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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

YOUNG AMERICA'S FOUNDATION, et
al.,
 Plaintiffs,
 v.
JANET NAPOLITANO, et al.,
 Defendants.

Case No. [17-cv-02255-MMC](#)

**ORDER GRANTING IN PART AND
DENYING IN PART DEFENDANTS'
MOTION TO DISMISS**

Re: Dkt. No. 38

Before the Court is defendants' "Motion to Dismiss First Amended Complaint," filed December 8, 2017. Plaintiffs have filed opposition, to which defendants have replied.¹ The matter came on regularly for hearing on February 16, 2018, after which, both parties filed, with leave of Court, supplemental briefing. The Court, having considered the respective written submissions and the arguments of counsel at the hearing, rules as follows.

BACKGROUND²

Plaintiffs Young America's Foundation ("YAF"), a "non-profit corporation whose mission is to educate the public on the . . . hallmarks of conservative values" (see FAC ¶ 14), and Berkeley College Republicans ("BCR"), a "[r]egistered [s]tudent [o]rganization" (see id. ¶ 15) at the University of California, Berkeley ("the University"), scheduled for

¹ Additionally, on January 25, 2018, the Attorney General filed on behalf of the United States a "Statement of Interest," to which defendants filed a "Response."

² The following facts are taken from the First Amended Complaint ("FAC").

1 February 1, 2017, an on-campus speaking engagement featuring Milo Yiannopoulos
2 (“Yiannopoulos”), “a contentious conservative writer, speaker, and former senior editor of
3 Breitbart News” (see id. ¶ 51) (“Yiannopoulos event”). “In the hours leading up to the
4 [Yiannopoulos event], dozens of black-clad, masked agitators and demonstrators . . . ,
5 appearing to act in concert, set fires and threw objects at buildings in downtown Berkeley
6 near the campus to protest [Yiannopoulos’] appearance,” and entered “physical
7 altercations . . . [with] those seeking to attend” the event. (See id. ¶¶ 52-53.) “[A]s a
8 result of the violent demonstration,” the University “canceled” the Yiannopoulos event and
9 “instituted a nearly campus-wide ‘lockdown.’” (See id. ¶ 55.)

10 Thereafter, “[o]n or around March 1, 2017” (see id. ¶ 56) defendants, all University
11 officials sued in their official and/or individual capacities, instituted an unwritten “High-
12 Profile Speaker Policy” (“HPSP”), which policy was used to place various restrictions on
13 two events hosted by plaintiffs, namely, speaking engagements featuring David Horowitz
14 (“Horowitz”), a “prominent conservative writer” (see id. ¶ 60) (“Horowitz event”), and Ann
15 Coulter (“Coulter”), a “conservative social and political commentator” (see id. ¶ 76)
16 (“Coulter event”). Subsequently, on July 14, 2017, defendants instituted a written “Major
17 Events Hosted by Non-Departmental Users” policy (“Major Events Policy” or “MEP”), a
18 revised version of which was published on August 14, 2017, and used to place various
19 restrictions on plaintiffs’ speaking engagement featuring Benjamin Shapiro (“Shapiro”), a
20 “renowned conservative political commentator and author” (see id. ¶ 14) (“Shapiro
21 event”).³

22 Based on the above events, plaintiffs challenge, pursuant to 42 U.S.C. § 1983, the
23

24 ³ At the February 16 hearing, although not in either their motion or reply,
25 defendants, for the first time and without identifying any particular paragraph(s) in the
26 FAC, argued that plaintiffs have pleaded the HPSP and MEP are “one and the same”
27 (see Feb. 16, 2018 Hr’g Tr. 72:19.) Plaintiffs, however, both in their papers and at the
28 hearing, have consistently discussed the HPSP and MEP as two separate policies, and
the Court, having reviewed the FAC, has located no clear allegation to the contrary.
Accordingly, for purposes of the instant order, the Court analyzes said policies
separately.

1 constitutionality of the above-referenced policies and their application to plaintiffs' events.
2 Specifically, plaintiffs assert the following four Claims for Relief: (1) "Violation of the First
3 Amendment Right to Freedom of Expression," (2) "First Amendment Retaliation," (3)
4 "Violation of the Fourteenth Amendment Right to Due Process," and (4) "Violation of the
5 Fourteenth Amendment Right to Equal Protection." By the instant motion, defendants
6 move to dismiss the FAC in its entirety, pursuant to Rule 12(b)(6) of the Federal Rules of
7 Civil Procedure.

8 **LEGAL STANDARD**

9 Dismissal under Rule 12(b)(6) of the Federal Rules of Civil Procedure "can be
10 based on the lack of a cognizable legal theory or the absence of sufficient facts alleged
11 under a cognizable legal theory." See Balistreri v. Pacifica Police Dep't, 901 F.2d 696,
12 699 (9th Cir. 1990). Rule 8(a)(2), however, "requires only 'a short and plain statement of
13 the claim showing that the pleader is entitled to relief.'" See Bell Atlantic Corp. v.
14 Twombly, 550 U.S. 544, 555 (2007) (quoting Fed. R. Civ. P. 8(a)(2)). Consequently, "a
15 complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual
16 allegations." See id. Nonetheless, "a plaintiff's obligation to provide the grounds of his
17 entitlement to relief requires more than labels and conclusions, and a formulaic recitation
18 of the elements of a cause of action will not do." See id. (internal quotation, citation, and
19 alteration omitted).

20 In analyzing a motion to dismiss, a district court must accept as true all material
21 allegations in the complaint, and construe them in the light most favorable to the
22 nonmoving party. See NL Indus., Inc. v. Kaplan, 792 F.2d 896, 898 (9th Cir. 1986). "To
23 survive a motion to dismiss, a complaint must contain sufficient factual material, accepted
24 as true, to 'state a claim to relief that is plausible on its face.'" Ashcroft v. Iqbal, 556 U.S.
25 662, 678 (2009) (quoting Twombly, 550 U.S. at 570). "Factual allegations must be
26 enough to raise a right to relief above the speculative level[.]" Twombly, 550 U.S. at 555.
27 Courts "are not bound to accept as true a legal conclusion couched as a factual
28 allegation." See Iqbal, 556 U.S. at 678 (internal quotation and citation omitted).

1 **DISCUSSION**

2 To state a claim under § 1983, a plaintiff must allege facts sufficient to show the
3 defendant, acting “under color” of law, deprived such plaintiff of “rights, privileges, or
4 immunities secured by the Constitution” or laws of the United States. See 42 U.S.C.
5 § 1983. As noted, plaintiffs base their claims on defendants’ alleged violation of plaintiffs’
6 First and Fourteenth Amendment rights. Defendants do not dispute that they were acting
7 under color of law, but contend plaintiffs have failed to allege any constitutional violation.
8 The Court addresses each asserted violation in turn.

9 **A. First Amendment Freedom of Expression (First Claim for Relief)**

10 To determine whether defendants have violated plaintiffs’ First Amendment rights,
11 the Court must first determine the nature of the forum here at issue.⁴ The Ninth Circuit
12 has classified forums into four categories: (1) traditional public forums, (2) designated
13 public forums, (3) limited public forums, and (4) nonpublic forums. See OSU Student
14 Alliance v. Ray, 699 F.3d 1053, 1062 (9th Cir. 2012). Here, plaintiffs contend the
15 relevant forum is a designated public forum, while defendants contend said forum is a
16 limited public forum.

17 “The defining characteristic of a designated public forum is that it’s open to the
18 same indiscriminate use, and almost unfettered access that exist in a traditional public
19 forum.” See Seattle Mideast Awareness Campaign v. King Cty., 781 F.3d 489, 496 (9th
20 Cir. 2015) (internal quotations and citations omitted). A limited public forum, by contrast,
21 is open “to use by certain groups or dedicated solely to the discussion of certain
22 subjects.” See Christian Legal Soc’y v. Martinez, 561 U.S. 661, 679 n.11 (2010). At the
23 February 16 hearing, the Court, for the reasons stated in detail on the record, found the
24 forum here at issue is a limited public forum.

25 In a limited public forum, government officials may not “discriminate against

26 _____
27 ⁴ For purposes of the instant order, the forum at issue comprises the campus
28 facilities made available to and/or requested by plaintiffs for purposes of hosting the
subject events.

1 speech on the basis of [their] viewpoint” or place restrictions on speech that are not
2 “reasonable in light of the purpose served by the forum.” See Rosenberger v. Rector &
3 Visitors of Univ. of Virginia, 515 U.S. 819, 829 (1995) (internal quotation and citation
4 omitted).

5 An ordinance or policy enforced in connection with a limited public forum may be
6 challenged either as unconstitutional on its face or as applied to a plaintiff’s protected
7 conduct. See Wright v. Incline Village Gen. Improvement Dist., 665 F.3d 1128, 1133,
8 1138-40 (9th Cir. 2011) (discussing facial and as-applied challenges to ordinance and
9 policy under which access to limited public forum restricted). Here, plaintiffs contend, the
10 HPSP and MEP are unconstitutional both on their face and as applied.

11 **1. Facial Challenges**

12 Where challenged under the First Amendment, an ordinance or policy is deemed
13 facially unconstitutional if “(1) it is unconstitutional in every conceivable application
14 because it . . . impermissibly restricts a protected activity or (2) it seeks to prohibit such a
15 broad range of protected conduct that it is unconstitutionally overbroad” See Menotti v.
16 City of Seattle, 409 F.3d 1113, 1128 (9th Cir. 2005).⁵ In bringing a challenge based on
17 the former, *i.e.*, on the basis that the ordinance “impermissibly restricts a protected
18 activity,” *see id.*, “a plaintiff seek[s] to vindicate his own constitutional rights,” *see Santa*
19 *Monica Food Not Bombs v. City of Santa Monica*, 450 F.3d 1022, 1033 (9th Cir. 2006)
20 (internal quotation and citation omitted). In bringing a challenge based on the latter, *i.e.*,
21 on the basis that the ordinance is “overbroad,” *see id.*, the plaintiff asserts that, although
22 the plaintiff’s own “speech or expressive conduct may validly be prohibited or
23 sanctioned,” the ordinance “threatens others not before the court,” *see id.* (internal
24 quotation and citation omitted).

25 _____
26 ⁵ Although, in support of their First Amendment claim, plaintiffs challenge the
27 HPSP and MEP as being unconstitutionally vague, such challenge “actually raises a due
28 process, as opposed to First Amendment, claim,” *see Hunt v. City of Los Angeles*, 638
F.3d 703, 710 (9th Cir. 2011), and, consequently, the Court addresses this additional
ground in Section C.

1 The Court next addresses plaintiffs’ facial challenges to each of the above-
2 described policies.

3 **a. High-Profile Speaker Policy**

4 Plaintiffs contend the HPSP impermissibly restricts protected speech by affording
5 University officials “unbridled discretion” to impose time, place, and manner restrictions
6 on the Horowitz and Coulter events.⁶

7 In support thereof, plaintiffs allege the HPSP, an “unwritten and unpublished”
8 policy (see FAC ¶ 2), required all events involving “high-profile” speakers to “conclude by
9 3:00 p.m.” and be held in “securable” locations (see id. ¶ 56), and, further, enabled
10 University officials to impose “security fee[s] . . . as a matter of discretion” (see id. ¶ 69).
11 Additionally, plaintiffs allege, “neither the University nor [d]efendants . . . set forth the
12 exact nature and scope of the [HPSP], despite requests from [p]laintiffs,” or “provid[ed]
13 any criteria making clear who [was] considered a ‘high-profile’ speaker[,] . . . to whom [the
14 HPSP] [had] been applied[,] . . . or what, if anything, render[ed] a particular venue . . .
15 ‘securable.’” (See id. ¶ 56.)

16 At the hearing, defendants, citing dicta in Ward v. Rock Against Racism, 491 U.S.
17 781 (1989), argued, for the first time, that an “unbridled discretion” challenge is improper
18 where, as here, the challenged policy does not afford discretion to deny expressive
19 activity, but only to impose time, place, and manner restriction on such activity. See id. at
20 793-94 (noting “it is open to question” whether claim based on discretion to regulate, but
21 not to deny, speech can support facial challenge; further noting “[o]ur cases permitting
22 facial challenges . . . have generally involved licensing schemes that ves[t] unbridled
23 discretion . . . to permit or deny expressive activity”) (internal quotation and citation
24

25 ⁶ To the extent plaintiffs continue to assert a facial challenge based on
26 overbreadth, plaintiffs’ claim is subject to dismissal for the reason that damages “are
27 unavailable for an overbreadth challenge,” see Outdoor Media Grp., Inc. v. City of
28 Beaumont, 506 F.3d 895, 901, 907 (9th Cir. 2007), and plaintiffs no longer have a viable
claim for declaratory or injunctive relief, as the HPSP has been superseded by the MEP,
see id. (finding declaratory and injunctive relief claims rendered moot by repeal of
ordinance).

1 omitted) (second alteration in original).

2 The Ninth Circuit, however, has permitted facial challenges based solely on time,
3 place, and manner restrictions, at least where the challenged provision has, in practice,
4 been enforced “as though it authorize[d] denying permits.” See Seattle Affiliate of Oct.
5 22nd Coal. to Stop Police Brutality, Repression & Criminalization of a Generation v. City
6 of Seattle, 550 F.3d 788, 795 (9th Cir. 2008) (hereinafter, “Seattle Affiliate”) (allowing
7 facial challenge to proceed where parade ordinance provided no discretion to deny
8 permit for street parade but was enforced as though police had authority to rescind permit
9 and require group to use sidewalk).⁷

10 Here, plaintiffs allege that defendants “informed” them the Coulter event “could not
11 proceed” if defendants could not locate a “‘securable’ venue” (see FAC ¶ 85), and,
12 thereafter, “claiming that [they] could not secure a room[,] . . . cancel[ed] the event” (see
13 id. ¶ 98). Given such allegation, the Court finds plaintiffs are not precluded from
14 proceeding on their facial challenge, and, accordingly, next turns to the merits of the
15 claim.

16 As discussed above, plaintiffs allege in the FAC that the HPSP includes no
17 standards, either through the policy’s terms or its history of enforcement, to limit any
18 implementing officials’ discretion; as plaintiffs further point out, the HPSP provides, for
19 example, no standard for determining what events fall under the policy, at what locations
20 events may be held, and what, if any, security fee may be imposed. Such allegations are
21 sufficient to plead a facial challenge based on unbridled discretion. See OSU Student
22 Alliance, 699 F.3d at 1064-65 (finding “[t]he fact that the ‘policy’ was not written or
23 otherwise established by practice meant there were no standards by which the officials
24 could be limited”); see also Kaahumanu v. Hawaii, 682 F.3d 789 (9th Cir. 2012) (holding

25 ⁷ After Seattle Affiliate, the Ninth Circuit allowed a facial challenge to proceed,
26 apparently without the above-discussed issue having been raised, where an “unwritten”
27 and “unannounced” policy limited the university campus locations at which the plaintiffs
28 could disseminate their student paper but did not entirely preclude such dissemination.
See OSU Student Alliance, 699 F.3d at 1057-58, 1064-65 (finding policy impermissibly
afforded university officials “unbridled discretion”).

1 prohibition against viewpoint discrimination in limited public forum “includes the
2 prohibition on a licensing authority’s unbridled discretion”).

3 **b. Major Events Policy**

4 Plaintiffs contend the MEP is facially unconstitutional because, according to
5 plaintiffs, it affords University officials “unbridled discretion” to impose time, place, and
6 manner restrictions on the Shapiro event and is overbroad.⁸ Although the MEP, on its
7 face, provides only for restriction, and not denial, of speech, the Court, for purposes of
8 the below discussion, and while questioning plaintiffs’ ability to proceed with their facial
9 challenge, see Ward, 491 U.S. at 793-94, will assume plaintiffs are not precluded from
10 doing so.

11 **(1) Unbridled Discretion**

12 Plaintiffs bring their challenge on three separate grounds. First, plaintiffs contend
13 three of the seven criteria used to designate an event as a “Major Event,” thereby
14 bringing the event within the scope of the policy, are not sufficiently definite to limit the
15 University’s discretion in making such designation. Second, plaintiffs contend that once
16 an event is deemed covered thereunder, the MEP fails to sufficiently constrain the types
17 of restrictions that may be imposed, or the circumstances under which any such
18 restrictions may be imposed. Third, plaintiffs contend the MEP permits the imposition of
19 unconstitutionally high security fees.⁹

20 At the February 16 hearing, the Court, for the reasons stated on the record, found
21 plaintiffs’ second and third grounds unpersuasive, and, as to the first ground, found two of

22 _____
23 ⁸ As noted, plaintiffs’ challenge on grounds of vagueness will be addressed in
Section C.

24 ⁹ To the extent plaintiffs also contend the MEP affords University officials
25 “unbridled discretion” to “refuse to approve the use of promotional materials both on and
26 off campus, including any effort to publicize an event online, through social media” (see
27 Opp. at 27:2-4), such contention is unsupported by the FAC and exhibits attached thereto
28 (see FAC Ex. L at 5 (requiring student organizations to submit publicity material to
University for purpose of University’s “verify[ing] that event details (such as date, time,
and location) are accurate”)).

1 the three challenged criteria used to define the term “Major Event” are sufficiently
 2 definite.¹⁰ Although the Court questioned the constitutionality of the remaining criterion,
 3 by which “Major Event” is defined as an event for which “[a]uthorized campus officials
 4 determine that the complexity of the event requires the involvement of more than one
 5 campus administrative unit” (see FAC Ex. L at 2) (hereinafter, “Complexity Provision”),
 6 plaintiffs’ facial challenge, to the extent based thereon, nonetheless is unavailing for two
 7 reasons. First, as discussed in Section E, defendants are entitled to qualified immunity
 8 as to any claim for damages resulting from defendants’ implementation of said criterion.
 9 Second, plaintiffs’ claims for declaratory and injunctive relief thereon are moot, as, on
 10 January 9, 2018, the University issued a final version of the MEP (“January 9 policy”),¹¹ in
 11 which the Complexity Provision has been revised. See Outdoor Media, 506 F.3d at 901,
 12 907 (holding plaintiff’s declaratory and injunctive relief claims rendered moot by repeal of
 13 ordinance); see also ASU Students For Life v. Crow, 357 F. App’x 156, 158 (9th Cir.
 14 2009) (holding plaintiff’s claims for declaratory and injunctive relief rendered moot by
 15 university’s issuance of “revis[ed]” policy).¹²

16 **(2) Overbreadth**

17 A facial challenge may be brought, and a policy “invalidated as overbroad[,] if a
 18 substantial number of its applications are unconstitutional, judged in relation to the

19 _____
 20 ¹⁰ The Court found sufficiently definite the following two criteria: (1) “Authorized
 21 campus officials determine that the event is likely to significantly affect campus safety
 22 and security (based on assessment from the University of California Police Department,
 23 hereafter UCPD) or significantly affects campus services (including kiosk guards, service
 roads, or parking”); and (2) “Authorized campus officials determine that the event has a
 substantial likelihood of interfering with other campus functions or activities.” (See FAC
 Ex. L at 2).

24 ¹¹ Defendants’ request for judicial notice of the “Major Events Hosted by Non-
 25 Departmental Users” policy adopted January 9, 2018 (see Heckenlively Decl., filed March
 26 2, 2017, Ex. 1) is hereby GRANTED. See Esquivel v. San Francisco Unified Sch. Dist.,
 630 F. Supp. 2d 1055, 1057 n.2 (N.D. Cal. 2008) (taking judicial notice of school board
 policy).

27 ¹² In so finding, the Court makes no determination as to the constitutionality of the
 28 Complexity Provision as revised.

1 [policy]’s plainly legitimate sweep.” See United States v. Stevens, 559 U.S. 460, 473
2 (2010) (internal quotation and citation omitted). Here, plaintiffs’ overbreadth challenge to
3 the MEP rests on the same alleged deficiencies as their unbridled discretion challenge,
4 and, as set forth below, fails.

5 In order to bring an overbreadth challenge, a plaintiff must establish: (1) there is a
6 “realistic danger” that the ordinance will “significantly compromise recognized First
7 Amendment protections of parties not before the [c]ourt”; and (2) “the ordinance will have
8 a[] different impact on . . . third parties’ interests in free speech than it has on” the
9 plaintiff’s. See Members of City Council of Los Angeles v. Taxpayers for Vincent, 466
10 U.S 789, 801 (1984).

11 Here, in light of the University’s issuance of the January 9 policy, the Court need
12 not resolve the parties’ respective arguments as to plaintiffs’ standing, as plaintiffs’
13 overbreadth claim is moot. See Outdoor Media, 506 F.3d at 901, 907 (holding damages
14 “are unavailable for an overbreadth challenge”; further holding repeal of ordinance
15 rendered plaintiff’s declaratory and injunctive relief claims moot); see also ASU Students
16 For Life, 357 F. App’x at 158 (holding plaintiff’s claims for declaratory and injunctive relief
17 rendered moot by university’s issuance of “revis[ed]” policy).

18 **c. Conclusion: Facial Challenge**

19 Accordingly, for the reasons set forth above, to the extent plaintiffs’ First Claim for
20 Relief is based on a facial challenge to the HPSP, such claim is not subject to dismissal.

21 **2. As-Applied Challenges**

22 As noted, the forum here at issue is a limited public forum, and, consequently, the
23 restrictions imposed on the Horowitz, Coulter, and Shapiro events must have been
24 viewpoint neutral and “reasonable in light of the purpose served by the forum.” See
25 Rosenberger, 515 U.S. at 829. Plaintiffs contend the subject restrictions fail to meet
26 either requirement.

27 **a. Viewpoint Discrimination**

28 To establish viewpoint discrimination, a plaintiff bringing an as-applied challenge

1 must show the government restricted protected speech “*because of* not merely in spite
2 of,” the speaker’s point of view. See Moss v. U.S. Secret Service, 572 F.3d 962, 970 (9th
3 Cir. 2009) (emphasis in original); Seattle Mideast Awareness Campaign, 781 F.3d at 502
4 (holding plaintiff must show “the government intended to suppress expression merely
5 because public officials oppose the speaker’s view”) (internal quotation and citation
6 omitted).¹³

7 Here, plaintiffs contend, viewpoint discrimination may be inferred from public
8 statements made by three University officials, and, according to plaintiffs, the fact that, on
9 dates close to those on which the Horowitz and Coulter events were scheduled to be
10 held, two “liberal” speakers were permitted to speak on campus “without incident or
11 interference from [d]efendants.” (See FAC ¶¶ 160-61.) The Court is unpersuaded.

12 **(1) University Officials’ Statements**

13 Plaintiffs contend viewpoint discrimination is evidenced by statements made by the
14 Chancellor of the University, Carol Christ (“Chancellor Christ”), a University Provost, Paul
15 Alivisatos (“Provost Alivisatos”), and the Vice Chancellor of Finance, Rosemarie Rae
16 (“Vice Chancellor of Finance Rae”), all said statements made in September 2017, the
17 month Shapiro was scheduled to speak.

18 First, in an interview with the Los Angeles Times, Chancellor Christ, in response to
19 a question concerning “the most controversial speaker in [her] time at Berkeley,” stated
20 that a speaker “who denied the Holocaust” came to campus “in the 90’s,” that the
21 University “had him speak in a small, really out-of-the-way room as a way of protecting
22 the campus,” and that “[t]he legal advice [they’ve] been getting now” is that, if available,

23
24 ¹³ To the extent plaintiffs contend defendants’ actions amount to a “heckler’s veto,”
25 by which “listeners react to speech based on its content and the government then ratifies
26 that reaction by restricting the speech in response to listeners’ objections,” see Santa
27 Monica Nativity Scenes Comm. v. City of Santa Monica, 784 F.3d 1286, 1292 (9th Cir.
28 2015), such argument is unavailing, as the doctrine has “no relevance in a limited public
forum” except to the extent a defendant’s “claimed fear of a hostile audience reaction”
can be shown to be a “mere pretext for suppressing expression because public officials
oppose the speaker’s point of view.” See Seattle Mideast Awareness Campaign, 781
F.3d at 502. As discussed below, plaintiffs have failed to allege any such pretext.

1 they “can’t deny [a more desirable] room to speakers on the basis of their viewpoints.”
2 (See id. Ex. U at 4).

3 Chancellor Christ’s remarks, however, particularly when read in the context of the
4 subject of the interview as a whole, make clear that the University’s assignment of that
5 more remote and smaller venue was driven by safety concerns. (See, e.g., id. Ex. U at 1
6 (reporter’s introductory paragraph beginning, “UC Berkeley . . . has become the nation’s
7 most prominent stage for violent confrontations between the left and the right”;
8 continuing, “campus is spending hundreds of thousands of dollars in security costs to
9 prevent violence”); see also id. (stating Chancellor Christ “said a ‘combustible mix’ of
10 changing youth sensibilities, political polarization and the choice of university campuses
11 as battlegrounds has made protecting free speech more fraught than ever”).) In other
12 words, the venue was chosen in spite of, not “*because of,*” the speaker’s point of view.
13 See Moss, 572 F.3d at 970 (emphasis in original). Further, even if the statement can be
14 read to describe viewpoint discrimination in the past, the statement provides no support
15 for an inference that the University engaged in viewpoint discrimination at any time
16 relevant to the instant action. Indeed, as noted, Chancellor Christ states therein that
17 such practice is inconsistent with the University’s current policy (see FAC Ex. U at 4) and,
18 at the beginning of the above-referenced interview, she states that, while she may
19 disagree with the viewpoints of speakers, such as Ben Shapiro, she “believe[s] very
20 strongly” in their “right to speak on campus” (see id. at 1).

21 Plaintiffs’ reliance on statements made by Provost Alivisatos and Vice Chancellor
22 of Finance Rae is similarly unavailing. Plaintiffs allege that, “[i]n the days leading up to
23 the Shapiro [e]vent,” Provost Alivisatos “emailed the student body and employees,”
24 stating: “We are deeply concerned about the impact some speakers may have on
25 individuals’ sense of safety and belonging. No one should be made to feel threatened or
26 harassed simply because of who they are or for what they believe.” (See FAC ¶ 153.)
27 Next, plaintiffs allege that, “at the outset of the Shapiro [E]vent,” Vice Chancellor of
28 Finance Rae stated: “[A]t UC Berkeley, we respect the action and intention of public

1 protest . . . [University police] and the campus *will be making decisions* about how
2 disruptions at this event will be addressed.” (See id. ¶ 154 (emphasis in original).)

3 Plaintiffs have not alleged, however, any facts to show either such individual had
4 any authority as to the restrictions that were placed on plaintiffs’ events, and neither
5 statement suggests either such individual, on his/her own behalf or on behalf of any of
6 the defendants, sought to restrict Shapiro’s speech in any way, let alone “because of”
7 Shapiro’s point of view. Rather, the above-referenced statements reflect a not unfounded
8 concern for safety, as well as a need for flexibility in responding to any potential
9 disruption occurring at the time of the Shapiro event. Indeed, plaintiffs themselves voiced
10 concerns about the possibility of a “violent outbreak” at the Shapiro event. (See id. Ex. Q
11 (email from Berkeley College Republicans to University police, “request[ing] information
12 on how [University police] plan[ned] to respond in the case of a violent outbreak
13 surrounding the Ben Shapiro event”).)

14 **(2) Differential Treatment**

15 Plaintiffs also contend viewpoint discrimination may be inferred from defendants’
16 more favorable treatment of two “liberal speakers” (see FAC ¶ 4), who spoke on campus
17 on dates close to those of the scheduled Horowitz and Coulter events. Specifically,
18 plaintiffs allege that defendants, citing “security concerns” (see id. ¶ 61) imposed on the
19 Horowitz and Shapiro events, an undesirable 3:00 p.m. curfew, along with security fees
20 and venue restrictions, whereas “the former president of Mexico,” Vicente Fox Quesada
21 (“Fox”), was permitted to “speak on campus at 4:00 p.m. to hundreds of people, without
22 incident or interference from [d]efendants” (see id. ¶ 160), and Maria Echaveste, “former
23 presidential advisor and White House Deputy Chief of Staff to President Bill Clinton,” was
24 “not subjected” to the HPSP and was permitted to speak at a central location on campus
25 from 6:45 p.m. to 8:00 p.m., “without incident or interference from [d]efendants” (see id.
26 ¶¶ 98, 161).

27 Any inference of viewpoint discrimination is, however, soundly negated by
28 plaintiffs’ allegation that, before violence spurred an increased concern for security,

1 Yiannopoulos, “a contentious conservative writer [and] speaker,” obtained “all necessary
 2 approval” to speak on campus, and plaintiffs have not alleged that any restrictions were
 3 imposed in connection with that approval. (See id. ¶ 51.) Moreover, the FAC includes
 4 numerous allegations setting forth defendants’ repeated explanation that the restrictions
 5 imposed on plaintiffs’ events were prompted by safety concerns, and there are no
 6 allegations suggesting those concerns were unfounded, or that the Fox and Echaveste
 7 events raised any security concerns, let alone concerns that rose to the level of those
 8 that surrounded plaintiffs’ events. (See, e.g., FAC ¶ 67 (alleging plaintiffs received, in
 9 advance of Horowitz event, email from Stephen Sutton, University Vice Chancellor for
 10 Division of Student Affairs (“Vice Chancellor Sutton”), explaining time and venue location
 11 restrictions were implemented to “mitigate risk [and] ensure safety for all”); ¶ 103
 12 (alleging plaintiffs received, in advance of Coulter event, email from Ellen Topp, Interim
 13 Chief of Staff for Student Affairs, explaining, “[campus] police department has made it
 14 clear that they have very specific intelligence regarding threats that could pose a grave
 15 danger to [Coulter], attendees, and those who may wish to lawfully protest the event”); ¶
 16 150 (alleging plaintiffs received, in advance of Shapiro event, email from Vice Chancellor
 17 Sutton, explaining closure of venue’s balcony due to recent “violent incidents in the City
 18 of Berkeley”); see also id. Ex. A (email from Vice Chancellor Scott Bidy and Vice
 19 Chancellor Sutton) (stating University police “determined that, given currently active
 20 security threats, it is not possible to assure . . . the safety of Ms. Coulter, the event
 21 sponsors, audience, and bystanders”); Ex. T (decision from Vice Chancellor for
 22 Undergraduate Education Catherine Koshland on BCR’s appeal of balcony closure for
 23 Shapiro event) (upholding decision to close balcony; explaining, in light of recent violence
 24 in Berkeley, “the balcony poses an unnecessary risk to safety and security, even with
 25 perimeter security measures in place”).)

26 **b. Reasonableness of Restrictions**

27 As discussed above, any restrictions, in addition to being viewpoint neutral, must
 28 be “reasonable in light of the purpose served by the forum.” See Rosenberger, 515 U.S.

1 at 829.

2 Here, the University made the subject campus facilities available “to enabl[e]
3 student organizations and other groups to host a variety of events on campus and
4 thereby to supplement and enrich students’ educational experience.” (See FAC Ex. L at
5 1.) The Court thus analyzes the challenged restrictions in light of such purpose, which
6 restrictions, as noted, are the security fees, curfews, venue options, and attendance
7 limitations placed on the Horowitz, Coulter, and Shapiro events.

8 At the outset, the Court acknowledges that a reasonable restriction “need not be
9 the most reasonable or the only reasonable limitation,” see Seattle Mideast Awareness
10 Campaign, 781 F.3d at 501, and that, with regard to security fees, government officials
11 may, as defendants point out, “properly impose fees consistent with the First
12 Amendment” (see Reply at 10:18-19 (citing Cox v. State of New Hampshire, 312 U.S.
13 569, 577 (1941)). Any such fees, however, must be limited to the costs incurred in
14 administering the event. See Sullivan v. City of Augusta, 511 F.3d 16, 38 (1st Cir. 2007)
15 (noting “[t]he Supreme Court has held that the government cannot profit from imposing
16 licensing or permit fees on the exercise of a First Amendment right; further noting, “[o]nly
17 fees that cover the administrative expenses of the permit or license are permissible”)
18 (citing Murdock v. Pennsylvania, 319 U.S. 105, 113-14 (1943); Cox, 312 U.S. at 577). As
19 set forth below, the Court finds plaintiffs have sufficiently alleged a First Amendment
20 violation based on the imposition of an unreasonable fee.¹⁴

21 First, plaintiffs allege defendants charged a \$5788 “security fee” for the Horowitz
22 event (see FAC ¶ 68), which fee was imposed under the HPSP, a policy alleged to be
23 wholly lacking in standards by which the basis for such fee, let alone the reasonableness
24 thereof, could be assessed. Next, plaintiffs allege, defendants, under the MEP, initially
25 imposed a \$15,738 “security fee” for the Shapiro event, which fee was “approximately

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27 ¹⁴ In light of such finding, and given that the parties have not addressed the
28 constitutionality of each alleged restriction separately, the Court does not address herein
the reasonableness of the remaining restrictions.

1 three times the amount charged . . . for an event featuring Supreme Court Justice Sonia
2 Sotomayor in the same facility in 2011.” (See id. ¶ 142.) Although, as plaintiffs further
3 allege, the fee subsequently was reduced to \$9162 after defendants closed access to the
4 venue’s balcony area and thereby reduced audience capacity “from over 1,900, to just
5 over 1,042” (see FAC ¶¶ 141, 143, 150), the fee ultimately charged for the Shapiro event,
6 even adjusting for inflation, remains substantially above a fee of approximately \$5000 for
7 the Sotomayor event, which, in addition, may have involved a larger potential audience
8 as there is no allegation that the balcony was closed for that event.

9 In the absence of a pleaded explanation for any of the fees imposed, and where,
10 as here, an explanation is not otherwise apparent,¹⁵ such allegations suffice to support an
11 as-applied challenge.

12 **c. Conclusion: As-Applied Challenges**

13 Accordingly, for the reasons set forth above, to the extent plaintiffs’ First Claim for
14 Relief asserts an as-applied challenge predicated on the alleged unreasonableness of
15 the restrictions imposed, the claim is not subject to dismissal.

16 **B. First Amendment Retaliation (Second Claim for Relief)**

17 “The First Amendment forbids government officials from retaliating against
18 individuals for speaking out.” See Blair v. Bethel Sch. Dist., 608 F.3d 540, 543 (9th Cir.
19 2010). To allege a First Amendment retaliation claim, a plaintiff must show “(1) he was
20 engaged in a constitutionally protected activity, (2) the defendant’s actions would chill a
21 person of ordinary firmness from continuing to engage in the protected activity and (3) the
22 protected activity was a substantial or motivating factor in the defendant’s conduct.” See
23 Pinard v. Clatskanie Sch. Dist. 6J, 467 F.3d 755, 770 (9th Cir. 2006).

24 Here, plaintiffs contend defendants’ actions were taken in retaliation for plaintiffs’

25 _____
26 ¹⁵ Any safety concerns, for example, cannot be used to explain the difference
27 between the fees charged for the Shapiro and Sotomayor events; pursuant to the MEP,
28 “security fees [may] not be charged to event sponsors based on concerns that the subject
matter of the event or the viewpoints, opinions, or anticipated expression of the sponsors,
event performers, or others participating in the event might provoke disturbances or
response costs required by such disturbances.” (See id. Ex. L at 9.)

1 “holding and expressing conservative viewpoints by inviting conservative speakers to
2 speak on the [University] campus” (see Compl. ¶ 183), in particular, plaintiffs’ having
3 “engaged in a protected activity by inviting Milo Yiannopoulos to speak on campus” (see
4 Opp. at 21:16-17). The Court is not persuaded.

5 As discussed above, plaintiffs have pleaded the undisputed factual circumstances
6 prompting defendants’ safety concerns, and have alleged no facts supporting a finding of
7 discrimination or other animus. (See, e.g., FAC ¶¶ 52-55, 67, 86, 92, 103, 150 & Exs. A,
8 Q.) Consequently, as the factual allegations provide a “more likely explanation[]” than
9 that asserted by the plaintiff, the complaint fails to state a “plausible” claim. See Iqbal,
10 556 U.S. at 681-82.

11 Accordingly, plaintiffs’ Second Claim for Relief is subject to dismissal.

12 **C. Fourteenth Amendment Due Process (Third Claim for Relief)**

13 To support their Third Claim for Relief, which, as noted above, is based on an
14 allegation that each of the challenged policies is “impermissibly vague” (see Opp. at
15 23:15), plaintiffs must show (1) “a deprivation of a constitutionally protected interest,” and
16 (2) that “the deprivation was achieved by means of [the] constitutionally vague policy or
17 procedure.” See Williams v. Vidmar, 367 F. Supp. 2d 1265, 1274 (N.D. Cal. 2005) (citing
18 Zinermon v. Burch, 494 U.S. 113, 125 (1990)). A policy or procedure is impermissibly
19 vague if it “fails to provide a person of ordinary intelligence fair notice of what is
20 prohibited, or is so standardless that it authorizes or encourages seriously discriminatory
21 enforcement.” See United States v. Williams, 553 U.S. 285, 304 (2008).

22 **1. High-Profile Speaker Policy**

23 As noted, plaintiffs allege the HPSP is “unwritten and unpublished” (see FAC ¶ 2),
24 and that defendants “failed to provide any criteria making clear who is considered a ‘high-
25 profile’ speaker under the policy; to whom this policy has been applied since its
26 formation; or what, if anything, renders a particular venue on the UC Berkeley campus
27 ‘securable’” (see id. ¶ 56). As alleged, the HPSP thus is wholly lacking in standards to
28 guide enforcement, and, consequently, fails to give “fair notice,” see Williams, 553 U.S. at

1 304, of what conduct falls within the policy’s scope.

2 Accordingly, to the extent plaintiffs’ Third Claim for Relief is based on a challenge
3 to the HPSP, such claim is not subject to dismissal.

4 **2. Major Events Policy**

5 In bringing a Due Process challenge, “[a] plaintiff who engages in some conduct
6 that is clearly proscribed cannot complain of the vagueness of the law as applied to the
7 conduct of others.” See Holder v. Humanitarian Law Project, 561 U.S. 1, 20 (2010). As
8 noted above, the Court has found the challenged portions of the MEP, with the possible
9 exception of the Complexity Provision, to be sufficiently definite. To the extent plaintiffs’
10 vagueness challenge is based on the Complexity Provision, such claim is unavailing, as
11 the parties agree that the Shapiro event, the one event sponsored by plaintiffs to which
12 the MEP was applied and for which plaintiffs requested a room large enough to
13 accommodate at least 500 attendees (see FAC ¶ 133), would have been classified as a
14 “Major Event” regardless of the Complexity Provision (see id. Ex. L at 2 (defining “Major
15 Event” to include any event for which “[o]ver 200 persons are anticipated to attend”).

16 Accordingly, to the extent plaintiffs’ Third Claim for Relief is based on a challenge
17 to the MEP, such claim is subject to dismissal.

18 **D. Fourteenth Amendment Equal Protection (Fourth Claim for Relief)**

19 As discussed above, plaintiffs’ First Amendment claim is not wholly subject to
20 dismissal. Once a plaintiff has sufficiently pleaded a First Amendment violation, such
21 plaintiff, in order to state an Equal Protection claim, must show he/she was treated
22 differently than another person, that the two “are in all relevant respects alike,” see
23 Nordlinger v. Hahn, 505 U.S. 1, 10 (1992), and that such differential treatment was not
24 “finely tailored to serve substantial interests,” see A.C.L.U of Nevada v. City of Las
25 Vegas, 466 F.3d 784, 798 (9th Cir. 2006) (holding strict scrutiny applies to Equal
26 Protection claim where government action has infringed First Amendment rights).

27 Here, plaintiffs base their Equal Protection claim on the above-described
28 differences between the manner in which their events were handled and the manner in

1 which the Fox, Echaveste, and Sotomayor events were handled. As set forth above in
 2 Section A, plaintiffs have failed to allege they and the hosts of the Fox and Echaveste
 3 events were “in all relevant respects alike.” See Nordlinger, 505 U.S. at 10. Plaintiffs
 4 have, however, for the reasons also set forth in Section A, alleged sufficient facts to show
 5 plaintiffs and the hosts of the Sotomayor event were, with regard to the fees imposed on
 6 the Shapiro and Sotomayor events, similarly situated, and, given the substantial
 7 difference in those fees, without any explanation discernible from the facts alleged in the
 8 complaint or otherwise apparent, the Court finds plaintiffs have pleaded sufficient facts to
 9 state an Equal Protection Claim based thereon.

10 Accordingly, plaintiffs’ Fourth Cause of Action, to the extent based on the Fox and
 11 Echaveste events, is subject to dismissal, and, to the extent based on the Sotomayor
 12 event, is not subject to dismissal.

13 **E. Qualified Immunity**

14 “The doctrine of qualified immunity shields officials from civil liability so long as
 15 their conduct does not violate clearly established statutory or constitutional rights of which
 16 a reasonable person would have known.” See Mullenix v. Luna, 136 S. Ct. 305, 308
 17 (2015) (internal quotation and citation omitted). A “clearly established” right is one
 18 “sufficiently clear that every reasonable official would have understood that what he is
 19 doing violates that right.” See id. (internal quotation and citation omitted). Although there
 20 need not be a case “directly on point, . . . existing precedent must have placed the
 21 statutory or constitutional question beyond debate.” See id. (internal quotation and
 22 citation omitted).

23 Here, to the extent plaintiffs assert a claim for damages based on the Complexity
 24 Provision, the Court finds defendants are entitled to qualified immunity. Although, as
 25 discussed at the February 16 hearing, such provision could be deemed impermissibly
 26 vague and to afford an impermissible amount of discretion, its wording is not so deficient
 27 that “every reasonable official would have understood” it to be unconstitutional. Indeed,
 28 plaintiffs have not cited, and the Court has not found, any authority placing the provision’s

1 constitutional “beyond debate.” See id.; Ashcroft v. al-Kidd, 563 U.S. 731, 743 (2011)
 2 (holding qualified immunity “gives government officials breathing room to make
 3 reasonable but mistaken judgments about open questions of law”); see also Reichle v.
 4 Howards, 566 U.S. 658, 664 (2012) (holding “courts may grant qualified immunity on the
 5 ground that a purported right was not ‘clearly established’ by prior case law, without
 6 resolving the often more difficult question whether the purported right exists at all”).

7 As to plaintiffs’ remaining claims, although the Supreme Court has “stressed the
 8 importance of resolving immunity questions at the earliest possible stage in litigation,”
 9 see Pearson v. Callahan, 555 U.S. 223, 232 (2009), the Court, in light of unresolved
 10 factual issues pertaining to defendants’ stated security concerns, finds it preferable to
 11 defer resolution of the immunity question until the record is more fully developed.

12 **F. Punitive Damages**

13 A plaintiff alleging a § 1983 violation pleads a claim for punitive damages where
 14 the complaint includes facts sufficient to show the defendant’s conduct was “motivated by
 15 evil motive or intent, or . . . involve[d] reckless or callous indifference to the federally
 16 protected rights of others.” See Smith v. Wade, 461 U.S. 30, 56 (1983). Here,
 17 defendants contend plaintiffs have failed “to allege sufficient facts” to support an award of
 18 punitive damages. (See Reply at 18:18.)¹⁶ The Court agrees.

19 As discussed above, plaintiffs have failed to plead facts sufficient to show
 20 defendants were motivated by viewpoint discrimination or retaliatory animus. The FAC
 21 contains no alternative factual basis for a finding of improper motive, nor does it allege
 22 any facts sufficient to show defendants acted with “reckless or callous indifference” to
 23 plaintiffs’ rights.

24
 25 ¹⁶ Contrary to plaintiffs’ contention, a claim for damages, “by itself” (see Opp. at
 26 30:8), can be dismissed pursuant to Rule 12(b)(6) where such dismissal is based on a
 27 failure to allege sufficient facts to support recovery. See Whittlestone, Inc. v. Handi-Craft
 28 Co., 618 F.3d 970, 974 (9th Cir. 2010) (holding motion pursuant to Rule 12(b)(6), rather
 than 12(f), proper vehicle for challenging claim for damages at pleading stage); Williams
v. Cty. of Alameda, 26 F. Supp. 3d 925, 948-49 (N.D. Cal. Feb. 10, 2014) (dismissing
 claim for punitive damages pursuant to Rule 12(b)(6)).

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Accordingly, plaintiffs' claim for punitive damages is subject to dismissal.

CONCLUSION

For the reasons set forth above, defendants' motion is hereby GRANTED in part and DENIED in part as follows:

1. As to plaintiffs' First Claim for Relief, to the extent such claim is based on a facial challenge to the MEP, the motion is hereby GRANTED, and, to the extent such claim is based on a facial challenge to the HPSP, and asserts an as-applied challenge to the HPSP and MEP predicated on the alleged unreasonableness of the restrictions imposed, the motion is hereby DENIED.

2. As to plaintiffs' Second Claim for Relief, the motion to dismiss is hereby GRANTED.

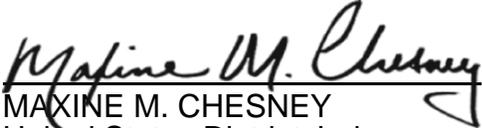
3. As to plaintiffs' Third Claim for Relief, to the extent such claim is based on a challenge to the MEP, the motion is hereby GRANTED, and, to the extent such claim is based on a challenge to the HPSP, the motion is hereby DENIED.

4. As to plaintiffs' Fourth Claim for Relief, to the extent such claim is based on the Fox and Echaveste events, the motion is hereby GRANTED, and, to the extent such claim is based on the Sotomayor event, the motion is hereby DENIED.

5. As to plaintiffs claim for punitive damages, the motion is hereby GRANTED.

IT IS SO ORDERED

Dated: April 25, 2018


MAXINE M. CHESNEY
United States District Judge