDICE.

23 2. The Clerk of Court shall enter judgment and close its file in this matter.

24 DATED this 20th day of August, 2019.

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26 
27 _____
Cindy K. Jorgenson
United States District Judge