

United States District Court  
Northern District of California

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

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

KIARA ROBLES,  
  
Plaintiff,  
  
v.  
  
IN THE NAME OF HUMANITY, WE  
REFUSE TO ACCEPT A FASCIST  
AMERICA, et al.,  
  
Defendants.

Case No. 17-cv-04864-CW

ORDER GRANTING THE REGENTS'  
MOTION TO DISMISS; GRANTING  
BERKELEY'S MOTION TO DISMISS;  
AND GRANTING IN PART  
MIRABDAL'S MOTION TO DISMISS  
OR STRIKE PURSUANT TO ANTI-  
SLAPP STATUTE

(Dkt. Nos. 11, 16, 43)

Plaintiff Kiara Robles filed this suit against Defendants In  
the Name of Humanity, We REFUSE to Accept a Fascist America  
(ANTIFA), The Regents of the University of California (Regents),  
University of California Police Department (UCPD), the City of  
Berkeley (Berkeley), Ian Dabney Miller, Raha Mirabdal, and DOES  
1-20. Docket No. 15. On October 2, 2017, Berkeley moved to  
dismiss the complaint. Docket No. 11. On October 4, 2017, the  
Regents also moved to dismiss the complaint. Docket No. 16. On  
February 8, 2018, Mirabdal moved to dismiss the complaint or to

1 strike it pursuant to the anti-SLAPP statute. Docket No. 43.  
2 The Court found these motions to dismiss suitable for disposition  
3 on the papers. Having reviewed the papers and the record, the  
4 Court GRANTS Berkeley's motion to dismiss, GRANTS the Regents'  
5 motion to dismiss, and GRANTS IN PART Mirabdal's motion to  
6 dismiss or strike.

7 BACKGROUND

8 I. Factual Background

9 Unless otherwise noted, the factual background is taken from  
10 the complaint, which is assumed to be true for purposes of  
11 Defendants' motions to dismiss or strike.

12 Robles is a resident of Oakland, California. Complaint at  
13 3. On February 1, 2017, she planned to attend a speech by Milo  
14 Yiannopoulos, a conservative gay media personality and political  
15 commentator, which was hosted at the University of California  
16 Berkeley (UC Berkeley) by a registered student organization. Id.  
17 3-4, ¶ 44. The Regents controls, administers, and manages UC  
18 Berkeley. Id. ¶ 6. Robles and others arrived at UC Berkeley's  
19 Sproul Plaza to hear Yiannopoulos speak. Id. at 3.

20 Around 1,500 protestors associated with ANTIFA also gathered  
21 at Sproul Plaza. Id. According to Robles, ANTIFA is "a radical  
22 American, left wing, anti-Trump, non-profit organization that  
23 organizes demonstrations to achieve its political agenda." Id.  
24 at 4. ANTIFA protestors soon "erupted into violence." Id. at 3.  
25 ANTIFA orchestrated the violence in order to disrupt the  
26 Yiannopoulos event. Id. ¶ 48. While Robles was being  
27 interviewed by news station KGO-TV about her thoughts related to  
28 the event, protestors surrounded her "combatively" and yelled

1 that she was a "fascist." Id. ¶ 49. Robles was attacked by both  
2 masked and unmasked assailants with pepper spray and bear mace.  
3 Id. at 3, ¶¶ 50-51.

4 At the time of the attack, there were "no campus police  
5 close enough to Robles to protect her from her assaulter." Id.  
6 ¶ 52. Robles alleges that "nearly 100 campus police and SWAT  
7 members waited in the Student Union building, within eyesight of  
8 the violence happening outside, watching the protestors become  
9 more belligerent and dangerous." Id. (emphasis omitted). Robles  
10 alleges that officers from UCPD and the City of Berkeley Police  
11 Department (BPD) could see the attacks, yet they did not act to  
12 protect any of the victims. Id. ¶ 54.

13 Soon after, Robles and others were again attacked by  
14 protestors. Miller, an ANTIFA protestor, "struck" Robles "in the  
15 face and body with flagpoles" until she "was forced to escape by  
16 jumping over a metal barrier." Id. ¶ 55. Mirabdal, another  
17 ANTIFA protestor, and several unknown assailants "surrounded" her  
18 "combatively," and Mirabdal "shined a flashlight aggressively" in  
19 Robles' face, "blinding" her and "placing her in fear and  
20 apprehension of harm." Id. ¶ 64. Again, neither the UCPD or BPD  
21 assisted Robles or apprehended her attackers. Id. ¶ 66.

22 II. Procedural Background

23 On June 5, 2017, Robles filed a related suit, Robles I,  
24 against nearly all of the Defendants in the present suit -- the  
25 Regents, UCPD, BPD, ANTIFA, Miller and Mirabdal -- as well as  
26 several others -- Janet Napolitano, President of the University  
27 of California; Monica Lozano, Chair of the Regents; Nicholas  
28 Dirks, Chancellor of UC Berkeley; the Coalition to Defend

1 Affirmative Action, Integration, & Immigrant Rights, and Fight  
2 for Equality by Any Means Necessary; Jesse Arreguin, mayor of  
3 Berkeley; Margo Bennett, Chief of the UCPD; Andrew Greenwood,  
4 Chief of the BPD; John Burton, California Democratic Party  
5 Chairman; Nancy Pelosi, Minority Leader of the House of  
6 Representatives; George Soros, an individual; and DOES 1-20.  
7 Robles I, Case No. 17-3235, Docket No. 1. Id. In her Robles I  
8 complaint, she asserted claims for: (1) violation of First  
9 Amendment rights under 42 U.S.C. § 1983; (2) violation of Equal  
10 Protection rights under 42 U.S.C. § 1983; (3) negligence;  
11 (4) gross negligence; (5) premises liability; (6) negligent  
12 infliction of emotional distress; (7) intentional infliction of  
13 emotional distress; (8) assault; (9) battery; and (10) violation  
14 of Bane Act, California Civil Code section 52.1. Id. On July  
15 13, 2017, BPD, Arreguin, and Greenwood moved to dismiss the  
16 complaint. Id., Docket No. 46. On July 17, 2017, the Regents,  
17 Bennett, Dirks, Lozano, and Napolitano also moved to dismiss the  
18 complaint. Id., Docket No. 51. One day later, Soros moved to  
19 dismiss the complaint. Id., Docket No. 52. Before the motions  
20 could be decided, Robles requested that the undersigned  
21 voluntarily recuse from the case. Id., Docket No. 50. This  
22 request was denied on July 25, 2017. Id., Docket No. 56. On  
23 that same day, Robles voluntarily dismissed the case. Id.,  
24 Docket No. 57.

25 Less than a month later, on August 22, 2017, Robles filed  
26 the instant suit, Robles II, against the Regents, Berkeley, UCPD,  
27 ANTIFA, Miller, and Mirabdal. Docket No. 1. Robles II involves  
28 the same set of facts as Robles I and nearly the same set of

1 asserted claims, adding only one additional claim for a violation  
2 of the Ralph Act, California Civil Code section 51.7. Id.  
3 Berkeley filed a motion to relate the two cases, which the Court  
4 granted. Robles I, Case No. 17-3235, Docket Nos. 58, 59.  
5 Berkeley, the Regents, and Mirabdal have moved to dismiss or  
6 strike the complaint. Docket Nos. 11, 16, 43. On October 24,  
7 2017, Miller filed an answer to the complaint. Docket No. 26.  
8 The UCPD and ANTIFA have not filed an answer or motion to  
9 dismiss.<sup>1</sup>

10 LEGAL STANDARD

11 A complaint must contain a "short and plain statement of the  
12 claim showing that the pleader is entitled to relief." Fed. R.  
13 Civ. P. 8(a). The plaintiff must proffer "enough facts to state  
14 a claim to relief that is plausible on its face." Ashcroft v.  
15 Iqbal, 556 U.S. 662, 678 (2009) (quoting Bell Atl. Corp. v.  
16 Twombly, 550 U.S. 544, 570 (2007)). On a motion under Rule  
17 12(b)(6) for failure to state a claim, dismissal is appropriate  
18 only when the complaint does not give the defendant fair notice  
19 of a legally cognizable claim and the grounds on which it rests.  
20 Twombly, 550 U.S. at 555. A claim is facially plausible "when  
21 the plaintiff pleads factual content that allows the court to  
22 draw the reasonable inference that the defendant is liable for  
23 the misconduct alleged." Iqbal, 556 U.S. at 678.

24 In considering whether the complaint is sufficient to state  
25

---

26 <sup>1</sup> As Robles has not filed proof of service for these  
27 entities, the Court cannot determine whether these parties have  
28 been served within the ninety-day time limit of Federal Rule of  
Civil Procedure 4(m). Robles shall file proof of service within  
fourteen days of this order.

1 a claim, the court will take all material allegations as true and  
2 construe them in the light most favorable to the plaintiff.  
3 Metzler Inv. GMBH v. Corinthian Colleges, Inc., 540 F.3d 1049,  
4 1061 (9th Cir. 2008). The court's review is limited to the face  
5 of the complaint, materials incorporated into the complaint by  
6 reference, and facts of which the court may take judicial notice.  
7 Id. at 1061. However, the court need not accept legal  
8 conclusions, including threadbare "recitals of the elements of a  
9 cause of action, supported by mere conclusory statements."  
10 Iqbal, 556 U.S. at 678 (citing Twombly, 550 U.S. at 555).

11 When granting a motion to dismiss, the court is generally  
12 required to grant the plaintiff leave to amend, even if no  
13 request to amend the pleading was made, unless amendment would be  
14 futile. Cook, Perkiss & Liehe, Inc. v. N. Cal. Collection Serv.  
15 Inc., 911 F.2d 242, 246-47 (9th Cir. 1990). In determining  
16 whether amendment would be futile, the court examines whether the  
17 complaint could be amended to cure the defect requiring dismissal  
18 "without contradicting any of the allegations of [the] original  
19 complaint." Reddy v. Litton Indus., Inc., 912 F.2d 291, 296 (9th  
20 Cir. 1990).

21 DISCUSSION

22 I. The Regents' Motion to Dismiss

23 Robles asserts nine claims against the Regents: violation of  
24 her First Amendment rights based on the Regents' alleged  
25 withholding of police protection; violation of equal protection  
26 based on her sexual orientation and political viewpoint;  
27 negligence; gross negligence; premises liability; negligent  
28 infliction of emotional distress; intentional infliction of

1 emotional distress; violation of California's Bane Act; and a  
2 claim for injunctive relief. The Regents contend that all of  
3 these claims should be dismissed.

4 A. Eleventh Amendment

5 The Regents first asserts that Robles' First Amendment and  
6 equal protection claims are barred by the Eleventh Amendment.  
7 Robles brings both of these claims pursuant to 42 U.S.C. § 1983,  
8 which creates a federal right of action against "[e]very person"  
9 who, under color of law, deprives a person of federal  
10 constitutional rights. See 42 U.S.C. § 1983; Will v. Michigan  
11 Dep't of State Police, 491 U.S. 58, 68 (1989). It is well-  
12 established that states and governmental entities considered  
13 "arms of the State" are immune from suits brought in federal  
14 court under the Eleventh Amendment and are not "persons" subject  
15 to suit under § 1983. Will, 491 U.S. at 70-71; Pennhurst State  
16 Sch. & Hosp. v. Halderman, 465 U.S. 89, 100, 104 (1984). The  
17 Ninth Circuit has ruled on multiple occasions that the "Regents,  
18 a corporation created by the California constitution, is an arm  
19 of the state for Eleventh Amendment purposes, and therefore is  
20 not a 'person' within the meaning of section 1983." Armstrong v.  
21 Meyers, 964 F.2d 948, 949-50 (9th Cir. 1992). See also BV Eng'g  
22 v. Univ. of California, Los Angeles, 858 F.2d 1394, 1395 (9th  
23 Cir. 1988) (quoting Jackson v. Hayakawa, 682 F.2d 1344, 1360 (9th  
24 Cir. 1982)) (holding that the Regents is "considered to be an  
25 instrumentalit[y] of the state, and therefore enjoy[s] the same  
26 immunity as the state of California.") (internal quotation marks  
27 and citations omitted). Thus, Robles' § 1983 claims against the  
28 Regents cannot be sustained.

1           The Eleventh Amendment also bars Robles' state law claims  
2 against the Regents. The Eleventh Amendment bars state law  
3 claims which are brought into federal court under pendent  
4 jurisdiction. Pennhurst State Sch. & Hosp., 465 U.S. at 121.  
5 This is because pendent jurisdiction, a judge-made doctrine of  
6 discretion based on considerations of efficiency, cannot override  
7 the Eleventh Amendment, a "constitutional limitation on the  
8 authority of the federal judiciary to adjudicate suits against  
9 the State." Id. at 121-23. Accordingly, Robles' state law  
10 claims against the Regents are also barred.

11           Robles argues that the Regents is not entitled to immunity  
12 under the Eleventh Amendment in this case because it was not  
13 functioning as an arm of the state. Relying on the Ninth  
14 Circuit's decision in Doe v. Lawrence Livermore Nat. Lab., 65  
15 F.3d 771, 775 (9th Cir. 1995), which was reversed by the Supreme  
16 Court in Regents of the Univ. of California v. Doe, 519 U.S. 425  
17 (1997), Robles argues that the Regents "is an enormous entity  
18 which functions in various capacities and which is not entitled  
19 to Eleventh Amendment immunity for all of its functions." Opp.  
20 at 6. Robles contends that the Regents' intentional withholding  
21 of police protection during the event had nothing to do with any  
22 official functions, but rather the Regents' own personally held  
23 beliefs.

24           Robles' argument is misguided. Even assuming that it was  
25 not overruled by the Supreme Court in Regents, the holding in Doe  
26 cited by Robles merely notes that there are exceptions to  
27 immunity for certain types of actions. Doe, 65 F.3d at 775. For  
28 example, the Doe court cited cases where immunity did not apply



1 to the Regents because "Congress has abrogated [its] immunity  
2 from suit in federal court for violation of patent law" and it  
3 "waived its Eleventh Amendment immunity by signing a government  
4 contract that contemplated possible suits against it in federal  
5 court and by entering into a federally regulated area." Id.  
6 Robles fails to explain why an exception applies to this  
7 situation. Indeed, as discussed above, controlling Ninth Circuit  
8 precedent holds that the Regents "is an arm of the state for  
9 Eleventh Amendment purposes," "is not a 'person' within the  
10 meaning of section 1983," and therefore is immune to § 1983  
11 claims. See Armstrong, 964 F.2d at 949-50. Robles does not  
12 provide any reason to depart from this precedent. Her argument  
13 is about the Regents' intent in allegedly withholding police  
14 protection, but the Regent's intent is not relevant to the  
15 analysis.

16 Accordingly, the Eleventh Amendment bars all of Robles'  
17 claims against the Regents, which are dismissed from the case.  
18 The Court therefore need not discuss the Regents' other grounds  
19 for dismissal.

20 In a footnote, Robles seeks leave to amend her claims "to  
21 add the individual decision and policy makers responsible for  
22 ordering the stand-down to UCPD during the Mr. Yiannopoulos  
23 event." Opp. at 6 n.14. The Regents argues that amendment would  
24 be futile because Robles already named several individual  
25 defendants in Robles I, alleging no facts showing that these  
26 individuals acted in their personal capacities, and then did not  
27 name the individual defendants at all in Robles II. Because it  
28 is not clear that amendment would be futile, Robles' request for

1 leave to amend her claims against the Regents is granted. Robles  
2 may attempt to avoid Eleventh Amendment immunity by alleging  
3 these claims against individual actors in their personal  
4 capacities.

5 II. Berkeley's Motion to Dismiss

6 Berkeley moves to dismiss Robles' claims based on the  
7 following grounds: (1) with respect to the first and second  
8 claims, failure to state a claim for Monell liability; (2) with  
9 respect to the sixth, seventh, and tenth claims, failure to  
10 exhaust administrative remedies; and (3) with respect to the  
11 twelfth claim, failure to state a claim for injunctive relief.

12 A. Monell liability

13 Robles brought her first and second claims against Berkeley  
14 pursuant to 42 U.S.C. § 1983, alleging that Berkeley violated her  
15 First and Fourteenth Amendment rights by willfully withholding  
16 police protection at the Yiannopoulos event.

17 Berkeley contends that Robles' § 1983 claims are not tenable  
18 because she does not allege that they were carried out according  
19 to a municipal policy or custom. It is well-established that "a  
20 local government may not be sued under § 1983 for an injury  
21 inflicted solely by its employees or agents." Monell v. Dep't of  
22 Soc. Servs. of City of New York, 436 U.S. 658, 694 (1978).

23 Instead, a municipality only faces liability under § 1983 when  
24 the "execution of a government's policy or custom, whether made  
25 by its lawmakers or by those whose edicts or acts may fairly be  
26 said to represent official policy, inflicts the injury." Id.  
27 Robles alleges that Berkeley police officers, at the direction of  
28 the Regents, chose to withhold their aid to the attendees of the

1 event due to the officers' animus against those who do not  
2 subscribe to their "ultra-leftist, radical philosophies." Opp.  
3 at 3-4 (quoting Complaint ¶¶ 25, 27-42). Robles gives two  
4 alternative reasons for the Berkeley police officers' actions:  
5 they either followed the direction of the Regents or had personal  
6 animus against the event participants. Neither shows that  
7 Berkeley implemented a custom or policy that caused Robles'  
8 constitutional injury. Nor does Robles allege that Berkeley was  
9 deliberately indifferent to the fact that training or supervision  
10 was required to prevent constitutional violations. Bd. of Cty.  
11 Comm'rs of Bryan Cty., Okl. v. Brown, 520 U.S. 397, 407 (1997).  
12 Accordingly, Robles' first and second claims must be dismissed.

13 B. Government Tort Claims Act

14 Berkeley contends that Robles did not present her state law  
15 claims to the city prior to filing them in federal court, and  
16 thus did not administratively exhaust her claims. Under the  
17 California Tort Claims Act, "a plaintiff must timely file a claim  
18 for money or damages with the public entity" before bringing suit  
19 against that entity." California v. Superior Court of Kings  
20 County (Bodde), 32 Cal. 4th 1234, 1237 (2004) (citing Cal. Gov.  
21 Code § 900 et seq.). "The failure to do so bars the plaintiff  
22 from bringing suit against that entity." Id. Moreover, because  
23 this is not only a procedural requirement, but "a condition  
24 precedent to plaintiff's maintaining an action against  
25 defendant," the plaintiff must plead compliance with this  
26 condition precedent in her complaint. Id. at 1240.

27 Robles does not contest that she did not comply with the  
28 California Tort Claims Act. Instead, she argues that she was not

1 required to do so because it would have been futile. "A  
2 plaintiff need not pursue administrative remedies where the  
3 agency's decision is certain to be adverse." Howard v. Cty. of  
4 San Diego, 184 Cal. App. 4th 1422, 1430 (2010). According to  
5 Robles, it would have been futile to seek administrative relief  
6 because a "favorable decision would force BPD to admit that they  
7 willfully ignored their sworn duties and withheld their services  
8 based on political and other biases." Opp. at 5. This is  
9 insufficient to establish application of the futility exception,  
10 which requires a plaintiff to show "that the agency has declared  
11 what its ruling will be on a particular case." Howard, 184 Cal.  
12 App. 4th at 1430 (internal quotation marks and brackets omitted).  
13 Robles does not allege that Berkeley ever declared that it would  
14 reject her claims. Berkeley's actions giving rise to Robles'  
15 claims cannot also serve as Berkeley's rejection of those same  
16 claims. Thus, the futility exception does not apply here and  
17 Robles' state law claims against Berkeley must be dismissed.

18 C. Injunctive Relief Claim

19 Berkeley correctly contends that Robles' twelfth claim, for  
20 injunctive relief, is improper because injunctive relief is a  
21 remedy, not a cause of action. Ajetunmobi v. Clarion Mortg.  
22 Capital, Inc., 595 F. App'x 680, 684 (9th Cir. 2014).  
23 Accordingly, it must be dismissed.

24 In sum, all of Robles' claims against Berkeley must be  
25 dismissed. The Court grants Robles leave to amend her first and  
26 second claims to attempt to state a claim for Monell liability.  
27 Because Robles concedes that she did not present her claims to  
28 the city pursuant to the California Tort Claims Act, and the

1 Court has already found that it would not have been futile to do  
2 so, amendment of her sixth, seventh, and tenth claims would  
3 appear to be futile. Thus, the Court will not grant leave to  
4 amend these claims.<sup>2</sup> The Court also will not grant leave to amend  
5 the twelfth claim for injunctive relief because amendment would  
6 be futile.

7 III. Mirabdal's Motion to Dismiss or Strike

8 A. Motion to Dismiss

9 Mirabdal asserts that the complaint fails sufficiently to  
10 plead the assault, battery, and Bane Act claims asserted against  
11 her. The only factual allegations in the complaint that directly  
12 refer to Mirabdal are as follows:

13 62. Mirabdal was also present at the Milo Yiannopoulos  
14 event.

15 63. Mirabdal is a member of the radical American, left  
16 wing, anti-Trump, non-profit organization funded by  
17 George Soros, ANTIFA, and carried out the assault on  
18 Plaintiff Robles at the direction of ANTIFA and in  
19 concert with each and every Defendant.

20 64. After Mirabdal and several unknown assailants  
21 surrounded Plaintiff Robles combatively, Mirabdal  
22 shined a flashlight aggressively in Plaintiff Robles'  
23 face, blinding Plaintiff Robles and placing her in fear  
24 and apprehension of harm.

25 65. Mirabdal further beat peaceful Milo Yiannopoulos  
26 supporters with a wooden sign post during the UC  
27 Berkeley riot.

28 In short, Robles alleges only that Mirabdal "surrounded" her  
"combatively" and "shined a flashlight aggressively" in her face,  
"blinding" her and "placing her in fear and apprehension of

---

29 <sup>2</sup> Robles may, however, seek leave to amend if she can allege  
30 new facts showing compliance with the California Tort Claims Act.  
31 Cf. California, 32 Cal. 4th at 1243-44 (discussing mechanisms to  
32 present a late claim).

1 harm."

2 1. Battery

3 In California, the elements of battery are: "(1) defendant  
4 touched plaintiff, or caused plaintiff to be touched, with the  
5 intent to harm or offend plaintiff; (2) plaintiff did not consent  
6 to the touching; (3) plaintiff was harmed or offended by  
7 defendant's conduct; and (4) a reasonable person in plaintiff's  
8 position would have been offended by the touching." Lawrence v.  
9 City & Cty. of San Francisco, 258 F. Supp. 3d 977, 998 (N.D. Cal.  
10 2017) (quoting So v. Shin, 212 Cal. App. 4th 652, 669 (2013)).

11 Mirabdal contends that the complaint fails to state a claim  
12 for battery because it does not allege that Mirabdal actually  
13 touched Robles. Robles responds that a defendant need not  
14 directly touch the plaintiff; rather, "any forcible contact  
15 brought about by an object or substance thrown or launched or set  
16 in motion by a defendant" could satisfy the touch requirement.  
17 Inter-Ins. Exch. of Auto. Club of S. Cal. v. Lopez, 238 Cal. App.  
18 2d 441, 445 (1965). Robles' theory of liability is that Mirabdal  
19 caused the flashlight's beam to "touch" Robles.

20 Robles' theory appears to raise an issue of first  
21 impression: whether shining a light beam at someone constitutes  
22 touching sufficient to satisfy the first element of battery under  
23 California law. Courts have held that tobacco smoke, as  
24 "particulate matter," has the physical properties capable of  
25 making contact. See, e.g., Leichtman v. WLW Jacor  
26 Communications, 92 Ohio App. 3d 232, 235 (1994). Mirabdal  
27 argues, however, that light, unlike smoke, is intangible. She  
28 further argues that tort law "has long distinguished between

1 tangible and intangible invasions and has deemed invasions by  
2 light to be the latter." In re WorldCom, Inc., 546 F.3d 211, 219  
3 (2d Cir. 2008). Thus, "it is not trespass to project light,  
4 noise or vibrations" -- i.e., intangible invasions -- "across or  
5 onto the land of another." Id.

6 The Court does not find Mirabdal's distinction between light  
7 and smoke to be persuasive. The Supreme Court has stated in the  
8 context of criminal battery that common-law battery may be  
9 accomplished by using an intangible substance, such as light.  
10 See United States v. Castleman, 134 S. Ct. 1405, 1414-15 (2014)  
11 ("'[A] battery may be committed by administering a poison or by  
12 infecting with a disease, or even by resort to some intangible  
13 substance,' such as a laser beam.").

14 A Virginia Court of Appeals case considering a similar issue  
15 is instructive. In Adams v. Virginia, the court considered  
16 whether shining a laser at someone constitutes touching for the  
17 purpose of the crime of battery. 33 Va. App. 463, 469 (2000).  
18 There, the court noted:

19 Because substances such as light or sound become  
20 elusive when considered in terms of battery, contact by  
21 means of such substances must be examined further in  
22 determining whether a touching has occurred. Such a  
23 test is necessary due to the intangible nature of those  
24 substances and the need to limit application of such a  
25 principle (touching by intangible substances) to  
26 reasonable cases. Because the underlying concerns of  
battery law are breach of the peace and sacredness of  
the person, the dignity of the victim is implicated and  
the reasonableness and offensiveness of the contact  
must be considered. Otherwise, criminal convictions  
could result from the routine and insignificant  
exposure to concentrated energy that inevitably results  
from living in populated society.

27 Id. at 469-70. Accordingly, the court held that "for purposes of  
28 determining whether a battery has occurred, contact by an

1 intangible substance such as light must be considered in terms of  
2 its effect on the victim" and "to prove a touching, the evidence  
3 must prove that the substance made objectively offensive or  
4 forcible contact with the victim's person resulting in some  
5 manifestation of a physical consequence or corporeal hurt." Id.  
6 at 470.

7 The same reasoning applies to the tort of battery, which  
8 should be limited to reasonable cases. Thus, because the contact  
9 here was effected by an intangible substance, light, the Court  
10 will closely scrutinize whether the substance "made objectively  
11 offensive or forcible contact with the victim's person resulting  
12 in some manifestation of a physical consequence or corporeal  
13 hurt," which goes to the third and fourth elements of battery.  
14 See id. It is conceivable that an intangible substance could  
15 cause "some manifestation of physical consequence or corporeal  
16 hurt"; for example, a high-intensity laser directed at a person's  
17 eye could cause lasting physical harm to the eye. Where an  
18 intangible substance causes no physical harm, however, it is  
19 unlikely to be offensive in a reasonably objective way.

20 Here, Robles alleges that Mirabdal shined a flashlight beam  
21 at her, "blinding" her. Complaint ¶ 64. If Robles was "blinded"  
22 such that she suffered serious, permanent physical eye injury,  
23 then that would undoubtedly constitute physical harm, as Robles  
24 suggests. Opp at 4. However, this allegation appears to be  
25 figurative rather than literal. As a result, Robles has not  
26 plead that she was harmed by the contact. Accordingly, Robles'  
27 battery claim must be dismissed with leave to amend.  
28



2. Assault

1 In California, a claim for assault requires a plaintiff to  
2 show: "(1) defendant acted with intent to cause harmful or  
3 offensive contact, or threatened to touch plaintiff in a harmful  
4 or offensive manner; (2) plaintiff reasonably believed she was  
5 about to be touched in a harmful or offensive manner or it  
6 reasonably appeared to plaintiff that defendant was about to  
7 carry out the threat; (3) plaintiff did not consent to  
8 defendant's conduct; (4) plaintiff was harmed; and  
9 (5) defendant's conduct was a substantial factor in causing  
10 plaintiff's harm." Lawrence, 258 F. Supp. 3d at 998 (quoting So,  
11 212 Cal. App. 4th at 668-69).

12 Mirabdal contends that the complaint does not allege that  
13 she intentionally threatened to touch Robles in a harmful or  
14 offensive manner, nor does it allege that Robles reasonably  
15 believed she was about to be touched in a harmful or offensive  
16 manner or that it reasonably appeared to her that Robles was  
17 about to carry out the threat. Robles responds that the  
18 complaint alleges Mirabdal aggressively shined a flashlight in  
19 her eyes and that Mirabdal, along with others, "surrounded" her  
20 "combatively."<sup>3</sup> These allegations do not, however, show that  
21 Mirabdal committed a "demonstration of an unlawful intent by one  
22 person to inflict immediate injury on the person of another  
23 then present." Plotnik v. Meihaus, 208 Cal. App. 4th 1590, 1603-  
24 04 (2012). In Plotnik, defendants approached the plaintiff  
25

---

26  
27 <sup>3</sup> Robles' allegation that Mirabdal beat other individuals  
28 with a wooden sign post is inapposite because Robles does not  
contend that Mirabdal did so in a way that threatened Robles.

1 "aggressively" and threatened to beat and kill him. Id. at 1604.  
2 The court held that, while the defendants' "actions and words  
3 were aggressive and threatening," they did not commit an act that  
4 "could or was intended to inflict immediate injury on Plotnik."  
5 Id. (internal punctuation and brackets omitted). The defendants  
6 did not display a weapon, take a swing at him, or otherwise  
7 attempt to touch him. Id.

8 The same is true here. Robles's allegations do not  
9 establish that Mirabdal committed an act that could or was  
10 intended to inflict immediate injury on Robles. Mirabdal's  
11 alleged acts surrounding Robles "combatively" and shining a  
12 flashlight in her face were not intended to inflict immediate  
13 injury on Robles. Nor were those acts threats to do so.  
14 Moreover, as discussed above, Robles has not established that  
15 shining a flashlight at her constitutes harmful contact or  
16 contact that is offensive in an objectively reasonable way. It  
17 follows that Mirabdal's acts leading up to shining the flashlight  
18 at Robles cannot constitute an act with intent to cause harmful  
19 or offensive contact, or a threat to touch Robles in a harmful or  
20 offensive manner. Thus, this claim must be dismissed with leave  
21 to amend.

22 3. Bane Act

23 The Bane Act authorizes a civil action for damages,  
24 injunctive relief, and other appropriate equitable relief against  
25 a person who "interferes by threat, intimidation, or coercion, or  
26 attempts to interfere by threat, intimidation, or coercion, with  
27 the exercise or enjoyment by any individual or individuals of  
28 rights secured by the Constitution or laws of the United States,

1 or of the rights secured by the Constitution or laws of this  
2 state." Cal. Civ. Code § 52.1(a) and (b). The Bane Act "was  
3 intended to address only egregious interferences with  
4 constitutional rights, not just any tort." Shoyoye v. Cty. of  
5 Los Angeles, 203 Cal. App. 4th 947, 959 (2012). "The act of  
6 interference with a constitutional right must itself be  
7 deliberate or spiteful." Id.

8 Robles alleges that Mirabdal's acts of surrounding her and  
9 thus preventing her escape and shining a flashlight at her  
10 interfered with her right to assemble peacefully. Mirabdal  
11 challenges that the allegations involving herself do not rise to  
12 the level of "threat, intimidation, or coercion" sufficient to  
13 state a claim under the Bane Act. But Mirabdal cites no case  
14 supporting her argument. Mirabdal's motion to dismiss this claim  
15 must be denied.

16 B. Motion to Strike

17 The California anti-SLAPP statute provides for a "special  
18 motion to strike" for a "cause of action against a person arising  
19 from any act of that person in furtherance of the person's right  
20 of petition or free speech," "unless the court determines that  
21 the plaintiff has established that there is a probability that  
22 the plaintiff will prevail on the claim." Cal. Code Civ. Proc.  
23 § 425.16. The anti-SLAPP statute applies in federal court. U.S.  
24 ex rel. Newsham v. Lockheed Missiles & Space Co., 190 F.3d 963,  
25 973 (9th Cir. 1999).

26 To resolve an anti-SLAPP motion, the court engages in a two-  
27 step process. "First, the court decides whether the defendant  
28 has made a threshold showing that the challenged cause of action

1 is one arising from protected activity." Jarrow Formulas, Inc.  
2 v. LaMarche, 31 Cal. 4th 728, 733 (2003). The defendant has the  
3 burden to show that her acts were "taken in furtherance of [her]  
4 right of petition or free speech under the United States or  
5 California Constitution in connection with a public issue." Id.  
6 "If the court finds such a showing has been made, it then  
7 determines whether the plaintiff has demonstrated a probability  
8 of prevailing on the claim." Id.

9 Mirabdal asserts that she was engaging in a protected  
10 activity, protesting against Yiannopoulos. Section 425.16(e) of  
11 the anti-SLAPP statute provides for four types of protected  
12 activity. Mirabdal's alleged conduct, shining a flashlight at  
13 Robles or surrounding her combatively, was not a written or oral  
14 statement, and so it does not qualify under subsections one  
15 through three, leaving only the possibility of subsection four.  
16 § 425.16(e). Mirabdal does not explain how shining a flashlight  
17 at Robles or surrounding her combatively constitutes "conduct in  
18 furtherance of the exercise of the constitutional right of  
19 petition or the constitutional right of free speech in connection  
20 with a public issue or an issue of public interest." Cal. Code  
21 Civ. Proc. § 425.16(e). As a result, she has not satisfied her  
22 burden of showing that she engaged in a protected activity and  
23 her motion must be denied.

24 CONCLUSION

25 The Court GRANTS Berkeley's motion to dismiss (Docket No.  
26 11), GRANTS the Regents' motion to dismiss (Docket No. 16), and  
27 GRANTS IN PART Mirabdal's motion to dismiss or strike (Docket No.  
28 43). Robles may file an amended complaint as permitted by this

1 order within twenty-one days.

2 Robles shall file proof of service within fourteen days of  
3 this order.

4 IT IS SO ORDERED.

5

6 Dated: June 4, 2018

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28



---

CLAUDIA WILKEN  
United States District Judge