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16 UNITED STATES DISTRICT COURT
17 NORTHERN DISTRICT OF CALIFORNIA

18 JESSICA FELBER
19 and BRIAN MAISSY

20 Plaintiffs,

21 vs.

22 MARK G. YUDOF, PRESIDENT OF THE
REGENTS OF THE UNIVERSITY OF
23 CALIFORNIA, et al.,

24 Defendants.
25

CASE NO. CV 11-01012 RS

**NOTICE OF MOTION AND MOTION TO
DISMISS OF DEFENDANTS MARK G.
YUDOF, PRESIDENT OF THE REGENTS
OF THE UNIVERSITY OF CALIFORNIA;
THE REGENTS OF THE UNIVERSITY
OF CALIFORNIA; ROBERT J.
BIRGENEAU, CHANCELLOR OF THE
UNIVERSITY OF CALIFORNIA,
BERKELEY; AND JONATHAN
POULLARD, DEAN OF STUDENTS OF
THE UNIVERSITY OF CALIFORNIA,
BERKELEY**

Judge: Hon. Richard Seeborg
Dept: Courtroom 3, 17th Floor
Date: September 22, 2011
Time: 1:30 pm

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NOTICE OF MOTION AND MOTION TO DISMISS

1
2 PLEASE TAKE NOTICE that on September 22, 2011 at 1:30 p.m. before the Honorable
3 Richard Seeborg in Courtroom 3 on the Seventeenth Floor of the above-entitled Court,
4 Defendants Regents of the University of California (“The Regents” or “UC”), Mark G. Yudof,
5 Robert J. Birgeneau, and Jonathan Poullard (collectively, “UC Defendants”) will move pursuant
6 to Rule 12(b)(6) of the Federal Rules of Civil Procedure to dismiss all claims brought against
7 them in Plaintiffs’ First Amended Complaint (“Complaint” or “Compl.”), filed May 18, 2011.¹

8 The Complaint should be dismissed pursuant to Rule 12(b)(6) for the following reasons:

9 (1) Claims 1 and 3—which allege violations of the rights of free exercise of
10 religion and freedom of assembly under the First Amendment and § 1983—fail to state a
11 claim because Plaintiffs have not alleged a substantial burden on their ability to exercise
12 their religion or any infringement of their ability to assemble to express their views. In
13 addition, state officials cannot be liable for failing to protect un-incarcerated individuals
14 from actions of other private individuals, even when those actions may affect the exercise
15 of constitutional rights. Moreover, Defendants Birgeneau and Yudof cannot be liable
16 under § 1983 because Plaintiffs have not alleged that either Defendant personally
17 participated in or even had knowledge of the incidents alleged in the Complaint.

18 (2) Claim 6—which alleges a violation of Title VI of the Civil Rights Act of
19 1964—fails to state a claim because (a) it is premised on the allegation that the UC
20 Defendants should have prohibited First Amendment protected speech; (b) Plaintiffs have
21 not alleged that the University was deliberately indifferent to conduct that went beyond
22 protected speech and involved threats or violence; (c) Plaintiffs have not alleged “severe,
23 pervasive, and objectively offensive” harassment; and (d) Plaintiffs have not alleged that
24 they were deprived of any educational opportunities.

25
26 ¹ Although the Complaint twice refers to UC Berkeley as a Defendant (*see* Compl. 4:4; 4:27),
27 Plaintiffs’ counsel have stated in writing that they did not intend to sue it separately. UC Berkeley
28 is an operating unit of The Regents and so is not separately subject to suit. *See* Cal. Const. Art.
IX, § 9(f) (stating that The Regents is the entity authorized to “sue and be sued” on behalf of the
University of California).

1 (3) Claims 2, 5, and 6—which allege violations of the free exercise clause of the
2 California Constitution, the California Unruh Act, and California Government Code
3 section 11135, respectively—should be dismissed because there is no reason to exercise
4 federal jurisdiction over purely state law claims once the federal claims are dismissed. In
5 addition, the Court should abstain from exercising jurisdiction over Claim 2 because it
6 presents novel questions of state law; dismiss Claim 5 because the University of
7 California is not a business establishment within the meaning of the Unruh Act; and
8 dismiss Claim 6 because it seeks only injunctive and declaratory relief and the UC
9 Defendants have immunity in federal court from claims for injunctive and declaratory
10 relief based on violations of state law.

11 This Motion is based upon the Memorandum of Points and Authorities included herein and such
12 additional authority and argument as may be presented in Defendants’ reply and at any hearing on
13 this Motion.

14 **MEMORANDUM OF POINTS AND AUTHORITIES**

15 **I. INTRODUCTION**

16 Plaintiffs allege in their Complaint that the University of California violated their right to
17 freely exercise their Jewish religion and their right to assemble and that it discriminated against
18 them on the basis of their religion. But this lawsuit is in substance an attempt by Plaintiffs to
19 compel UC to restrict the freedom of speech and assembly of its other students, in violation of
20 *their* First Amendment rights. Plaintiffs’ principal complaint is that UC has permitted its students
21 to engage in political demonstrations and protests against Israel and in support of Palestinian
22 causes. With one exception, these alleged demonstrations and protests were not targeted at either
23 Plaintiff, and Plaintiffs have not even alleged they were present when most of the alleged events
24 took place. Indeed, the majority of the events alleged in the Complaint occurred either long before
25 Plaintiffs enrolled as students at UC Berkeley or at took place at other campuses altogether.
26 Plaintiffs should not be permitted to use meritless claims of infringement of their rights as part of
27 an effort to stifle the free speech and assembly rights of others.

28 Plaintiffs’ federal constitutional claims fail as a matter of law because Plaintiffs have not

1 alleged any burden, let alone a substantial burden, on their ability to exercise their religion or any
2 infringement of their ability to assemble to express their views. To the extent Plaintiffs allege that
3 the UC Defendants failed to prevent private individuals from taking actions that affected
4 Plaintiffs' ability to exercise their rights to free exercise of religion and assembly, that allegation
5 does not support a constitutional claim. The § 1983 claims against Chancellor Birgeneau and
6 President Yudof must also be dismissed because Plaintiffs have not alleged that either Defendant
7 personally participated in any alleged deprivation of rights. The constitutional claims against The
8 Regents must be dismissed for the additional reason that The Regents is an arm of the state and
9 therefore has sovereign immunity and cannot be sued under 42 U.S.C. § 1983, and the claims for
10 damages against Defendants Yudof, Birgeneau, and Poullard should be dismissed on the basis of
11 qualified immunity, because their alleged actions did not violate clearly established law.

12 Plaintiffs' Title VI claim must be dismissed because UC cannot be liable for allowing its
13 students to engage in speech and assembly that are protected by the First Amendment. The
14 majority of the incidents described in the Complaint involve the type of political and social
15 advocacy that lies at the core of First Amendment protection, and courts have repeatedly
16 recognized that vigorous protection of free speech is particularly important in the university
17 setting. Indeed, courts that have considered rules enacted to limit derogatory or controversial
18 speech at a public university have routinely struck them down as incompatible with the First
19 Amendment. UC may not be held liable under Title VI for allowing speech that it could not have
20 prohibited without violating the First Amendment. Further, Plaintiffs have not alleged that the UC
21 Defendants were deliberately indifferent to actions of which they were aware and which involved
22 threats or violence rather than protected speech.

23 Plaintiffs' Title VI claim fails for the independent reasons that the incidents alleged in the
24 Complaint do not amount to "severe, pervasive, and objectively offensive" harassment of
25 Plaintiffs or of Jewish students generally and that Plaintiffs do not allege that they have been
26 deprived "of access to the educational opportunities or benefits provided by the school." *Davis v.*
27 *Monroe County Bd. of Educ.*, 526 U.S. 629, 650 (1999). The Title VI claim against the individual
28 defendants must be dismissed for the additional reason that Title VI provides a remedy against

1 only programs or activities that receive federal funding, not individuals. Moreover, all of Felber's
2 claims for injunctive relief must be dismissed because she is no longer a student at UC and so
3 does not have standing to seek injunctive relief.

4 Given that all of Plaintiffs' federal claims should be dismissed, this Court should decline
5 to exercise supplemental jurisdiction over any of Plaintiffs' state law claims. In the alternative:
6 the Court should abstain from exercising jurisdiction over Plaintiffs' free exercise claim under the
7 California Constitution because it presents novel questions of California law; Plaintiffs' Unruh
8 Act claim should be dismissed because UC is not a business establishment within the meaning of
9 that Act; and Plaintiffs' state law claims for injunctive and declaratory relief, including Plaintiffs'
10 entire Government Code claim, should be dismissed for lack of federal jurisdiction because the
11 UC Defendants have Eleventh Amendment immunity.

12 **II. ALLEGATIONS OF THE FIRST AMENDED COMPLAINT**

13 Plaintiffs Brian Maissy, a current UC Berkeley student, and Jessica Felber, who graduated
14 from UC Berkeley in December 2010 (Compl. ¶ 15), claim that Defendants—The Regents, UC
15 President Yudof, UC Berkeley Chancellor Birgeneau, UC Berkeley Dean of Students Poullard,
16 and the Associated Students of UC—violated Plaintiffs' right to freely exercise their Jewish
17 religion and their right to assemble, and that Defendants discriminated against them on the basis
18 of their religion. But the Complaint contains no allegations about Plaintiffs' religious beliefs or
19 practices, let alone any allegation that Defendants prevented them from exercising their religion;
20 no allegation that Maissy or Felber was ever prevented from assembling to express his or her
21 views or religious beliefs; and no allegation that Defendants treated Plaintiffs differently than
22 other students, let alone on the basis of their religion. Instead, the Complaint describes various
23 protests and demonstrations against Israel, most of which occurred somewhere other than UC
24 Berkeley and/or before Plaintiffs enrolled at UC. Plaintiffs contend that, by allowing these
25 protests and demonstrations to occur, "defendants[] tolera[ted] the development of a dangerous
26 anti-Semitic climate on its campuses . . . which . . . threatens and endangers the health and safety
27 of University of California's Jewish students." (*Id.* at 3:14-18.)
28

1 **A. Plaintiffs Allege That Protests Against Israeli Policies Occurred on UC**
 2 **Campuses.**

3 Plaintiffs allege that the Students for Justice in Palestine (“SJP”) and the Muslim Students
 4 Association (“MSA”), two University of California student groups, have engaged in a number of
 5 political demonstrations on UC campuses in opposition to Israeli policies. (*See id.* ¶¶ 27-29, 40,
 6 42, 43, 45, 48.)² Plaintiffs allege, for example, that in 2002 SJP and MSA students at UC Irvine
 7 displayed “mock ‘body bags’ of Palestinians claimed to have been ‘murdered’ by the Israeli
 8 army” (*id.* ¶ 45), and that in 2008 SJP sponsored a “die-in” at UC Berkeley in response to the
 9 launching of Israeli rockets into Palestinian territories. (*Id.* ¶ 48.) In addition, Plaintiffs allege that
 10 in 2002 SJP and MSA students at UCLA and UC Irvine published a “highly anti-Israel”
 11 newsmagazine (*id.* ¶ 46) and that, in the same year, UC Berkeley offered an English course
 12 entitled “The Politics and Poetics of Palestinian Resistance.” (*Id.* ¶ 47.) Plaintiffs further allege
 13 that in 2000 the SJP “called for an international boycott of all Israeli products and an end to U.S.
 14 economic supported Israel” (*id.* ¶ 26) and that in 2010 SJP helped organize an event that focused
 15 on “promot[ing] a boycott of Israeli academic institutions as well as . . . corporations which do
 16 business with Israel.” (*Id.* ¶ 56.)

17 Plaintiffs further allege that SJP and MSA students have set up mock checkpoints at UC
 18 Berkeley to imitate those utilized by Israeli soldiers. (*Id.* ¶¶ 27, 40.) Plaintiffs allege that, at these
 19 “checkpoints,” “students dress as soldiers, carry realistic-looking [guns],” “lay barbed wire on
 20 heavily traveled campus walkways, and interrogate others about their religious affiliation and
 21 national origins.” (*Id.* ¶ 59.) Plaintiffs claim that, during one mock checkpoint demonstration, a
 22 student in a wheelchair became accidentally entangled in barbed wire that was part of the
 23 demonstration. (*Id.* ¶ 27.) Plaintiffs attach in Exhibit A to their Complaint, however, an email in
 24 which Dean Poullard states that the protesters themselves “quickly assist[ed] the person in
 25 passing the checkpoint” and then “placed one of their members in the area to further assist any

26 _____
 27 ² Plaintiffs allege that, at one of these political demonstrations, a Jewish observer was spat on by a
 28 demonstrator. (Compl. ¶ 42). The Complaint itself, however, states that “[s]tudents from several
 northern California campuses” took part in this demonstration, and it does not allege that either
 the perpetrator or the victim of the spitting incident was a UC student. (*Id.*)

1 other individuals in passing the demonstration.” (Ex. A ¶ 15 (Declaration of Brian Massey).)

2 **B. Plaintiffs Describe Incidents to Which Law Enforcement Authorities**
 3 **Responded.**

4 Plaintiffs contend that SJP and/or MSA students have disrupted speakers perceived to be
 5 pro-Israel or anti-Muslim (*id.* ¶¶ 29, 53, 54) and a concert organized by a pro-Israel group. (*Id.*
 6 ¶ 49.)³ Plaintiffs allege that law enforcement authorities responded to all of these incidents.
 7 Plaintiffs allege that, in three of the incidents, campus police intervened. (*Id.* ¶¶ 49, 53, 54).
 8 Plaintiffs allege that the fourth incident led the Orange County District Attorney to prosecute the
 9 students involved. (*Id.* ¶ 29.)⁴

10 **C. Plaintiffs Allege an Assault by Another Student on Felber.**

11 Plaintiffs characterize the range of activities by SJP and MSA described above as “campus
 12 terrorist incitement,” “pro-terrorist programs, goals and conduct,” and “harassment and
 13 intimidation.” (Compl. ¶ 17.) Plaintiffs claim that Defendants’ policies “fostered and encouraged”
 14 these activities and led to an alleged “assault” on Felber. (*Id.*)

15 Specifically, Plaintiffs allege that Felber was assaulted on the UC Berkeley campus on
 16 March 5, 2010, by Berkeley student and SJP member Husam Zakharia. (*Id.* ¶ 18.) Plaintiffs allege
 17 that Felber was holding a placard that read “Israel Wants Peace” when Zakharia deliberately hit
 18 her with a shopping cart, causing her injury that required medical attention. (*Id.* ¶¶ 18, 20.)
 19 According to Plaintiffs, Zakharia did this “to vent his hostility toward the non-violent message
 20 stated in her placard and her Jewish identity.” (*Id.* ¶ 19.) Plaintiffs allege that, although Felber
 21 obtained a permanent restraining order to keep Zakharia away from her, she was subsequently
 22 fearful to walk on campus alone. (*Id.* ¶ 20.) Plaintiffs do not allege that either law enforcement
 23 authorities or UC failed to respond to this incident.

24 Plaintiffs further allege that Zakharia had previously spat and yelled at Felber during a
 25 political demonstration (*id.* ¶ 21) and that Zakharia and two others had been cited by the UC

26 ³ It appears that paragraphs 41 and 49 of the Complaint may describe the same event.

27 ⁴ Plaintiffs also claim that, during the 2001-2002 academic year, a member of a Jewish religious
 28 group at Berkeley was assaulted and the Hillel was vandalized. (*Id.* ¶ 44.) Plaintiffs do not claim
 that law enforcement authorities or UC failed to respond to those alleged incidents.

1 Campus police for battery against another Jewish UC Berkeley student in November 2008. (*Id.*
2 ¶ 41.)

3 **D. Plaintiffs Allege Violations of the Federal and California Constitutions and of**
4 **Federal and State Anti-Discrimination Laws.**

5 Plaintiffs allege that the SJP and MSA activities described in the Complaint are
6 “terrifying” (*id.* ¶ 59) and “make Jewish students feel particularly endangered, intimidated, and
7 harassed.” (*Id.* at 3:24-25, *see also id.* at 2:17, ¶ 56.) Plaintiffs allege that, by failing to “adopt and
8 implement policies, regulations, and student organization procedures” to prevent these activities
9 (*id.* at 3:15-16) and failing to impose “effective disciplinary proceedings” in response to these
10 activities (*id.* ¶ 51), Defendants have violated their rights in the following ways:

11 Plaintiffs allege that Defendants’ conduct violated their rights under the federal and
12 California Constitutions to freely exercise their religion. (*Id.* ¶¶ 62-64, 65-67, 68-71.) Plaintiffs
13 also claim that Defendants violated their federal constitutional right to freedom of assembly. (*Id.*
14 ¶ 69.) Plaintiffs further claim that Defendants discriminated against them in violation of Title VI
15 of the Civil Rights Act of 1964 (*id.* ¶¶ 80-81), California’s Unruh Act (*id.* ¶ 74-79), and
16 California Government Code § 11135. (*Id.* ¶ 82-83.) Plaintiffs request damages (*id.* at 22:18-21),
17 declaratory and injunctive relief (*id.* at 22:24-23:12), and attorneys’ fees and costs. (*Id.* at 22:22-
18 23; 23:15-16).

19 **III. ARGUMENT**

20 **A. Plaintiffs’ Complaint Must Be Dismissed if It Fails to State a Legally**
21 **Cognizable Claim.**

22 Rule 12(b)(6) of the Federal Rules of Civil Procedure authorizes the Court to dismiss a
23 complaint that fails to state a claim upon which relief may be granted. The Supreme Court has
24 emphasized that, “[w]hile a complaint attacked by a Rule 12(b)(6) motion to dismiss does not
25 need detailed factual allegations,” a plaintiff must provide “more than labels and conclusions.”
26 *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007); *see also Ashcroft v. Iqbal*, 129 S. Ct. 1937,
27 1949 (2009) (holding that *Twombly* standards apply in all cases). “[T]hreadbare recitals of the
28 elements of a cause of action, supported by mere conclusory statements, do not suffice.” *Iqbal*,
129 S. Ct. at 1949. Thus, to survive a motion to dismiss, a complaint must plead “enough facts to

1 state a claim to relief that is plausible on its face.” *Twombly*, 550 U.S. at 570; *see also Moss v.*
 2 *U.S. Secret Serv.*, 572 F.3d 962, 969 (9th Cir. 2009) (“[F]or a complaint to survive a motion to
 3 dismiss, the non-conclusory ‘factual content,’ and reasonable inferences from that content, must
 4 be plausibly suggestive of a claim entitling the plaintiff to relief.”).

5 **B. Plaintiffs’ Federal Constitutional Claims Fail As a Matter of Law.**

6 Plaintiffs’ first claim for relief asserts a violation of the First Amendment’s Free Exercise
 7 Clause (Compl. ¶¶ 62-64), and their third claim for relief asserts a cause of action under 42
 8 U.S.C. § 1983 for violation of the First Amendment’s Free Exercise and Freedom of Assembly
 9 Clauses. (*Id.* ¶¶ 68-71).⁵ It is well established that there is no cause of action directly under the
 10 United States Constitution and that a § 1983 cause of action is the proper means for asserting a
 11 violation of federal constitutional rights. *See, e.g., Azul-Pacífico, Inc. v. City of Los Angeles*, 973
 12 F.2d 704, 705 (9th Cir. 1992). These claims are therefore redundant. Regardless, Plaintiffs’
 13 constitutional claims fail on their merits because Plaintiffs have not alleged a substantial burden
 14 on their ability to exercise their religion or any infringement of their ability to assemble to express
 15 their views. To the extent Plaintiffs allege that the UC Defendants failed to prevent private
 16 individuals from taking actions that affect Plaintiffs’ rights to free exercise of religion and
 17 assembly rights, that allegation does not support a constitutional claim.

18 **1. Plaintiffs’ free exercise claim fails because Plaintiffs have not alleged**
 19 **any burden on their practice of religion.**

20 Plaintiffs’ free exercise claim fails because they do not allege that Defendants have placed
 21 any burden on Plaintiffs’ exercise of their religion, let alone the sort of substantial burden that
 22 would be required to state a free exercise claim. As the Supreme Court has explained, “[t]he free
 23 exercise inquiry asks [first] whether government has placed a *substantial burden* on the
 24 observation of a central religious belief or practice.” *Hernandez v. C.I.R.*, 490 U.S. 680, 699
 25 (1989) (emphasis added). Plaintiffs’ conclusory allegation that Defendants’ “failure to adequately
 26 secure and monitor the hostile campus environment prohibits Plaintiffs from the free exercise of

27 ⁵ The caption of the Complaint also lists § 1985, but, because § 1985 is not mentioned in the body
 28 of the Complaint, the UC Defendants assume the Plaintiffs are not actually asserting a § 1985
 claim.

1 their religion” (Compl. ¶ 63) does not meet this standard.

2 Plaintiffs do not allege that Defendants interfered at all with Plaintiffs’ ability to observe
3 any tenet or belief central to their religious faith. Plaintiffs have not alleged, nor could they allege,
4 that Defendants have required anything “proscribed by a religious faith” or forbidden anything
5 “mandated by religious belief,” as would be required to make out a violation of the Free Exercise
6 Clause. *Hobbie v. Unemployment Appeals Comm’n of Fla.*, 480 U.S. 136, 141 (1987) (internal
7 quotation marks omitted); *see also Graham v. C.I.R.*, 822 F.2d 844, 850-51 (9th Cir. 1987) (“To
8 show a free exercise violation, the religious adherent . . . has the obligation to prove that a
9 governmental regulatory mechanism . . . pressur[es] him or her to commit an act forbidden by the
10 religion or . . . prevent[s] him or her from engaging in conduct . . . which the faith mandates.”),
11 *aff’d by Hernandez v. C.I.R.*, 490 U.S. 680 (1989). Indeed, not a single allegation in the
12 Complaint relates to Plaintiffs’ practice of their religion. Plaintiffs’ free exercise claim therefore
13 must be dismissed. *See Twombly*, 550 U.S. at 555 (“[w]hile a complaint attacked by a Rule
14 12(b)(6) motion to dismiss does not need detailed factual allegations,” a plaintiff must provide
15 “more than labels and conclusions”).

16 **2. Plaintiffs’ freedom of association claim fails because Plaintiffs have not**
17 **alleged any burden on their ability to peaceably assemble.**

18 In their Third Claim for Relief, Plaintiffs allege that Defendants deprived Plaintiffs of
19 their right to freedom of assembly. (Compl. ¶ 69.) Here too, however, the Complaint contains no
20 factual allegations in support of the claim. To violate the Assembly Clause, government
21 restrictions must “impose[] a serious burden upon” or “substantially restrain[]” assembly rights.
22 *San Jose Christian Coll. v. City of Morgan Hill*, 360 F.3d 1024, 1033 (9th Cir. 2004) (holding
23 that a zoning ordinance did not restrict a congregation’s assembly rights because the congregants
24 could assemble in a different location). Plaintiffs have not alleged that Defendants did anything
25 whatsoever to interfere with their right to assemble. Again, the mere conclusory assertion that
26 “Defendants . . . deprived plaintiffs of their right . . . of their freedom of assembly” is insufficient
27 to defeat a motion to dismiss. *See Twombly*, 550 U.S. at 555.

28

1 3. **Failure to protect an individual’s First Amendment rights from**
2 **infringement by third parties is not a basis for constitutional liability.**

3 Even if Plaintiffs had alleged some burden on their exercise of religion or ability to
4 assemble, the alleged source of that burden would be the alleged assault on Felber by Zakharia
5 and/or the acts of other SJP and MSA members. Government actors are not, however, liable for
6 failure to protect individuals from interference by third parties with their exercise of First
7 Amendment rights. This principle is derived from *DeShaney v. Winnebago County Department of*
8 *Social Services*, 489 U.S. 189, 197-200 (1989), in which the Supreme Court held that the Due
9 Process Clause does not impose an affirmative duty on the state to protect a person from private
10 violence unless that person is in state custody. Courts have applied *DeShaney’s* reasoning in the
11 First Amendment context, holding that the state does not have an affirmative obligation to assist
12 citizens in exercising their First Amendment rights. For example, in *Pietrangelo v. Alvas Corp.*,
13 664 F. Supp. 2d 420 (D. Vt. 2009), plaintiff alleged that he was assaulted while picketing and
14 sued the city for failing to protect his exercise of First Amendment rights. *Id.* at 432-33. The
15 court, construing the complaint as asserting a substantive due process claim, held that the state
16 had no affirmative duty to protect the individual against private violence, regardless of whether he
17 was exercising his First Amendment rights at the time. *Id.*; *see also Haitian Refugee Ctr., Inc. v.*
18 *Baker*, 953 F.2d 1498, 1513-14 (11th Cir. 1992) (“[t]he Constitution, however, does not require
19 the Government to assist the holder of a constitutional right in the exercise of [the] right” of
20 freedom of associate); *Tater-Alexander v. Amerjan*, No. 08-00372, 2011 WL 319012, at *13
21 (E.D. Cal. Jan. 28, 2011) (police officers do not have an “affirmative obligation to investigate a
22 crime in a particular way or to protect one citizen from another even when one citizen deprives
23 the other of liberty of property” in order to protect the citizen’s First Amendment right to petition
24 the Government for a redress of grievances); *see also Nelson v. Streeter*, 16 F.3d 145, 150 (7th
25 Cir. 1994) (suggesting that *DeShaney* could be read to “imply that the police do not have a
26 constitutionally enforceable duty to protect an artist and the populace from a mob” angry about
27 the content of the artist’s work). As these cases make clear, the state has no affirmative duty to
28 protect individuals, such as Plaintiffs, from interference with their First Amendment rights by

1 third-parties.

2 Here, Plaintiffs' claim is not that Defendants took any affirmative act that infringed on
3 their free exercise or assembly rights, but rather that Defendants failed to "adequately secure and
4 monitor the hostile campus environment" that Plaintiffs claim was created by the alleged acts of
5 Zakharia and other members of the SJP and MSA. Under *DeShaney* and its progeny, this theory
6 fails to state a constitutional claim.⁶

7 **4. Chancellor Birgeneau and President Yudof are not liable under § 1983**
8 **because neither is alleged to have personally participated in the**
9 **conduct challenged in the Complaint.**

9 Plaintiffs' § 1983 claim against Chancellor Birgeneau and President Yudof should be
10 dismissed for the additional reason that the Complaint does not allege that either Defendant
11 personally deprived Plaintiffs of their free exercise or assembly rights. The Supreme Court has
12 held that "vicarious liability is inapplicable to . . . § 1983 suits, [so] a plaintiff must plead that
13 each Government-official defendant, through the official's own individual actions, has violated
14 the Constitution." *Iqbal*, 129 S. Ct. at 1948; *see also Jones v. Williams*, 297 F.3d 930, 934 (9th
15 Cir. 2002) ("[I]n order for a person acting under color of state law to be liable under section 1983
16 there must be a showing of personal participation in the alleged rights deprivation."). Plaintiffs do
17 not allege that Chancellor Birgeneau or President Yudof personally engaged in any
18 unconstitutional actions or inactions. Even if Plaintiffs' constitutional theories otherwise had
19 merit, Plaintiffs do not even allege that either Defendant personally failed to protect Jewish
20 students at UC Berkeley or to adequately discipline students for any alleged wrongdoing. The
21 only reference to Chancellor Birgeneau in the Complaint is that he "commented on the need to
22 limit hate speech which incites violence." (Compl. ¶ 52.) The only reference to President Yudof
23 states that he "declined to commit to minimum protections of Jewish students against SJP and
24 MSA harassment, at a recent November 10, 2010 conference *at UC Irvine*," (*id.* ¶ 51 (emphasis

25 _____
26 ⁶ To the extent Plaintiffs' allegations focus on Defendants' purported failure to protect Ms. Felber
27 from a physical attack by another student, courts have construed similar claims as substantive due
28 process claims and have rejected them under *DeShaney*. *See, e.g., Melendez-Garcia v. Sanchez*,
629 F.3d 25, 36 (1st Cir. 2011) ("A state's failure to protect an individual against private violence
simply does not constitute a violation of the Due Process Clause.") (quoting *DeShaney*, 489 U.S.
at 197).

1 added)), but Plaintiffs do not claim that President Yudof was even aware of, much less failed to
 2 adequately respond to, any incidents that occurred at UC Berkeley.

3 Nor can Defendants Birgeneau and Yudof be held liable for their subordinates' alleged
 4 failure to adequately respond to the incidents cited by Plaintiffs. Under § 1983, supervisors are
 5 not vicariously liable for the wrongful acts of their employees. *See Iqbal*, 129 S. Ct. at 1949 (“In a
 6 § 1983 suit or a *Bivens* action—where masters do not answer for the torts of their servants—the
 7 term ‘supervisory liability’ is a misnomer. Absent vicarious liability, each Government official,
 8 his or her title notwithstanding, is only liable for his or her own misconduct.”). Accordingly,
 9 Plaintiffs’ contention that Dean Poullard met with students “as an agent of all other Defendants”
 10 (Compl. ¶ 21) is inapposite. Rather, “a supervisor is only liable for constitutional violations of his
 11 subordinates if the supervisor participated in or directed the violations, or knew of the violations
 12 and failed to act to prevent them.” *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989). For
 13 example, the Ninth Circuit has held that a prison inmate who was allegedly denied medical
 14 treatment had no § 1983 claim against the Director of Prisons because there was no claim that the
 15 director was either “involved or knowledgeable.” *May v. Enomoto*, 633 F.2d 164, 167 (9th Cir.
 16 1980). Similarly here, Defendants Birgeneau and Yudof cannot be culpable for failing to
 17 adequately respond to events of which they are not even alleged to have had knowledge. *See*
 18 *Oona R.-S.- by Kate S. v. McCaffrey*, 143 F.3d 473, 477-78 (9th Cir. 1998) (“A supervisor may be
 19 found liable under § 1983 if the supervisor is aware of a specific risk of harm to the plaintiff.”
 20 (internal quotation marks omitted)).⁷

21
 22
 23
 24 ⁷ The Ninth Circuit has also found that supervisors may be held liable “for culpable action or
 25 inaction in training, supervision, or control of subordinates,” “for acquiescence in the
 26 constitutional deprivation by subordinates” or “for conduct that shows a reckless or callous
 27 indifference to the rights of others.” *al-Kidd v. Ashcroft*, 580 F.3d 949, 964-65 (9th Cir. 2009),
 28 *rev’d on other grounds*, 131 S. Ct. 2074 (2011). Plaintiffs have not alleged that any of the
 incidents alleged in the Complaint resulted from inadequate training or supervision. Given that
 Plaintiffs have not alleged that either Chancellor Birgeneau or President Yudof knew of—or even
 had reason to know of—any alleged deprivation of constitutional rights, they cannot be liable
 under any of these alternative liability tests.

1 **5. The Regents has Eleventh Amendment immunity from Plaintiffs’**
 2 **constitutional claims.**

3 Because The Regents is an arm of the state, it has sovereign immunity from all claims
 4 brought by individuals in federal court, unless the claim is brought pursuant to a federal statute
 5 that expressly abrogates states’ sovereign immunity, or unless The Regents consents to suit,
 6 which it has not done here. *Jackson v. Hayakawa*, 682 F.2d 1344, 1350 (9th Cir. 1982) (“[T]he
 7 Board of Regents [is] considered to be [an] instrumentalit[y] of the state for purposes of the
 8 Eleventh Amendment.”); *Edelman v. Jordan*, 415 U.S. 651, 662-63 (1974) (“[T]his Court has
 9 consistently held that an unconsenting State is immune from suits brought in federal courts by her
 10 own citizens as well as by citizens of another State.”).

11 In *Will v. Michigan Department of State Police*, 491 U.S. 58, 64 (1989), the Supreme
 12 Court held that § 1983 does not abrogate states’ sovereign immunity (holding that a state is not a
 13 “person” against whom an action may be brought under § 1983). It is thus firmly settled that, as
 14 an arm of the State of California, The Regents is not subject to suit under § 1983. *See, e.g.,*
 15 *Armstrong v. Meyers*, 964 F.2d 948, 949-50 (9th Cir. 1992) (The Regents “is an arm of the state
 16 for Eleventh Amendment purposes, and therefore is not a ‘person’ within the meaning of” 42
 17 U.S.C. § 1983). For this additional reason, Plaintiffs’ constitutional claims against The Regents
 18 must be dismissed.

19 **C. Plaintiffs’ § 1983 Claims for Damages Should Be Dismissed on Qualified**
 20 **Immunity Grounds Because Defendants Did Not Violate Any Clearly**
 21 **Established Law.**

22 For the reasons discussed above, Plaintiffs’ constitutional claims are meritless and barred
 23 by the Eleventh Amendment. In the alternative, the constitutional claims for damages against
 24 President Yudof, Chancellor Birgeneau, and Dean Poullard (the “Individual Defendants”) should
 25 be dismissed on the basis of qualified immunity, because the rights Plaintiffs claim were violated
 26 were far from clearly established.

27 “State officials are entitled to qualified immunity from suits for damages ‘insofar as their
 28 conduct does not violate clearly established statutory or constitutional rights of which a
 reasonable person would have known.’” *Krainski v. Nev. ex rel. Bd. of Regents of Nev. Sys. of*

1 *Higher Educ.*, 616 F.3d 963, 968 (9th Cir. 2010) (citing *Harlow v. Fitzgerald*, 457 U.S. 800, 818
2 (1982)). To determine whether an official is entitled to qualified immunity, courts ask: (1)
3 whether, taken in the light most favorable to the party asserting the injury, the facts alleged show
4 the official's conduct violated a constitutional right; and (2) if so, whether the right was clearly
5 established in light of the specific context of the case. *Saucier v. Katz*, 533 U.S. 194, 201 (2001).
6 "For a constitutional right to be clearly established, its contours must be sufficiently clear that a
7 reasonable official would understand that what he is doing violates that right." *Hope v. Pelzer*,
8 536 U.S. 730, 739 (2002) (internal quotation marks omitted). It is within a court's "sound
9 discretion" to address these two prongs in any sequence it sees fit. *Pearson v. Callahan*, 129 S.
10 Ct. 808, 818 (2009). Here, a reasonable official in any of the Individual Defendants' positions
11 would have had no reason to think anything he was doing or refraining from doing violated
12 Plaintiffs' constitutional rights.

13 Plaintiffs' free exercise and assembly claims are so conclusory that it is hard to know what
14 Plaintiffs' supporting theories even could be. But we are unaware of any free exercise or freedom
15 of assembly case discussing allegations anything like those Plaintiffs have asserted here, let alone
16 clearly established precedent in Plaintiffs' favor.

17 Moreover, cases in the due process context based on allegations that university officials
18 failed to protect the plaintiffs from violence by students have found that the university officials
19 had qualified immunity. For example, in *Melendez-Garcia v. Sanchez*, 629 F.3d 25 (1st Cir.
20 2010), an ROTC officer was assaulted during a student protest at the University of Puerto Rico
21 and sued university officials under § 1983 for alleged failure to adequately provide security for
22 the ROTC. The First Circuit held that the university officials were entitled to qualified immunity
23 on the § 1983 claims because, under *DeShaney*, "[a] state's failure to protect an individual against
24 private violence simply does not constitute a violation of the Due Process Clause." *Id.* at 36
25 (quoting *DeShaney*, 489 U.S. at 197). The court recognized that "a university, like a local
26 government, must choose how to use limited resources," and thus it would not have been clear to
27 a reasonable official that the university's security decisions violated the Plaintiffs' right to
28 substantive due process. *Melendez-Garcia*, 629 F.3d at 37. Similarly, the Eleventh Circuit held

1 that university officials were entitled to qualified immunity against a claim that they deprived a
2 student killed in a school shooting of due process rights by failing to protect him from the known
3 threats of another student. *Alexander v. Univ. of N. Fla.*, 39 F.3d 290, 292 (11th Cir. 1994).

4 **D. Plaintiffs Fail to State a Title VI Claim.**

5 Plaintiffs' allegations fail to state a Title VI claim. As an initial matter, because Title VI
6 applies only to "program[s] or activit[ies] receiving Federal financial assistance," 42 U.S.C.
7 § 2000d, "Title VI . . . precludes liability against those who do not receive federal funding,
8 including individuals." *Shotz v. City of Plantation*, 344 F.3d 1161, 1170 (11th Cir. 2003); *see also*
9 *T.M. ex rel. Benson v. San Francisco Unified Sch. Dist.*, No. 09-01463, 2010 WL 291828, at *4
10 (N.D. Cal. Jan. 19, 2010). Thus, the Title VI claim against the Individual Defendants must be
11 dismissed.

12 Plaintiffs' Title VI claim against The Regents also fails because: (1) it is based primarily
13 on Plaintiffs' objections to student protests against Israel, and UC cannot be liable for allowing
14 speech that UC could not have prohibited without violating the First Amendment; (2) Plaintiffs
15 have not sufficiently alleged that the University acted with "deliberate indifference" to conduct
16 involving threats or violence rather than pure speech; (3) the alleged incidents described in the
17 Complaint do not amount to "severe, pervasive, and objectively offensive" harassment of
18 Plaintiffs or of Jewish students generally, *Davis*, 526 U.S. at 650; and (4) Plaintiffs do not allege
19 that they have been deprived "of access to the educational opportunities or benefits provided by
20 the school," *id.* Most of the incidents complained of involved protected speech that UC could not
21 legally prohibit and so cannot be a basis for liability under Title VI.

22 The majority of Plaintiffs' allegations describe political speech that is protected by the
23 First Amendment and that UC therefore could not prohibit or punish. As the Supreme Court has
24 emphasized, an entity that receives federal funds may be liable for acts committed by third parties
25 "only where the funding recipient has some control over the alleged harassment. A recipient
26 cannot be directly liable for its indifference where it lacks the authority to take remedial action."
27 *Davis*, 526 U.S. at 644. This is precisely the situation here: the University lacked any authority to
28 discipline SJP and MSA students for exercising their right to engage in protected speech. Indeed,

1 “principles of the First Amendment ‘acquire a special significance in the university setting, where
2 the free and unfettered interplay of competing views is essential to the institution’s educational
3 mission.’” *Coll. Republicans at San Francisco State Univ. v. Reed*, 523 F. Supp. 2d 1005, 1015-
4 16 (N.D. Cal. 2007) (quoting *Doe v. Univ. of Mich.*, 721 F. Supp. 852, 863 (E.D. Mich. 1989)).

5 **1. Most of the incidents described in the Complaint involved core First**
6 **Amendment protected speech that UC could not have prohibited.**

7 The First Amendment “‘was fashioned to assure unfettered interchange of ideas for the
8 bringing about of political and social changes.’” *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 269
9 (1964) (quoting *Roth v. United States*, 354 U.S. 476, 484 (1957)). Accordingly, the Supreme
10 Court’s “First Amendment decisions have created a rough hierarchy in the constitutional
11 protection of speech” in which “[c]ore political speech occupies the highest, most protected
12 position.” *R.A.V. v. City of St. Paul*, 505 U.S. 377, 422 (1992) (Stevens, J., concurring in
13 judgment); *see also Citizens United v. Fed. Election Comm’n*, 130 S. Ct. 876, 904 (2010) (“If the
14 First Amendment has any force, it prohibits [the government] from fining or jailing citizens, or
15 associations of citizens, for simply engaging in political speech.”).

16 Just this Term, the Supreme Court found that highly offensive placards held at a soldier’s
17 funeral, with messages such as “God Hates the USA/Thank God for 9/11,” “Fags Doom Nations,”
18 “Thank God for Dead Soldiers,” and “Priests Rape Boys,” were “speech . . . at a public place on a
19 matter of public concern” and therefore “entitled to ‘special protection’ under the First
20 Amendment.” *Snyder v. Phelps*, 131 S. Ct. 1207, 1216-17, 1219 (2011). The Court explained:
21 “Such speech cannot be restricted simply because it is upsetting or arouses contempt. . . . [T]he
22 point of all speech protection . . . is to shield just those choices of content that in someone’s eyes
23 are misguided, or even hurtful.” *Id.* at 1219 (quoting *Hurley v. Irish-American Gay, Lesbian &*
24 *Bisexual Group of Boston, Inc.*, 515 U.S. 557, 574 (1995)).

25 Plaintiffs’ own allegations make clear that the majority of the incidents about which
26 Plaintiffs complain consisted of students engaging in speech on controversial political
27 matters—speech which is at the core of First Amendment protection. (*See, e.g.*, Compl. ¶¶ 26-28,
28 40, 42, 45-48, 56.) Many of the incidents cited in Plaintiffs’ Complaint involved speech in

1 opposition to Israeli policies—for example, publishing a magazine that analogized Israeli policies
 2 to “Apartheid” and “promote[d] both Hamas and Hizbullah as legitimate and noteworthy
 3 resistance movements”—and which thus plainly related to matters of public concern. (*Id.* ¶ 46;
 4 *see also id.* ¶¶ 27, 40, 42, 45, 47, 48.)

5 That several of the alleged demonstrations involved not only speech but also provocative,
 6 expressive conduct does not take the demonstrations outside the First Amendment’s protection.
 7 For example, Plaintiffs allege that students set up mock checkpoints to imitate those utilized by
 8 Israeli soldiers (*id.* ¶¶ 27, 40), displayed mock “body bags” of Palestinians “murdered” by the
 9 Israeli army (*id.* ¶ 45), and held a “Die-In” in response to Israeli rocket launches into Palestinian
 10 territories (*id.* ¶ 48). These public displays are analogous, for constitutional purposes, to an
 11 “illegal immigration bake sale” held by College Republicans that this Court recognized as First
 12 Amendment protected speech in *Reed*. *See* 523 F. Supp. 2d at 1018. During the bake sale
 13 discussed in *Reed*, buyers were forced to reach through or climb over chain-link fences to
 14 purchase baked goods. *Id.* at 1018 n.7. This Court observed that such expressive conduct can be
 15 more likely to “reach and be understood by its intended audience” in part because it “obviously
 16 [and] cleverly . . . varies from oft-used means or commonly occurring forms of communication.”
 17 *Id.* at 1018.

18 The fact that Plaintiffs may have been upset by speech critical of Israel does not make it
 19 illegal harassment rather than protected speech. To the contrary, as the Supreme Court recently
 20 emphasized in *Snyder*, “[i]f there is a bedrock principle underlying the First Amendment, it is that
 21 the government may not prohibit the expression of an idea simply because society finds the idea
 22 itself offensive or disagreeable.” *Snyder*, 131 S. Ct. at 1219 (quoting *Texas v. Johnson*, 491 U.S.
 23 397, 414 (1989)). Indeed, in *Reed*, this Court suggested that “seem[ing] disrespectful and
 24 offensive” are sometimes the “very characteristics . . . critical to [a demonstration’s]
 25 effectiveness.” *Id.* at 1019.

26 **a. Protecting controversial speech is particularly important in a**
 27 **university setting.**

28 The Supreme Court has repeatedly recognized that freedom of speech is particularly

1 important in a university setting. *See, e.g., Healy v. James*, 408 U.S. 169, 180 (1972) (“The
 2 college classroom with its surrounding environs is peculiarly the marketplace of ideas”)
 3 (internal quotation marks omitted); *Keyishian v. Bd. of Regents of Univ. of State of N.Y.*, 385 U.S.
 4 589, 603 (1967) (“The vigilant protection of constitutional freedoms is nowhere more vital than in
 5 the community of American schools [of higher learning].”). As the Supreme Court has
 6 emphasized, “[t]eachers and students must always remain free to inquire, to study and to evaluate,
 7 to gain new maturity and understanding; otherwise our civilization will stagnate and die.” *Sweezy*
 8 *v. State of N.H.*, 354 U.S. 234, 250 (1957). The Supreme Court has also specifically held that
 9 speech in an educational environment may not be curtailed simply because some observers find
 10 the conclusions offensive or even abhorrent. *See Bd. of Educ., Island Trees Union Free Sch. Dist.*
 11 *No. 26 v. Pico*, 457 U.S. 853, 871 (1982) (finding it unconstitutional to remove books from a
 12 school library because the school board opposed the content of those books). The Complaint’s
 13 suggestion that UC should have been particularly restrictive of speech because of the relative
 14 youth of some students on campus is thus entirely contrary to well established First Amendment
 15 principles. *See Brown v. Entm’t Merchs. Ass’n*, -- S. Ct. --, No. 08-1448, 2011 WL 2518809, at *5
 16 (June 27, 2011) (the state’s “power to protect children from harm . . . does not include a free-
 17 floating power to restrict the ideas to which children may be exposed”).

18 **b. Courts have found university speech codes to be**
 19 **unconstitutional.**

20 Even to the extent that some of the speech in question expressed hostility to Jews rather
 21 than solely addressing political issues of public concern, it is unlikely that UC could have
 22 prohibited or punished the speech without running afoul of the First Amendment. Courts have
 23 repeatedly struck down “speech codes” that universities developed and implemented in response
 24 to racially motivated incidents—codes that penalized various forms of hateful speech such as
 25 “insults, epithets, ridicule, or personal attacks,” *Roberts v. Haragan*, 346 F. Supp. 2d 853, 872
 26 (N.D. Tex. 2004), or speech ““stigmatizing or victimizing’ individuals or groups on the basis of
 27 race, ethnicity, religion, sex, sexual orientation, creed, national origin, ancestry, age, marital
 28 status, handicap or Vietnam-era veteran status.” *Doe*, 721 F. Supp. at 853. Indeed, every reported

1 decision of which we are aware that has considered a speech code enacted at a public university
 2 has struck down the policy as incompatible with the First Amendment. *See Reed*, 523 F. Supp. 2d
 3 1005; *Roberts*, 346 F. Supp. 2d 853; *Bair v. Shippensburg Univ.*, 280 F. Supp. 2d 357 (M.D. Pa.
 4 2003); *Dambrot v. Cent. Mich. Univ.*, 839 F. Supp. 477 (E.D. Mich. 1993), *aff'd*, 55 F.3d 1177
 5 (6th Cir. 1995); *UWM Post, Inc. v. Bd. of Regents of the Univ. of Wisc. Sys.*, 774 F. Supp. 1163
 6 (E.D. Wisc. 1991); *Doe*, 721 F. Supp. 852.⁸

7 Of course, to the extent speech constitutes a “true threat,” it is not protected by the First
 8 Amendment. The Supreme Court has defined “true threats” as “those statements where the
 9 speaker means to communicate a serious expression of an intent to commit an act of unlawful
 10 violence to a particular individual or group of individuals.” *Virginia v. Black*, 538 U.S. 343,
 11 359 (2003). In addition, advocacy of the use of force or illegal activity may be prohibited if “such
 12 advocacy is directed to inciting or producing imminent lawless action and is likely to incite or
 13 produce such action.” *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969). But Plaintiffs have not
 14 alleged that the speech alleged in the Complaint met either of these criteria. Plaintiffs allege
 15 neither that the speakers were seriously threatening violence toward an individual or group of
 16 individuals nor that the speakers were inciting imminent illegal activity.⁹

17 While the alleged shopping cart incident would constitute an act of violence, Plaintiffs do
 18 not allege that law enforcement authorities failed to respond to this incident or that UC failed to

19 ⁸ *See also Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 215 (3d Cir. 2001) (Alito, J.) (striking
 20 down a public school district’s anti-harassment policy); *Iota Xi Chapter of Sigma Chi Fraternity*
 21 *v. George Mason Univ.*, 993 F.2d 386 (4th Cir. 1993) (holding that George Mason University
 22 could not discipline fraternity for holding an “ugly woman contest” despite university’s
 23 substantial interest in maintaining an educational environment free of discrimination and racism
 24 and providing a gender-neutral education); *Corry v. Leland Stanford Junior Univ.*, No. 740309
 25 (Cal. Sup. Ct. Feb. 27, 1995) (striking down Stanford’s speech code under a California statute
 26 providing that private university students have the same right to exercise their free speech on
 27 campus as they enjoy off campus).

28 ⁹ Plaintiffs allege that “[i]n October 2000, the president of UCLA’s MSA led a crowd of
 demonstrators at the Israeli consulate in chants of . . . ‘Death to the Jews!’” (Compl. ¶ 43.) In the
 context of a peaceful demonstration outside a consulate, this statement does not constitute a “true
 threat.” Even if it were a threat, the demonstration did not occur on a UC campus, and Plaintiffs
 do not allege that the individual in question was acting in his or her capacity as UCLA’s MSA
 president, or that the protest was organized by UCLA’s MSA. Given that, it is unclear what
 Plaintiffs think UC could or should have done about it. In addition, this alleged demonstration
 occurred long before either Felber or Maissy was enrolled at UC. Apparently, the only reason
 Plaintiffs (or their counsel) know about the incident is that it “was reported on publicly.” (*Id.*)

1 discipline Zakharia for it. Moreover, the Complaint explicitly alleges that, after the other alleged
 2 incident in which “Zakharia assaulted a Jewish UCB student,” “Zakharia and two other SJP
 3 activists were cited for battery by UC Campus Police.” (Compl. ¶ 41.) Thus, the alleged
 4 “deliberate[] indifferen[ce]” upon which Plaintiffs base their Title VI claim (*id.* ¶ 81) appears to
 5 refer merely to UC’s failure to prevent speech that UC could not have prohibited or punished
 6 without violating the speakers’ First Amendment rights.

7 c. **The Supreme Court and the United States Department of**
 8 **Education have recognized that there can be no liability for**
 9 **refraining from prohibiting protected speech.**

10 Consistent with the clear principle that public universities cannot constitutionally restrict
 11 student speech, both the Supreme Court and the Department of Education have recognized that
 12 protected First Amendment speech cannot constitute actionable harassment for which an
 13 educational institution may be liable. The Supreme Court noted in *Davis* that “it would be entirely
 14 reasonable for a school to refrain from a form of disciplinary action that would expose it to
 15 constitutional or statutory claims.” 526 U.S. at 649. Justice Kennedy cautioned explicitly in his
 16 dissent in *Davis* that “[a] university’s power to discipline its students for speech that may
 17 constitute harassment is . . . circumscribed by the First Amendment.” *Davis*, 526 U.S. at 667-68
 18 (Kennedy, J., dissenting); *see also id.* (“A number of courts have already confronted difficult
 19 problems raised by university speech codes designed to deal with peer sexual and racial
 20 harassment. The difficulties associated with speech codes simply underscore the limited nature of
 21 a university’s control over student behavior that may be viewed as . . . harassment.”) (internal
 22 citations omitted).

23 Similarly, the U.S. Department of Education Office for Civil Rights (OCR) issued
 24 investigative guidance in 1994 to explicate their policy and approach to investigating racial
 25 incidents and harassment at educational institutions. Department of Education, Racial Incidents
 26 and Harassment Against Students at Educational Institutions; Investigative Guidance (Mar. 10,
 27 1994), 59 Fed. Reg. 11448. The guidance emphasizes that Title VI is directed at “conduct that
 28 constitutes race discrimination . . . and not at the content of speech. In cases in which verbal
 statements or other forms of expression are involved, consideration will be given to any

1 implications of the First Amendment to the United States Constitution.” 59 Fed. Reg. at 11448
 2 n.1 (emphasis added); *see also id.* at 11450 n.7 (“Of course, OCR cannot endorse or prescribe
 3 speech or conduct codes or other campus policies to the extent that they violate the First
 4 Amendment to the United States Constitution.”).

5 In addition, the OCR published a letter in 2003 in response to the speech code cases
 6 reiterating that OCR does not interpret Title VI to reach speech protected by the First
 7 Amendment. Gerald A. Reynolds, Office for Civil Rights, First Amendment: Dear Colleague
 8 (July 28, 2003), *available at* <http://www.ed.gov/about/offices/list/ocr/firstamend.html> (“No
 9 OCR regulation should be interpreted to impinge upon rights protected under the First
 10 Amendment to the U.S. Constitution or to require recipients to enact or enforce codes that punish
 11 the exercise of such rights.”). The OCR confirmed that Title VI is concerned with discriminatory
 12 *conduct*, not speech: “Harassment, . . . to be prohibited by the statutes within OCR’s jurisdiction,
 13 must include something beyond the mere expression of views, words, symbols, or thoughts that
 14 some person finds offensive. Under OCR’s standard, the conduct must also be considered
 15 sufficiently serious to deny or limit a student’s ability to participate in or benefit from the
 16 educational program.” *Id.*

17 Here, if it had disciplined students for engaging in most of the speech described in the
 18 Complaint, UC would potentially have been subject to liability for violating students’ First
 19 Amendment rights. UC cannot be liable under Title VI for refraining from doing what is
 20 prohibited by the First Amendment. Plaintiffs’ Title VI claim should therefore be dismissed.

21 **2. Plaintiffs’ Title VI claim also fails because Plaintiffs do not allege that**
 22 **Defendants were deliberately indifferent to severe, pervasive, and**
 23 **objectively offensive harassment of them or of Jewish students**
 24 **generally.**

25 Plaintiffs claim that UC violated Title VI because it was deliberately indifferent to what
 26 Plaintiffs allege was harassment by other students on the basis of their Jewish ancestry and
 27 affiliation. (Compl. ¶ 81.)¹⁰ In *Davis*, the Supreme Court held that recipients of federal funding

28 ¹⁰ Title VI of the Civil Rights Act of 1964 provides that no person shall “on the ground of race,
 color, or national origin, be excluded from participation in, be denied the benefits of, or be
 subjected to discrimination under any program or activity receiving Federal financial assistance.”
 42 U.S.C. § 2000d. The United States Department of Education Office for Civil Rights has issued

1 may be liable under Title IX for student-on-student harassment “only where they are deliberately
 2 indifferent to sexual harassment, of which they have actual knowledge, that is so severe,
 3 pervasive, and objectively offensive that it can be said to deprive victims of access to the
 4 educational opportunities or benefits provided by the school.” 526 U.S. at 650. The Supreme
 5 Court has repeatedly emphasized that Title VI is to be given the same interpretation and
 6 construction as Title IX, because Title IX was intentionally patterned after Title VI and has nearly
 7 identical wording. *See, e.g., Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 286 (1998)
 8 (Title IX “was modeled after Title VI . . . , which is parallel to Title IX except that it prohibits
 9 race discrimination, not sex discrimination, and applies in all programs receiving federal funds,
 10 not only in education programs.”); *Fitzgerald v. Barnstable Sch. Comm.*, 129 S. Ct. 788, 797
 11 (2009); *Alexander v. Sandoval*, 532 U.S. 275, 280 (2001); *Cannon v. Univ. of Chicago*, 441 U.S.
 12 677, 694-96 (1979). Accordingly, Courts evaluating Title VI claims of student-on-student
 13 harassment after *Davis* have held that its standard applies to race-based harassment under Title VI
 14 as well.¹¹ *See, e.g., Whitfield v. Notre Dame Middle Sch.*, No. 09-2649, 2011 WL 94735, at *3 (3d
 15 Cir. Jan. 12, 2011) (“A plaintiff may recover [under Title VI] for alleged ‘severe, pervasive, and
 16 objectively offensive’ student-on-student harassment if the school ‘acts with deliberate
 17 indifference to known acts of harassment.’” (citing *Davis*, 526 U.S. at 648)); *Bryant v. Indep. Sch.*
 18 *Dist. No. I-38*, 334 F.3d 928, 934 (10th Cir. 2003) (“[T]he district court is directed to apply to the
 19 Plaintiffs’ Title VI deliberate indifference claims the standard for a Title IX deliberate

20 a “Dear Colleague” letter interpreting Title VI’s prohibition of discrimination on the basis of race
 21 or national origin to prohibit discrimination on the basis of anti-Semitism. *See* Russlyn Ali, Office
 22 for Civil Rights, Dear Colleague Letter (Oct. 26, 2010), *available at*
<http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.html>, at 5. The UC Defendants
 do not challenge that interpretation for purposes of this Motion.

23 ¹¹ The year before *Davis* was decided, the Ninth Circuit held in *Montiero v. Tempe Union High*
 24 *School District*, 158 F.3d 1022, 1032-33 (9th Cir. 1998), that a school district’s failure to
 25 adequately respond to student-on-student racial harassment constituted a violation of Title VI.
 26 While *Montiero*’s central holding that student-on-student harassment claims are actionable under
 27 Title VI remains undisturbed after *Davis*, at least two elements of the test articulated in *Montiero*
 28 conflict with the *Davis* standard. First, while *Davis* requires “severe, pervasive, and objectively
 offensive” harassment, 526 U.S. at 650, *Montiero* had held that conduct need be only “severe,
 pervasive, or persistent.” 158 F.3d at 1033. Second, *Davis* requires the school district to have
 actual knowledge of the harassment, 526 U.S. at 650, while *Montiero* had held that the school
 district’s knowledge could be actual or constructive. 158 F.3d at 1034. The *Davis* standard has
 implicitly overruled *Montiero* on these two points.

1 indifference claim as previously articulated and applied by the Supreme Court in *Davis*.”). Under
 2 that standard, Plaintiffs fail to state a Title VI claim.

3 a. **Plaintiffs fail to state a Title VI claim because they have not**
 4 **pleaded facts sufficient to state a claim that UC acted with**
 5 **deliberate indifference.**

6 Plaintiffs have not pleaded facts sufficient to support a claim that Defendants were
 7 deliberately indifferent to the alleged incidents that involved threats or violence rather than
 8 protected speech. In *Gebser*, the Supreme Court held that recipients of federal funding may be
 9 liable under Title IX only for “deliberate indifference to known acts of” sexual harassment. 524
 10 U.S. at 290-91. An educational institution acts with deliberate indifference only where its
 11 response to known peer harassment “is *clearly unreasonable* in light of the known
 12 circumstances.” *Davis*, 526 U.S. at 648 (emphasis added); *see also Williams ex rel. Hart v. Paint*
 13 *Valley Local Sch. Dist.*, 400 F.3d 360, 368 (6th Cir. 2005). The Supreme Court has made clear
 14 that this is “not a mere reasonableness standard,” but a heightened standard that requires the
 15 defendants’ conduct to have been “not clearly unreasonable.” *Davis*, 526 U.S. at 649. The
 16 Supreme Court has further stressed that student victims of harassment are not entitled to make
 17 “particular remedial demands” about how their school should have responded to the harassment,
 18 and that “[c]ourts should refrain from second-guessing the disciplinary decisions made by school
 19 administrators.” *Id.* at 648. Ultimately, a federal funding recipient cannot be liable for an
 20 inadequate response to peer harassment unless the institution “has made ‘an official decision . . .
 21 not to remedy [a] violation.’” *Oden v. Marianas Coll.*, 440 F.3d 1085, 1089 (9th Cir. 2006)
 22 (quoting *Gebser*, 524 U.S. at 290).

23 Plaintiffs have not alleged facts sufficient to support an inference that the University
 24 failed, in a manner that was clearly unreasonable, to respond to incidents that involved threats or
 25 violent conduct rather than protected speech. Plaintiffs allege only a handful of such incidents
 26 occurring over a period of 15 years. Plaintiffs themselves admit that the University responded to
 27 three of those incidents. (Compl. ¶ 41 (Zakharia was cited for the battery by UC campus police);
 28 *id.* ¶ 49 (UC campus police responded to a “riot” after a concert that was part of an Israel event
 was disrupted); *id.* ¶ 54 (UC campus police escorted disruptive protestors out of a pro-Israel

1 talk)). Plaintiffs do not allege that the University failed to respond to Zakharia’s alleged assault
 2 on Ms. Felber with a shopping cart, (*id.* ¶ 18) or to two other violent acts alleged to have occurred
 3 years before Felber and Maissy were students at UC Berkeley. (*Id.* ¶ 44.) Plaintiffs claim that UC
 4 issued no “effective condemnation” in response to an alleged incident in 1995 in which a Jewish
 5 observer was spat on by a demonstrator at a rally supporting Hamas, but Plaintiffs do not allege
 6 that either the victim or the perpetrator was a UC student or that UC failed to respond at all—
 7 even if it did not respond in the manner Plaintiffs would have chosen. (*Id.* ¶ 42.) Moreover,
 8 Plaintiffs affirmatively allege that UC Berkeley’s Dean of Students Poullard held “meetings with
 9 both Tikvah and SJP about the conflict on campus.” (*Id.* ¶ 21.)

10 **b. Plaintiffs cannot recover under Title VI because the incidents**
 11 **they describe cannot reasonably be viewed as harassment of**
 12 **them or others for being Jewish.**

12 Under the Supreme Court’s decision in *Davis*, in addition to establishing a subjective
 13 perception of harassment, plaintiffs must show that the complained of conduct was “*objectively*
 14 *offensive.*” *Davis*, 526 U.S. at 633. Titles IX and VI borrow the “hostile environment” standard
 15 from Title VII cases involving hostile environments in the workplace. *Saxe v. State Coll. Area*
 16 *Sch. Dist.*, 240 F.3d 200, 205 (3d Cir. 2001); *Papelino v. Albany Coll. of Pharm. of Union Univ.*,
 17 633 F.3d 81, 89 (2d Cir. 2011) (“[A] Title IX hostile education environment claim is “governed
 18 by traditional Title VII ‘hostile environment’ jurisprudence.”). In the Title VII context, the
 19 Supreme Court has held that, in order to constitute harassment under a hostile environment
 20 theory, conduct must be objectively severe and pervasive such that a reasonable person would
 21 agree that it is harassment. *Harris v. Forklift Sys. Inc.*, 510 U.S. 17, 21-22 (1993); *see also Oncale*
 22 *v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81 (1998) (“[T]he objective severity of
 23 harassment should be judged from the perspective of a reasonable person in the plaintiff’s
 24 position, considering all the circumstances.”) (internal quotation marks omitted).

25 A reasonable person would not believe that criticism of Israel is harassment at all, let
 26 alone harassment of Jewish students for being Jewish. In *Finkelshteyn v. Staten Island University*
 27 *Hospital*, 687 F. Supp. 2d 66 (E.D.N.Y. 2009), the court rejected a Jewish plaintiff’s claim that a
 28 co-worker’s comments that Israelis “needed to leave the country they were fighting in” created a

1 hostile work environment, finding that the comment instead represented a “disagree[ment] with
2 [plaintiff’s] position on volatile geo-political issues.” *Id.* at 78; *see also id.* at 82 (holding that a
3 comment that “Israelis should leave Gaza” was not a sign of anti-Semitism).

4 The incidents that Plaintiffs allege were harassment include political demonstrations,
5 publications, and academic events critical of Israel and supportive of Palestinians. (Compl. ¶¶ 27-
6 29, 45-49, 56). They also include disruption of speakers perceived to be pro-Israel or anti-Muslim
7 (*id.* ¶¶ 29, 53, 54). Criticism of Israeli policies and support for Palestinian self-determination,
8 particularly in a university setting, does not constitute harassment of Jewish students on the basis
9 of their religious ancestry and affiliation. Incidents such as heckling during a film “about the rise
10 and dangers of radical Islam” (*id.*) or disruption of a concert by draping Palestinian flags across
11 the stage at “an Israel event” (*id.* ¶ 49), while perhaps disruptive and impolite, are not even
12 alleged to have been directed at Plaintiffs or any other Jewish student on the basis of their Jewish
13 background. These alleged events cannot reasonably be characterized as racially-motivated
14 harassment and therefore cannot support a Title VI student-on-student harassment claim.

15 The only incidents alleged to have been targeted at either Plaintiff are Zakharia’s alleged
16 spitting at Felber and his later allegedly “assaulting” her with a shopping cart. (*Id.* ¶¶ 18, 21.)¹²
17 Even if Defendants had been deliberately indifferent to these incidents, which the Complaint does
18 not allege (as the Complaint is silent about whether Zakharia was arrested and about whether UC
19 initiated student disciplinary proceedings against him), these isolated incidents would not
20 constitute harassment sufficiently pervasive to violate Title VI. *See Davis*, 526 U.S. at 652-53
21 (“Although in theory, a single instance of sufficiently severe one-on-one peer harassment could
22 be said to have [the systemic effect of denying the victim equal access to an educational program
23 or activity] we think it unlikely that Congress would have thought such behavior sufficient to rise
24 to this level in light of the inevitability of student misconduct and the amount of litigation that
25

26 _____
27 ¹² Although Plaintiffs alleges that Zakharia assaulted another Jewish student at UC Berkeley on
28 November 2008 (*id.* ¶ 41), Plaintiffs do not allege that the assault was motivated by the fact that
the student was Jewish. Nor does the Complaint allege that Plaintiffs were personally aware of
the incident, instead basing the allegation only “on information and belief.” (*Id.*)

1 would be invited by entertaining claims of official indifference to a single instance of one-on-one
2 peer harassment.”).

3 c. **Most incidents alleged in the Complaint were not witnessed by**
4 **Plaintiffs, occurred long ago, or are not similar to acts that**
5 **Plaintiffs personally experienced.**

6 Plaintiffs cannot base a Title VI claim on events of which they were not aware when they
7 were UC students and which are not proximate in time or similar to incidents they personally
8 experienced. Again, Title IX and Title VI borrow the “hostile environment” standard from Title
9 VII cases involving hostile environments in the workplace. *Saxe*, 240 F.3d at 205; *Papelino*, 633
10 F.3d at 89. In the Title VII context, courts may consider “harassing acts [that] were directed at
11 others or occurred outside of the plaintiff’s presence,” but only if the “plaintiff bec[ame] aware
12 *during the course of his or her employment*” of that harassment. *Hawkins v. Anheuser-Busch,*
13 *Inc.*, 517 F.3d 321, 336 (6th Cir. 2008) (emphasis added); *see also, e.g., King v. McMillan*, 594
14 F.3d 301, 310 (4th Cir. 2010) (testimony of others was relevant to the ‘severe or pervasive’
15 element only if [the plaintiff] “was aware of [the harassment described in the testimony] during
16 the course of her employment”); *Schwapp v. Town of Avon*, 118 F.3d 106, 111-12 (2d Cir. 1997).

17 Correspondingly, alleged acts of harassment that happened outside of Plaintiffs’ presence
18 are potentially relevant to their Title VI claim only if they were aware of them while they were
19 students at UC Berkeley. Felber is no longer a student at UC (Compl. ¶ 3), and the Complaint
20 does not allege that Felber was aware of the incidents it describes—other than the alleged
21 shopping cart and spitting incidents in which she was involved (*id.* ¶¶ 18-21)—while she was a
22 student at UC. Although Maissy is a current student and presumably now knows about the
23 incidents described in the Complaint, the only incident at which Maissy is alleged to have been
24 present is the alleged barbed wire incident (*id.* Ex. A ¶¶ 3-13), which affected a student other than
25 Maissy himself.

26 In addition, past acts of harassment directed at other individuals are potentially relevant
27 only if they occurred close in time to incidents that plaintiffs personally experienced. *Hawkins*,
28 517 F.3d at 337 (“[T]he appropriate weight to be given a prior act will be directly proportional to
the act’s proximity in time to the harassment at issue in the plaintiff’s case.”). Here, many of the

1 alleged incidents occurred long before Plaintiffs enrolled at UC Berkeley.¹³ Plaintiffs claim that
 2 they were harassed by incidents that occurred as early as 1995, when Felber would have been
 3 only five years old and Maissy even younger. (Compl. ¶ 42; *see also id.* ¶¶ 27-28, 43-47, 54).¹⁴

4 Moreover, incidents of harassment directed at others are potentially relevant to a hostile
 5 environment claim, regardless of timing, only if they are “similar” to acts of harassment that have
 6 been experienced directly by the plaintiff. *Hawkins*, 517 F.3d at 336-37. Thus, courts have
 7 considered acts of harassment directed at individuals other than the plaintiff to be relevant only if
 8 they are similar to those suffered by the plaintiff herself. *E.g.*, *King*, 594 F.3d at 306-08 (female
 9 sheriff was repeatedly sexually harassed and sexually assaulted); *Schwapp*, 118 F.3d at 108 (“the
 10 four central incidents” of racial harassment all occurred in the presence of the plaintiff, an
 11 African-American police officer). Here, Maissy has not alleged *any* harassment directed at him
 12 personally; the only event at which he even claims to have been present is a single “Apartheid
 13 Week” political demonstration. (Compl. Ex. A (Decl. of Brian Maissy.)) Felber has alleged only
 14 that Zakharia “assaulted” her with a shopping cart on one occasion (*id.* ¶ 18) and spat at her
 15 during a political rally on another. (*Id.* ¶ 21.) All of the other incidents alleged in the Complaint
 16 were either distant in time or dissimilar in character to the two incidents involving Zakharia and
 17 Felber, so all of the other incidents are entirely irrelevant to Plaintiffs’ Title VI claim. The alleged
 18 shopping cart and spitting incidents are not “severe and pervasive” enough to provide a basis for a
 19 deliberate indifference claim. *See Davis*, 526 U.S. at 652-53.

20 **3. Plaintiffs fail to state a Title VI claim because they have not alleged**
 21 **that they were denied educational benefits or opportunities.**

22 Plaintiffs fail to state a Title VI claim for the additional reason that they have not alleged
 23 they were denied access to any educational benefits or opportunities. To satisfy the *Davis*

24 _____
 25 ¹³ Several of the alleged incidents of harassment did not occur at UC Berkeley at all, making them
 26 completely irrelevant to Plaintiffs’ claims about the purported atmosphere at UC Berkeley. (*Id.*
 27 ¶¶ 29, 43, 45, 46.) For example, Plaintiffs object to a news magazine that was published at UCLA
 28 and UC Irvine but which they do not even allege was distributed at Berkeley. (*Id.* ¶ 46.)

¹⁴ Ms. Felber also alleges that she was harassed by events that occurred after she graduated in
 December 2010. (*Id.* ¶¶ 29, 40.) Ms. Felber’s ability to access educational benefits and
 opportunities at the University of California could not have been affected by incidents that
 occurred after she was no longer a student there.

1 standard, harassment must “deprive victims of access to the educational opportunities or benefits
2 provided by the school.” 526 U.S. at 650. This requirement is not a mere technicality but is
3 essential to the purpose of Title VI, which was enacted to provide recourse to individuals who
4 were excluded on the basis of race from entities receiving federal funds. *See Cannon*, 441 U.S. at
5 704 & n.64.

6 In order to be actionable under Title VI, the alleged conduct must have a “concrete,
7 negative effect on [the plaintiff’s] ability to receive an education.” *Davis*, 526 U.S. at 654. Courts
8 have recognized three types of impediments to a plaintiff’s access to education in the Title IX
9 context: physical exclusion from educational facilities, *e.g.*, *Montgomery v. Indep. Sch. Dist. No.*
10 *709*, 109 F. Supp. 2d 1081, 1094 (D. Minn. 2000), poor academic performance, *e.g.*, *Jennings v.*
11 *Univ. of N.C.*, 482 F.3d 686 (4th Cir. 2007), and absence, withdrawal, or suspension from school,
12 *e.g.*, *Williams v. Bd. of Regents of Univ. Sys. of Ga.*, 477 F.3d 1282, 1298-99 (11th Cir. 2007);
13 *Vance v. Spencer County Pub. Sch. Dist.*, 231 F.3d 253, 259 (6th Cir. 2000); *Murrell v. Sch. Dist.*
14 *No. 1*, 186 F.3d 1238, 1248-49 (10th Cir. 1999). Absent one of these concrete effects on a
15 plaintiff’s access to educational opportunities, discomfort about the alleged harassment does not
16 constitute a denial of access to an education.

17 For example, in *Gabrielle M. v. Park Forest-Chicago Heights, IL School District 163*, 315
18 F.3d 817 (7th Cir. 2003), the Seventh Circuit held that there is no evidence that [the plaintiff] was
19 denied access to an education,” because “[a]lthough [the plaintiff] was diagnosed with some
20 psychological problems, the record show[ed] that her grades remained steady and her absenteeism
21 from school did not increase.” *Id.* at 823. In *Hawkins v. Sarasota County School Board*, 322 F.3d
22 1279 (11th Cir. 2003), plaintiffs testified that they were upset as a result of the alleged harassment
23 and even faked being sick several times to avoid going to school. *Id.* at 1289. The Eleventh
24 Circuit held that these facts “[fell] short of demonstrating a systemic effect of denying equal
25 access to an educational program or activity,” given the fact that the students’ grades did not
26 suffer and their teachers did not observe any change in their classroom demeanor. *Id.*; *see also*
27 *Trentadue v. Redmon*, 619 F.3d 648, 654 (7th Cir. 2010) (a student was not denied equal access to
28 an education where her grades did not suffer, she was not absent from school, and she graduated

1 with a high class rank).¹⁵

2 Plaintiffs have alleged that, after the alleged shopping cart incident, Felber was fearful to
3 walk on campus alone. (Compl. ¶ 20.)¹⁶ Maissy likewise states in his declaration—though not in
4 the Complaint itself—that he does “not feel safe on . . . campus because of the actions of a few
5 radical groups.” (*Id.* Ex. A ¶ 18.) These general claims are not accompanied by any specific
6 allegations sufficient to establish that Plaintiffs’ access to educational benefits or opportunities
7 was actually impaired. Plaintiffs have not alleged that any purported harassment caused them to
8 be physically excluded from any educational opportunities. Nor have they alleged that the
9 purported harassment detracted from their academic performance, caused them to miss classes,
10 caused them to withdraw from school, or prevented them from completing graduation
11 requirements on schedule. (*See id.* ¶ 15 (noting that Felber has graduated).)

12 One outlier case suggests that an allegation that a plaintiff’s extreme fear for his physical
13 safety and well-being effectively barred his access to educational opportunities and benefits and
14 so was sufficient to meet his pleading burden. *See Ray v. Antioch Unified Sch. Dist.*, 107 F. Supp.
15 2d 1165, 1171 (N.D. Cal. 2000). But Plaintiffs have not met even this more lenient standard. In
16 *Ray*, a middle school student had been “repeatedly threatened, insulted, taunted, and abused”
17 throughout the school day and during school activities. *Id.* at 1167. After the student’s parents
18 complained to the school and the school took no action, the student was assaulted, “causing a
19 concussion, hearing impairment in one ear, severe and permanent headaches, and severe
20 psychological injury.” *Id.* In contrast to the permanent physical injury and severe psychological
21 damage suffered in *Ray*, Plaintiffs’ conclusory allegations here about fearfulness on campus do

22 _____
23 ¹⁵ *See also Milligan v. Bd. of Trustees*, No. 09- 320, 2010 WL 2649917, at *10 (S.D. Ill. June 30,
24 2010) (despite the fact that plaintiff felt “uncomfortable and distracted” as a result of harassment,
25 there was no concrete, negative effect on his education where there was no impact on the
26 classroom learning environment, his grades did not drop, and he was not substantially absent
from class); *Burwell v. Pekin Cmty. High Sch. Dist.* 303, 213 F. Supp. 2d 917, 932 (C.D. Ill.
2002) (even if the harassment plaintiff was subjected to caused her to receive a lower grade in a
single class, her educational experience was not undermined where she was on the honor roll and
graduated with her class).

27 ¹⁶ Given that Plaintiffs allege that Felber obtained a permanent restraining order against Zakharia
28 (Compl. ¶ 20)—the only student that the Complaint suggests ever did anything threatening
toward her—precisely what she feared, or what more she believes UC could conceivably have
done concerning Zakharia, is unclear.

1 not describe an objectively reasonable fear for their personal safety. By Plaintiffs' own
2 allegations, Felber obtained a protective order against Zakharia (Compl. ¶ 20), and nothing in the
3 Complaint explains why Maissy would reasonably fear for his safety.

4 **E. Felber Lacks Standing to Seek Injunctive Relief.**

5 Felber does not have standing to seek injunctive relief in federal court as a remedy for any
6 of her claims. In order to have standing to seek an injunction, a plaintiff must allege a "likelihood
7 of substantial and immediate irreparable injury," *O'Shea v. Littleton*, 414 U.S. 488, 502 (1974),
8 that is "real and immediate, not conjectural or hypothetical." *City of Los Angeles v. Lyons*, 461
9 U.S. 95, 102 (1983). In *Lyons*, the Supreme Court held that a plaintiff who had been placed in a
10 chokehold by a police officer did not have standing to sue the police department for injunctive
11 relief, because there was no real or immediate threat that he would suffer future injury from the
12 use of chokeholds by police officers. *Id.* at 105. Because Felber is no longer a student at UC
13 Berkeley, it is similarly unlikely here that Felber would be a victim of an attack on that campus
14 again, and she no longer experiences the purportedly hostile campus environment. (Compl. ¶ 15).
15 Plaintiffs' allegation that Felber "contemplate[s] graduate studies at the University," (*id.* ¶ 79), is
16 too speculative to confer standing.

17 On similar facts, the Eleventh Circuit held that a student who withdrew from the
18 University of Georgia as a result of an alleged sexual assault lacked standing to pursue injunctive
19 relief under Title IX. *Williams*, 477 F.3d at 1303. The court held that the threat of future harm to
20 plaintiff was merely conjectural because neither the plaintiff nor the alleged assailants currently
21 attended the university. *Id.* Although the plaintiff alleged that she might return if the university
22 adopted a more protective sexual harassment policy, the court held that this contingency was "too
23 conjectural to warrant injunctive relief." *Id.*

24 **F. Plaintiffs' State Law Claims Should Be Dismissed.**

25 Given that all of Plaintiff's federal claims should be dismissed, this Court should decline
26 to exercise supplemental jurisdiction over Plaintiffs' state law claims. In the alternative, the Court
27 should dismiss Plaintiffs state law claims because: (1) Plaintiffs' free exercise claim under the
28 California Constitution presents novel questions of state law, so the Court should abstain from

1 deciding it; (2) Plaintiffs’ Unruh Act claim fails because UC is not a business establishment
 2 within the meaning of that Act; and (3) Plaintiffs’ Government Code claim fails because it seeks
 3 only injunctive and declaratory relief, and the UC Defendants have immunity in federal court
 4 from claims for injunctive and declaratory relief based on violations of state law.

5 **1. Plaintiffs’ state law claims should be dismissed for lack of**
 6 **supplemental jurisdiction.**

7 For the reasons discussed above, all of Plaintiffs’ federal law claims (the first, third, and
 8 sixth claims for relief in the Complaint) should be dismissed. Once Plaintiffs’ federal claims are
 9 dismissed, this Court should decline to exercise supplemental jurisdiction over the remaining state
 10 law claims (the second, fifth, and seventh claims for relief in the Complaint). *See* 28 U.S.C.
 11 § 1367(c) (“The district courts may decline to exercise supplemental jurisdiction over a claim . . .
 12 if . . . the district court has dismissed all claims over which it has original jurisdiction”).¹⁷ The
 13 Supreme Court has recognized that, “in the usual case in which all federal-law claims are
 14 eliminated before trial, the balance of factors to be considered under the pendent jurisdiction
 15 doctrine—judicial economy, convenience, fairness, and comity—will point toward declining to
 16 exercise jurisdiction over the remaining state-law claims.” *Carnegie-Mellon Univ. v. Cohill*, 484
 17 U.S. 343, 350 & n.7 (1988) (interpreting the statement in *United Mine Workers of America v.*
 18 *Gibbs*, 383 U.S. 715, 726 (1966), that “if the federal claims are dismissed before trial . . . the state
 19 claims should be dismissed as well”). There is no reason here to depart from this well-established
 20 default rule. Significant federal judicial resources have not yet been expended on the state law
 21 claims.

22 **2. This Court should abstain from exercising jurisdiction over the**
 23 **California free exercise claim because it raises novel questions of state**
 24 **law.**

24 Plaintiffs’ second claim for relief—under the free exercise clause in article I, section 4 of
 25 the California Constitution—presents novel questions of California law regarding the elements of

26 ¹⁷ The fourth claim for relief, which apparently seeks declaratory relief for alleged violations of
 27 the First Amendment to the United States Constitution and California Constitution Article I,
 28 section 4 (the California free exercise clause) is redundant with claim 1 (First Amendment), claim
 2 2 (California free exercise clause), and claim 3 (§ 1983), so the discussion above of those claims
 also explains why the fourth claim should be dismissed.

1 the claim and the availability of damages.¹⁸ The presence of these novel questions of state law is
 2 an additional reason for dismissal. Under 28 U.S.C. § 1367(c)(1), “district courts may decline to
 3 exercise supplemental jurisdiction over a [state law] claim . . . if the claim raises a novel or
 4 complex issue of State law.” *Id.* Accordingly, federal courts routinely dismiss claims that turn on
 5 novel questions of state law. *See, e.g., Lee v. Wilkinson*, No. 09-00722, 2009 WL 2824758, at *7
 6 (E.D. Cal. Sept. 1, 2009) (relying on § 1367(c)(1) and the *Pullman* abstention doctrine to decline
 7 jurisdiction over a claim presenting a novel question of California law) (citing *R.R. Comm’n of*
 8 *Tex. v. Pullman Co.*, 312 U.S. 496, 501 (1941)); *Creighton v. City of Livingston*, 628 F. Supp. 2d
 9 1199, 1219 (E.D. Cal. 2009) (“[W]hether § 3 provides for a damages remedy has not been
 10 addressed by California courts, presenting a novel issue This issue is best left to the
 11 California courts.”).

12 Plaintiffs’ California free exercise claim raises two novel and complex questions of
 13 California law. First, what elements and standards govern such a claim has not yet been
 14 determined by the California courts. The California Supreme Court has observed “that the
 15 meaning of the California Constitution article I, section 4 . . . is not dependent on the meaning of
 16 any provision of the federal Constitution.” *Catholic Charities of Sacramento, Inc. v. Superior*
 17 *Court*, 32 Cal. 4th 527, 560 (2004); *North Coast Women’s Care Med. Group, Inc. v. Superior*
 18 *Court*, 44 Cal. 4th 1145, 1158 (2008). But “[t]he California Supreme Court ‘has never had
 19 occasion to definitively construe’ this clause.” *Barnes-Wallace v. City of San Diego*, 607 F.3d
 20 1167, 1175 (9th Cir. 2010) (quoting *E. Bay Asian Local Dev. Corp. v. California*, 24 Cal. 4th 693,
 21 719 (2000)); *see also North Coast Women’s Care*, 44 Cal. 4th at 1158 (recognizing that the
 22 California Supreme Court has not “determined the appropriate standard of review for such a
 23 challenge under the state Constitution’s guarantee of free exercise of religion”). Because this
 24 Court cannot confidently predict how the California Supreme Court will interpret California’s
 25 free exercise clause, it should decline supplemental jurisdiction and dismiss Plaintiffs’ claim.

26 _____
 27 ¹⁸ The caption of the Complaint also lists sections 2 and 7 of Article I, but because neither of
 28 those sections is mentioned in the body of the Complaint, the UC Defendants assume the only
 claim Plaintiffs are asserting under the California Constitution is a free exercise claim under
 Article I, section 4.

1 Second, the California courts have never decided whether the California free exercise
 2 clause creates a cause of action for money damages. In *Katzberg v. Regents of the University of*
 3 *California*, 29 Cal. 4th 300 (2002), the California Supreme Court expressed skepticism about
 4 recognizing new constitutional torts for money damages. The court noted, for example, that both
 5 the U.S. Supreme Court and California courts have refused for more than twenty years to
 6 recognize any new money damages actions for constitutional violations. *Id.* at 308, 311. The court
 7 then laid out a stringent and lengthy analysis that must be undertaken before any new
 8 constitutional tort is created. *Id.*

9 In *Khatib v. County of Orange*, No. 07-1012, 2008 WL 822562 (C.D. Cal. Mar. 26, 2008),
 10 the Central District of California dismissed plaintiffs’ claim for money damages under article I,
 11 section 4 of the California Constitution, acknowledging that “The California Courts have not yet
 12 addressed whether such a private suit for monetary damages is available under Article I, Section 4
 13 of the California Constitution.” *Id.* at *11. The court explained its decision to decline to exercise
 14 supplemental jurisdiction:

15 In addition to being a matter of first impression, and therefore novel, the
 16 determination of whether a private action for money damages exists also appears
 17 complex. It would involve careful consideration of the intention of the state
 18 legislature, a delicate balancing of existing state law remedies, and consideration
 of the broader impact of such a constitutional tort. The Court finds it prudent to
 abstain from considering this important issue of California law in favor of
 California courts.

19 *Id.* This Court should similarly dismiss Plaintiffs’ California free exercise claim.

20 **3. Plaintiffs’ Unruh Act claim fails because UC is not a “business**
 21 **establishment” within the meaning of that Act.**

22 Plaintiffs’ fifth claim for relief, under California’s Unruh Civil Rights Act, does not state a
 23 claim because UC is not a “business establishment” within the meaning of that Act. *See* Cal. Civil
 24 Code § 51. While no case has yet decided whether universities are “business establishments”
 25 under the Act,¹⁹ the closest case on point—*Doe v. California Lutheran High School Association*,

26 ¹⁹ This would also be a reason to abstain from exercising jurisdiction over Plaintiffs’ Unruh Act
 27 claim. *See* section III.F.2 *supra*. In *Lee v. Wilkinson*, No. 09-00722, 2009 WL 2824758, at *7
 28 (E.D. Cal. Sept. 1, 2009), the district court abstained of exercising jurisdiction over the plaintiff’s
 Unruh Act claim against a state prison because the California courts had not decided whether
 prisons were “business establishment[s]” under the Act.

1 170 Cal. App. 4th 828 (2009)—held that a private high school was not a business establishment,
2 at least with regard to the school’s admissions and disciplinary decisions. In *Doe*, two students
3 were expelled from a private religious school because they were engaging in a same-sex
4 relationship; they sued the school district under the Unruh Act, alleging that the school had
5 discriminated against them on the basis of sexual orientation. *Id.* at 833. The court held that the
6 school was not a “business establishment” subject to the Act. *Id.* at 840. The *Doe* court implied
7 that a school might engage in some transactions that would make it a “business establishment” for
8 purposes of those transactions, such as selling football tickets to the public or holding golf
9 tournaments to raise funds for the school. *Id.* at 839. It distinguished, however, between such
10 commercial transactions with non-members and admissions or disciplinary decisions that are
11 central to the overall purpose and function of the school. *Id.*; *see also Curran v. Mount Diablo*
12 *Council of the Boy Scouts*, 17 Cal. 4th 670, 700 (1998) (holding that the Boy Scouts could be a
13 business, and hence prohibited from discriminating, with respect to nonmember transactions, and
14 yet not be a business, and hence not be prohibited from discriminating, with respect to its
15 membership decisions); *cf. Marin Mun. Water Dist. v. Chenu*, 188 Cal. 734, 738 (1922) (“It is not
16 to be presumed that the Legislature undertook to place public corporations . . . in the same class
17 as private corporations engaged in ordinary business. The rule of construction we have already
18 referred to forbids it.”).

19 Here, Plaintiffs’ allegations put the University of California clearly outside the business
20 establishment category. Plaintiffs challenge what they claim was UC’s failure to adequately
21 discipline its students and the extent to which UC acts as an open public forum for student
22 speech, however unpopular. These aspects of UC’s affairs are entirely non-commercial in
23 character, relate to the internal affairs of the university, and are directly related to its central
24 educational purposes and functions. The Court should therefore dismiss Plaintiffs’ claim under
25 the Unruh Act because UC is not a “business establishment” within the meaning of the Act.

26 **4. Plaintiffs’ state law claims for injunctive and declaratory relief fail**
27 **because the UC Defendants have Eleventh Amendment immunity.**

28 As discussed above, The Regents has sovereign immunity against any claims brought by

1 individuals in federal court, absent congressional abrogation or consent. *See* Section III.B.5,
2 *supra*. All of Plaintiffs’ state law claims must be dismissed as against The Regents for this reason
3 alone.

4 In addition, the Individual Defendants have Eleventh Amendment immunity against all of
5 Plaintiffs’ state law claims for injunctive and declaratory relief. *See Pennhurst State Sch. & Hosp.*
6 *v. Halderman*, 465 U.S. 89, 106 (1984) (“[I]t is difficult to think of a greater intrusion on state
7 sovereignty than when a federal court instructs state officials on how to conform their conduct to
8 state law. Such a result conflicts directly with the principles of federalism that underlie the
9 Eleventh Amendment.”); *see also Air Transp. Ass’n of Am. v. Pub. Utils. Comm’n of State of*
10 *Cal.*, 833 F.2d 200, 203-04 (9th Cir. 1987) (dismissing claims for injunctive and declaratory relief
11 on the ground that, under *Pennhurst*, “[t]he eleventh amendment . . . bars claims in federal court
12 against state officials based on state law violations”).

13 Because Plaintiffs’ seventh claim for relief—under California Government Code
14 § 11135—seeks only injunctive and declaratory relief (Compl. 22:2), it must be dismissed against
15 the UC Defendants. *See Donovan v. Poway Unified Sch. Dist.*, 167 Cal. App. 4th 567, 595 (2008)
16 (stating that § 11139 “limit[ed] the remedies available in a private enforcement action [under
17 §11135] to equitable or injunctive relief”); *Pennhurst*, 465 U.S. at 106.

18 **IV. CONCLUSION**

19 For the foregoing reasons, all of Plaintiffs’ claims against the UC Defendants should be
20 dismissed.

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1 DATED: July 5, 2011

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17 UNITED STATES DISTRICT COURT
18 NORTHERN DISTRICT OF CALIFORNIA

19 JESSICA FELBER
and BRIAN MAISSY,

20 Plaintiffs,

21 vs.

22 MARK G. YUDOF, PRESIDENT OF THE
REGENTS OF THE UNIVERSITY OF
CALIFORNIA, et al.,

23 Defendants.
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CASE NO. CV 11-01012 RS

**[PROPOSED] ORDER GRANTING
MOTION TO DISMISS OF DEFENDANTS
MARK G. YUDOF, PRESIDENT OF THE
REGENTS OF THE UNIVERSITY OF
CALIFORNIA; THE REGENTS OF THE
UNIVERSITY OF CALIFORNIA;
ROBERT J. BIRGENEAU,
CHANCELLOR OF THE UNIVERSITY
OF CALIFORNIA; AND JONATHAN
POULLARD, DEAN OF STUDENTS OF
THE UNIVERSITY OF CALIFORNIA,
BERKELEY**

Judge: Hon. Richard Seeborg
Dept: Courtroom 3, 17th Floor
Date: September 22, 2011
Time: 1:30 pm

1 The motion of Defendants MARK G. YUDOF, THE REGENTS OF THE
2 UNIVERSITY OF CALIFORNIA, ROBERT J. BIRGENEAU, and JONATHAN POUILLARD
3 (“UC DEFENDANTS”) under Rule 12(b)(6) of the Federal Rules of Civil Procedure to dismiss
4 Plaintiffs’ First Amended Complaint for failure to state a claim upon which relief may be granted
5 came on for hearing before this Court on September 22, 2011.

6 After consideration of the briefs and arguments of counsel, and all other matters
7 presented, the Court hereby GRANTS the motion for the reasons set forth in the UC Defendants’
8 papers.

9 (1) Claims 1 and 3—which allege violations of the rights of free exercise of
10 religion and freedom of assembly under the First Amendment and § 1983—fail to state a
11 claim because Plaintiffs have not alleged a substantial burden on their ability to exercise
12 their religion, *Hernandez v. C.I.R.*, 490 U.S. 680, 699 (1989), or any infringement of their
13 ability to assemble to express their views, *San Jose Christian Coll. v. City of Morgan Hill*,
14 360 F.3d 1024, 1033 (9th Cir. 2004). In addition, state officials are not liable for failing to
15 protect un-incarcerated individuals from actions of other private individuals, even when
16 those actions may affect the exercise of constitutional rights. *DeShaney v. Winnebago*
17 *County Dep’t of Soc. Servs.*, 489 U.S. 189, 197-200 (1989); *Pietrangelo v. Alvas Corp.*,
18 664 F. Supp. 2d 420, 432-33 (D. Vt. 2009). Moreover, Defendants Birgeneau and Yudof
19 are not liable under Section 1983 because Plaintiffs have not alleged that either Defendant
20 personally participated in or even had knowledge of the incidents alleged in the
21 Complaint. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1948-49 (2009).

22 (2) Claim 6—which alleges a violation of Title VI of the Civil Rights Act of
23 1964—fails to state a claim because (a) it is premised on the allegation that the UC
24 Defendants should have prohibited speech that is in fact protected by the First
25 Amendment from prohibition, *see, e.g., Davis v. Monroe County Board of Education*, 526
26 U.S. 629, 649 (1999) (“[I]t would be entirely reasonable for a school to refrain from a
27 form of disciplinary action that would expose it to constitutional or statutory claims.”);
28 *Coll. Republicans at San Francisco State Univ. v. Reed*, 523 F. Supp. 2d 1005 (N.D. Cal.

1 2007) (striking down a university speech code as unconstitutional); (b) Plaintiffs have not
2 alleged that the University was deliberately indifferent to conduct that went beyond
3 protected speech and involved threats or violence, *Davis*, 526 U.S. at 648-49; (c) Plaintiffs
4 have not alleged “severe, pervasive, and objectively offensive” harassment, *id.* at 650;
5 *Hawkins v. Anheuser-Busch, Inc.*, 517 F.3d 321, 336-37 (6th Cir. 2008); *Finkelshteyn v.*
6 *Staten Island Univ. Hosp.*, 687 F. Supp. 2d 66, 78, 82 (E.D.N.Y. 2009); and (d) Plaintiffs
7 have not alleged that they were deprived of any educational opportunities, *Davis*, 526 U.S.
8 at 654.

9 (3) Claims 2, 5, and 7—which allege violations of the free exercise clause of the
10 California Constitution, the California Unruh Act, and California Government Code
11 § 11135, respectively—are dismissed because there is no reason to exercise federal
12 jurisdiction over purely state law claims once the federal claims are dismissed. 28 U.S.C.
13 § 1367(c); *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 350 & n.7 (1988). In the
14 alternative, the Court will abstain from exercising jurisdiction over Claim 2 because it
15 presents novel questions of state law, *Barnes-Wallace v. City of San Diego*, 607 F.3d
16 1167, 1175 (9th Cir. 2010) (“[The California Supreme Court ‘has never had occasion to
17 definitively construe’ [the California Free Exercise] clause.”) (quoting *E. Bay Asian Local*
18 *Dev. Corp. v. California*, 24 Cal. 4th 693, 719 (2000)); *Khatib v. County of Orange*, No.
19 07-1012, 2008 WL 822562, *11 (C.D. Cal. Mar. 26, 2008) (“The California Courts have
20 not yet addressed whether such a private suit for monetary damages is available under
21 Article I, Section 4 of the California Constitution.”); dismiss Claim 5 because the
22 University of California is not a business establishment within the meaning of the Unruh
23 Act, *Doe v. Cal. Lutheran High Sch. Ass’n*, 170 Cal. App. 4th 828 (2009); and dismiss
24 Claim 6 because it seeks only injunctive and declaratory relief and the UC Defendants
25 have immunity in federal court from claims for injunctive and declaratory relief based on
26 violations of state law, *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 106
27 (1984).

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(4) Claim 4 is dismissed because it does not include a substantive claim but rather seeks only a form of relief—relief that is not available because Plaintiffs’ substantive claims fail as a matter of law.

Accordingly, IT IS HEREBY ORDERED that the UC Defendants’ motion to dismiss the First Amendment Complaint is GRANTED pursuant to Federal Rule of Civil Procedure 12(b)(6).

DATED: _____, 2011

By: _____

United States District Judge