UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

JACOB MANDEL, et al.,

Plaintiffs,

v.

BOARD OF TRUSTEES OF THE CALIFORNIA STATE UNIVERSITY, et al.,

Defendants.

Case No. 17-cv-03511-WHO

**ORDER GRANTING MOTIONS TO DISMISS**

Re: Dkt. Nos. 131, 136, 138, 141, 151

In this action, plaintiffs allege that defendants have tolerated and, in some instances, fostered or encouraged anti-Semitic conduct on the San Francisco State University campus. On the prior motions to dismiss, I dismissed the FAC as to all defendants after exhaustively reviewing the 76-page, 248 paragraph First Amended Complaint ("FAC") and explained in detail why plaintiffs' allegations were insufficient to support their claims. Dkt. No. 124 (the "March 2018 Order"). Plaintiffs filed a Second Amended Complaint ('SAC"), adding new plaintiffs and dropping some defendants but maintaining the same essential causes of action. Perhaps to avoid the import of my prior ruling, plaintiffs shifted their theories away from claims of invidious discrimination based on religion and national origin and towards viewpoint discrimination based on political positions that plaintiffs allege are tied to their Jewish identity or Israeli ancestry.

This shift in theories, however, does not save the SAC from dismissal. While I understand that these plaintiffs, and some other members of the Jewish or Israeli community in or around SFSU, feel deeply that SFSU has not done enough to curtail others' anti-Semitic behaviors and to foster a better environment for Jewish and pro-Israeli students, the acts described in the SAC do not adequately allege a violation of federal anti-discrimination laws so that liability may be imposed on SFSU, its administrators, or its faculty.

Plaintiffs allege that the adoption of the policy of "anti-normalization" in the COES and AMED departments "mandates" that Abdulhadi and Monteiro "engage in and support efforts to disrupt speech and gatherings in support of Jewish sovereignty and bar Israelis, Zionists, and anyone who acknowledges Israel's actual existence from publicly expressing themselves." The anti-normalization policies adopted by the departments and individuals have allegedly created a hostile environment at SFSU for Jewish and Israeli students. *Id.* ¶ 39; *see also id.* ¶¶ 40-51 (describing two GUPS/AMED sponsored anti-Israel or anti-Zionist events held on campus in 2013 and 2015, describing the violent messages issued at those events, as well as violent threats made by the former president of GUPS and SFSU's alleged failure to respond to those threats).[4] Plaintiffs assert that instead of adequately addressing the threats to Jewish and Israeli-identified students, defendant Wong "directly" contributed to this "pervasively hostile environment for Jews on campus" by praising and encouraging GUPS and its behavior and disregarding the concerns of Jewish groups like Hillel. *Id.* ¶ 51.

Plaintiffs contend that SFSU's discrimination and anti-Semitic attitude are most recently exemplified by two specific events.

## II. MAYOR BARAK EVENT

On March 28, 2016, the student group Hillel arranged for the Mayor of Jerusalem, Nir Barkat, to speak on SFSU's campus at an event on April 6, 2016 titled "Jerusalem Mayor Nir Barkat: How is a Visionary from the High-Tech Sector Leading a Diverse and Scrutinized City?"

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for the academic and cultural boycott of Israel, because plaintiffs rely on these guidelines in support of their opposition to the motion to dismiss and cite them in footnote 6 of the SAC and reference the issuing organization at paragraph 37 of the SAC. RJN (Dkt. No. 154), Ex. F. Plaintiffs oppose, arguing that despite their own reliance on these guidelines Abdulhadi's reliance on the full language is simply an attempt to soften or ignore the import of her anti-normalization policy. Dkt. No. 162. The request is GRANTED as to the guidelines that plaintiffs themselves rely on in their SAC, but only for purposes of noting the content of those guidelines.

[4] Plaintiff Ben-David describes violent threats made by the former President of GUPS in 2013, including wanting to kill Israeli soldiers, as a direct threat of violence to her as she is a former Israeli soldier and was in a class with the student who made the threats. *Id.* ¶¶ 47-49. Plaintiffs complain that insufficient actions were taken to protect Jewish or students identified with Israel in general and Ben-David in particular, and that despite his threats, administration officials allowed the student who made the violent threats to finish his degree. *Id.* ¶ 49.

given the "powder kegs" all over campus. *Id.* ¶ 58. Wong "lamented" in an email to Hong on March 31, that "there may be no option for us." *Id.* ¶ 59.

Plaintiffs allege that when they became aware that administrators, including Wong, were actively seeking a way to stop the event, Begley, Hong, Stuart, Birello and Jaramilla (with Wong's knowledge of and acquiescence in) "collectively applied an unwritten, unannounced, never-before-enforced and entirely discretionary, standardless policy of moving 'controversial speakers' away from CCSC and to a remote and poorly-known location," which required a fee. *Id.* ¶ 60. Jaramilla informed a Hillel student that the room at CCSC was not available and wrote to Birello that a "conflict" has arisen and the event could not be hosted at CCSC. *Id.* ¶ 61. Begley then confirmed in an email that CCSC was not available and the only other space under consideration was Seven Hills. *Id.* The Seven Hills room required a $356.60 fee (the CCSC room did not), and Hillel paid the fee. *Id.* ¶ 62. According to Mandel, many students with whom he spoke had no idea where Seven Hills was located. *Id.* Plaintiffs allege that the forced-use of Seven Hills and the delay in confirming the location directly hampered Hillel's ability to publicize the event and resulted in deceased attendance. *Id.*

Plaintiffs complain that the "policy" of moving the event to a distance and fee-based room based upon a determination that the event or speaker was "controversial" is arbitrary, subject to ad hoc unchecked and discriminatory application, and applied to target speech based on content, making it unconstitutional. *Id.* ¶¶ 63-65. Plaintiffs complain that in "direct contrast to SFSU's practice regarding expression by Jews," neither a "controversial Palestinian speaker" hosted by GUPS and AMED in 2015 nor any other "controversial" speakers hosted by GUPS, AMED, or COES "were banished to for-fee locations on the outskirts of campus on the basis of either perceived 'controversy' of the events, their content, or any worries about protected activity." *Id.* ¶ 50.

SF Hillel Assistant Director Rachel Nilson communicated with a member of SFSU Police Department, Dave Rodriguez, in the days leading up to the event. Rodriguez informed Nilson that the police expected protesters and intended to erect barriers and have a designated protest area outside the event. *Id.* ¶ 55. Nilson also emailed Begley to ask about what types and levels of

(which was to remove the protestors to the designated protest area). *Id.* ¶ 83.

Plaintiff Merkulova stepped into the hall to call 911 because she felt scared for her physical safety; she was informed that officers were already present. *Id.* ¶ 79. When she approached the officers at the event, they told her they were directed not to intervene in order to protect the protestors' "free speech." *Id.* Plaintiff Rosekind informed a uniformed officer that she did not feel safe. *Id.* ¶ 80. Plaintiffs Mandel and Volk feared for their safety and for the safety of others at the event and plaintiff Kern sought to physically protect them. *Id.* ¶ 81. Aaron Parker (a former named plaintiff who was omitted from the SAC) told Chief Parson that he did not feel safe. Parson asked if Parker would complete a citizen's arrest form but Parson never returned with the form. *Id.* ¶ 82. During the event, Parker was informed by SFSU University Corporation Director Jason Porth that the Barkat Shutdown Defendants did not want to remove the protestors. *Id.*

After Mayor Barkat left the room, the protestors cheered proudly and continued to shout, "Get the fuck off our campus!" to the Barkat Shutdown Plaintiffs. *Id.* ¶ 86. The stand down order created and contributed to this unsafe and hostile environment. According to plaintiffs, it showed the defendants' "utter indifference" to direct threats against Jewish individuals who attended the event. *Id.* ¶ 87.

**C. Conduct and Investigations After the Event**

In written responses regarding the disruption of the event, as well as in a SFSU-commissioned investigation into the event ("Barkat Report"),[6] SFSU administrators and the Barkat Report concluded that the protestors' use of amplified sound violated school and student policies and disrupted the event. *Id.* ¶¶ 72-74. According to plaintiffs, the Barkat Report concluded that the administrators' refusal to engage the disruptors, and the fact that Parson was the only administrator who told the protestors to stop, meant the administrators "impliedly sanctioned" the disruption. *Id.* ¶ 75.

President Wong, in his communications following the event, "ratified" the actions of Begley, Parson, and Birello, by publicly declaring his support for their conduct and failing to take

[6] Various findings of fact from the Barkat Report were cited in the FAC and I took Judicial Notice of that document. March 2018 Order at 5 n.3.

GUPS and COES "hunger strike," in which participants were chanting anti-Zionist slogans and complaining about the investigation of GUPS students' behavior at the Barkat event. *Id.* ¶ 97. He reported these and "other concerns" to a professor and to SFSU in two EO 1097 complaints on April 6, 2016 and May 2, 2016. *Id.* ¶¶ 89, 97.[7] Those complaints were "disregarded" by SFSU. *Id.* ¶ 97.

Plaintiff Volk felt "sufficiently threatened" by a constant stare down from a GUPS member in his Israeli Conflict class the day after the Mayor Barkat event that anxiety forced him to leave mid-way through class. *Id.* ¶ 90.[8]

Plaintiffs allege that Wong was aware of the fear and intimidation faced by Jewish students on campus following the Barkat event, as confirmed by an email sent by Hillel's director to Wong after Wong held a meeting with students where those students expressed concerns about wearing Stars of David or otherwise outwardly identifying as Jewish on campus. *Id.* ¶ 98. Yet, when Wong held a meeting to discuss the concerns of Jews on campus on June 3, 2016, he was displeased with a list of "demands" made by attendees and expressed his belief that Hillel was partially to blame for the Barkat event disruption given the lack of advance notice. *Id.* ¶ 99. He also conveyed to the students that their concerns were not appropriately directed to him but should be raised with other, lower-level administrators. *Id.* ¶ 100. Wong refused to acknowledge that his concern about the Jewish students having "disproportional access" to him was an anti-Semitic stereotype. *Id.* ¶¶ 101-102. Plaintiffs fault Wong for attempting to get Jewish faculty members to ignore or minimize the problems faced by Jewish students on campus in order to secure a grant from a major Jewish funder. *Id.* ¶¶ 109-110. And plaintiffs argue that Wong has given conflicting definitions of Zionism and "intimated" that "Jews who wanted to be Jews" were not welcome at SFSU. *Id.* ¶ 111.

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[7] EO 1097 is the CSU systemwide policy prohibiting discrimination, harassment, or retaliation. SAC ¶ 89 n. 19.

[8] Plaintiff Kern's allegations about being subject to verbal assaults and his reluctance to enroll in COES classes, contained in the FAC, have been removed from the SAC. *See* FAC ¶ 24.

¶ 121.

Plaintiffs assert that Hillel's exclusion was "ratified" by the other KYR Fair defendants.[11] In particular, Begley was made aware of the organizers' intent to exclude Hillel 13 days in advance and was informed by Hong that excluding Hillel would be a problem. *Id.* ¶¶ 122. But neither Begley nor Hong took any steps to force the organizers to include Hillel or shut down the event "despite having the authority" to do so. Hillel's director spoke directly to Begley about the exclusion two days before the event, yet again Begley did not act, ratifying the decision. *Id.*

Monteiro also became aware of that an unspecified "problem was unfolding" with the Fair and reversed a prior decision to speak at the event. *Id.* ¶ 123. Plaintiffs contend that as Dean of COES he was empowered to compel the organizers to admit all interested groups or else shut down the event. He did neither, and his failure to act was a ratification of Hillel's exclusion. *Id.* Similarly, Birello and Jaramilla's job titles make them responsible for coordinating and managing student events at SFSU. As a result, they had the power to prevent the intentional exclusion of Hillel but took no steps to do so, and actively allowed Hillel to be excluded because of a viewpoint. *Id.* ¶ 127.

Plaintiffs assert that SFSU commissioned a non-legal investigation into Hillel's exclusion, but has not released the report to the public (KYRF Report). On information and belief, the KYRF Report concluded that Hillel was intentionally excluded and organizers were responsible for "retaliation and intentional discrimination" against Hillel in violation of SFSU's policies. *Id.* ¶¶ 124-125, 135. The intentional discrimination, according to the KYRF Report, was not based on religious discrimination but on viewpoint discrimination, and the retaliation was against specific Hillel-identified students who filed EO complaints related to the Barkat event.[12]

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[11] The KRY Fair defendants are Wong, Begley, Birello, Monteiro, Abdulhadi, and Jaramilla.

[12] Defendant Abdulhadi asks me to take judicial notice under the doctrine of incorporation of the April 13, 2018 "Executive Order 1096/1097 (Revised) Appeal Response" issued by the CSU's Chancellor's Office of Investigations, Appeals and Compliance. RJN (Dkt. No. 135), Ex. E. Abdulhadi contends this Response is the final action following the SFSU internal investigation and Know Your Rights Report discussed in paragraph 135 of the SAC. The Response describes the conclusions' SFSU reached in its KYRF Report; that Hillel was intentionally excluded from the KYR Fair because of its viewpoint and in retaliation for EO complaints made by Hillel members following the Barkat event, but Hillel was not excluded because of its Jewish religious

targeted as specific individuals are identified. The two "stare downs" suffered by Mandel and Volk following the Barkat event in 2016, and the threats that Ben-David felt were directed at her in 2013, came from fellow students.

There is also the added allegation that on the first day of school in September 2016, three Jewish groups (Hillel, AEPi fraternity, and Lambda Chi Mu sorority) were denied tabling permits at the New Student Recruitment fair. Birello "berated" Mandel regarding what paperwork was necessary to secure the permits for Hillel, but it later turned out Birello was at fault for forgetting to "click" approve in the SFSU system for Hillel. *Id.* ¶ 108. The other two groups lost out on 4-5 days of tabling in their attempt to get permits and, on information and belief no other groups had "trouble" securing permits. *Id.*

Presumably to bolster their Title VI claim, plaintiffs seek leave to file a "supplement" to the SAC. Dkt. No. 151. That supplement details the experiences plaintiff Gershon had in and outside of class with Professor Simmy Makhijani, who taught the "South Asians in America" class through COES. Gershon alleges that Makhijani learned that Gershon was Jewish and had Israeli ancestry (through an assignment where Gershon focused on her personal experiences witnessing a pattern of targeting and discrimination at SFSU based on both Israeli national origin and Jewish identity). Dkt. No 151-1, ¶ 4. After this, Gershon complains that she was frequently "called out in class" and encouraged to join anti-Zionist groups, criticized for her beliefs that people at SFSU demonized Israelis, and lectured that those harassing and targeting Zionists were doing so because of their own oppression. *Id.* ¶¶ 4-5. Despite Gershon informing Makhijani that she did not want to have those conversations in front of her peers, the professor continued to target and harass Gershon in and outside of class. *Id.* ¶ 8. Based on her observations, Gershon believes that COES faculty "perpetuates a consistent narrative that denies the humanity, civil rights and right to self-determination" of members of her Jewish and Israeli communities. *Id.* While Gershon became increasingly uncomfortable, nervous, and upset because of her treatment by the professor, to protect her grade in the class she knew she had to continue showing up and participating. Gershon is afraid to take any additional classes at COES because she believes she will face the same intimidation, harassment, and discrimination from all COES faculty. *Id.* ¶ 12. Gershon filed an

Plaintiffs contend that on more than a dozen occasions over the last two years, SFSU, its Board of Trustees and Wong have publicly acknowledged an anti-Semitism problem that pervades SFSU, but have made only "empty and disingenuous promises" to take steps to address the problem. *Id.* ¶ 128. They point to various ineffectual efforts defendants have taken, including: (i) investigations into violations of the Student Code and allegations of discrimination that have resulted in no consequences against the perpetrators, (ii) the existence of unfilled positions for campus climate professionals, (iii) the Working Group on Campus Climate (announced in September 2017) was dissolved almost immediately because of lack of support from Wong; and (iv) that the same fate met the Task Force on Anti-Semitism (also announced in September 2017), which dissolved in the face of no support from Wong or the administration. *Id.* ¶ 129.

Then plaintiffs point to measures they have presumably asked for but SFSU has not implemented, including: (i) training on the existence and enforcement of free speech and time place and matter policies; (ii) training on anti-Semitism; (iii) official apologies for Hillel's intentional exclusion from the KRY Fair; (iv) affirmation by Wong that Zionists are welcome on campus; and (v) further face-to-face meetings by Wong with Jewish campus or community leaders.

Finally, plaintiffs complain that despite Jewish student requests, there is no "representative mural" for Jewish students on campus despite there being others for various minority communities. *Id.* ¶ 107.

## V. CAUSES OF ACTION

Based on these allegations, as amended, the following causes of action are asserted in the SAC:

1. Violation of 42 U.S.C. § 1983 (asserted by the "Barkat Removal Plaintiffs" against the "Barkat Removal Defendants"[16]) based on the violation of these plaintiffs' First Amendment "right to assemble, the right to listen or the right to hear" when these

[16] The Barkat Removal Plaintiffs are Mandel, Volk, and Kern. SAC ¶ 65. The Barkat Removal Defendants are Begley, Hong, Jaramilla, Stuart, Birello, and Wong. SAC ¶ 56.

6. Violation of 42 U.S.C. § 1983 (asserted by KYRF Plaintiffs against KYRF Defendants) based on denial of equal protection guaranteed by the Fourteenth Amendment, related to their Jewish student organization's intentional exclusion based on the student's Jewish identity and perceived viewpoint from the KYR Fair, denying them the meaningful opportunity to speak and hear about their rights provided to other similarly situated SFSU students, SAC ¶¶ 187-199;
7. Violation of Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq*. (asserted by "Title VI Jewish Students" against defendants CSU and SFSU), related to SFSU's discrimination against and exclusion of plaintiffs from the benefits of education at SFSU based on their status and identification as members of the Jewish race, Jewish ancestry, and Jewish religion; SAC ¶¶ 200-215;
8. Violation of Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d et seq. (asserted by "Title VI Israeli Students" against defendants CSU and SFSU), related to SFSU's discrimination against and exclusion of plaintiffs from the benefits of education at SFSU based on their national origin or ancestry and their identification as Israeli, SAC ¶¶ 216-231; and
9. A claim for Declaratory Relief under 28 U.S.C. §§ 2201, 2202 (asserted by Title VI Jewish Plaintiffs against all defendants other than Abdulhadi).[19]

Defendants, again, move to dismiss, arguing that the newly added factual allegations and clarified theories still do not state a claim against any defendant.[20]

A group of Jewish Studies Scholars and Open Hillel have filed motions for leave to appear as Amicus Curiae, which are opposed by plaintiffs.[21]

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[19] The SAC's causes of action break out some of plaintiffs' claims into separate causes of action, but encompass the same claims as presented in their FAC.

[20] Defendant Abdulhadi had moved to strike the SAC's quotation of the U.S. State Department's definition of Anti-Semitism, arguing it was distorted and not accurate. Dkt. No. 134. Pursuant to the parties' stipulation, the SAC was amended to correct the quotation of that definition and Abdulhadi's motion was withdrawn. Dkt. No. 144. As before, Abdulhadi separately moves to dismiss the claims asserted against her.

[21] The Jewish Studies Scholars seek leave to file an amicus brief in support of the motions to

cured the fundamental deficiencies I identified in the March 2018 Order. They urge that plaintiffs fail to plead plausible facts showing intent of invidious discrimination by the Administration Defendants and differential treatment by the Administration Defendants to support plaintiffs' discrimination and equal protection claims.

Plaintiffs switched theories to attempt to avoid the intent hurdles. They now claim that their injuries were not caused by invidious discrimination based on race or religion but were the result of unconstitutional viewpoint discrimination. Defendants argue the new theories do not apply to the types of claims asserted here and cannot save plaintiffs' Section 1983 claims.

As an initial matter, the parties spend significant portions of their briefs arguing whether, in light of my prior, very detailed Order, the Administration Defendants could simply identify how plaintiffs had not cured the deficiencies I identified, or whether the Administration Defendants needed to more exhaustively address plaintiffs' claims. The parties also spend significant time debating whether plaintiffs were given leave to change their theories of discrimination in the SAC, or whether that was prevented by the "law of the case" doctrine. For purposes of the resolution of this case, I will give full consideration to both sides' arguments and theories. The fundamental question before me is straight forward: have plaintiffs stated a claim in their SAC?

**A. First Amendment Claims – Barkat Event**

The essence of plaintiffs' First Amendment Claims surrounding the Barkat event remains the same in the SAC. Plaintiffs claim that the student and community plaintiffs' rights to assemble, listen or hear were infringed by: (i) intentionally assigning the Barkat event to a remove, fee-based location; and (ii) defendants' failure to remove or otherwise stop the protestors and allowing the protestors the shut down the event.

**1. Official Capacity**

As I noted in the March 2018 Order, in order to allege a claim against the individual Administration Defendants in their official capacities, plaintiffs must allege facts plausibly showing that a policy or custom led to their injuries. The FAC did not do so. March 2018 Order at 16. In the SAC, plaintiffs allege a new theory: they were injured when "Defendants Begley, Hong, Stuart, Birello, and Jaramilla collectively applied an unwritten, unannounced, never-before-

them liable. *Id.*[23] In order to avoid that holding – likely because as noted in the prior Order even plaintiffs' own allegations and reliance on the Barkat Report showed that defendants took their actions because of fear of disruption to classes, not because of the religious or political content of the talk – plaintiffs now assert they suffered from viewpoint discrimination under the standardless "policy" regarding controversial speakers. Plaintiffs contend that all the defendants can be held liable for their mere knowledge, even if they did not personally act to move the event to a distant fee-based room.

The fundamental problem with this switch to a theory of viewpoint discrimination, as discussed above, is that plaintiffs plead no facts to support their contention that the location for the event was changed as a result of any official yet standardless policy that could allow for or result in viewpoint discrimination. Nor did plaintiffs even attempt to allege a policy with respect to the stand down order.[24]

The lack of specific intent alleged for any individual remains an insurmountable problem for both the pre-event removal as well as the stand down order.

**3. Infringement of First Amendment Rights – Pre-Event "Removal"**

Another reason that this newly broken out claim does not survive is the continued failure to allege infringement on the plaintiffs' fundamental rights. As I noted in my prior Order, in addition to the lack of allegations to plausibly show that the move to a distant fee-based room was the result of intentional or even viewpoint discrimination, that move *did not* result in an

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[23] In my prior Order, I explained why plaintiffs' reliance on "cases arising under the Eighth and Fourteenth Amendments that discuss 'deliberate indifference' when conditions of confinement are involved" and allow supervisory liability based on deliberate indifference are irrelevant to the facts of this case. March 2018 Order at (distinguishing the *Starr v. Baca*, 652 F.3d 1202, 1206 (9th Cir. 2011) line of cases and discussing the distinction recognized in *OSU*, 699 F.3d at 1071).

[24] The "heckler's veto" cases repeatedly relied on by plaintiffs do not support them here. *See, e.g., Forsyth County, Ga. v. Nationalist Movement*, 505 U.S. 123, 134 (1992) (striking down an ordinance that failed to contain adequately defined and constrained criteria for setting permit fees because of the danger of unbridled content-based discrimination in setting the fee); *Ctr. for Bio-Ethical Reform, Inc. v. Los Angeles County Sheriff Dept.*, 533 F.3d 780, 787 (9th Cir. 2008) ("If the statute, as read by the police officers on the scene, would allow or disallow speech depending on the reaction of the audience, then the ordinance would run afoul of an independent species of prohibitions on content-restrictive regulations, often described as a First Amendment-based ban on the 'heckler's veto.'").

harassment and intimidation directed against them based on their religion to be deemed as an interference with their free exercise of that religion, they simply have no basis for pursuing such constitutional claims against defendants. With exceptions not implicated here, state actors have no constitutional obligation to prevent private actors from interfering with the constitutional rights of others.").

Plaintiffs have not stated a First Amendment claim under any of their theories based on any conduct related to the Barkat event.

**B. Equal Protection Claim – Barkat Pre-Event "Removal"**

To the extent this claim is based on the application of the "standardless previously unenforced policy," it survives only to the extent that First Amendment claim survives. *See OSU Student All. v. Ray*, 699 F.3d 1053, 1067 (9th Cir. 2012) ("[T]he complaint properly alleges that the University infringed plaintiffs' speech rights by employing a standardless policy to draw a distinction between the Liberty and the Barometer and by engaging in viewpoint discrimination. Therefore, the complaint also states equal protection claims for differential treatment that trenched upon a fundamental right."). As noted above, plaintiffs have failed to allege facts supporting their First Amendment claim.

To the extent this claim is based (as it was on the prior round of briefing) on the theory that plaintiffs were denied equal protection because they were subject to treatment (assignment of a distant fee-based room) when others similarly situated were not, they have again failed to plead facts to plausibly support this claim. Plaintiffs plead only on information and belief that other groups with controversial speakers were not treated similarly. SAC ¶ 154 ("On information and belief, no other events were banished to for-fee locales on the outskirts of campus based on concerns about controversial speakers drawing protest activity."). There are no facts, nor even assertions, that other events held in the middle of the day, during class time, in class space, and that were likely to draw protest activity were treated differently than plaintiffs' event, much less that any differential treatment was based on a protected category (race, religion, national origin) or because of the Administration's disapproval of the speaker's content.

Plaintiffs complain that this lack of facts is not their fault, as all of the facts reside in

Plaintiffs assert they have done that in the SAC by pointing to evidence that, in this instance, the police were directed to act against established protocol. SAC ¶ 83 ("Chief Parson told Mr. Mandel that the 'stand down' instruction from Defendants Begley, Birello, and the other administrators present was an order to the police by their superiors to ignore protocol, which was to remove the disruptors to the designated protest area. The other officers that had arrived also told Mandel that, despite protocol, they had been instructed to 'stand down.'"). I agree with plaintiffs that this more specific allegation gets them closer, but it still fails to plausibly allege that the "stand down" order was issued *because* Hillel and the Jews in attendance were Jewish or that the decision-makers issued the stand-down order *because* they disagreed with the content of the speech or favored the content of the protestors' speech.[27] Absolutely no facts have been alleged to support their mere assertion of differential treatment.

Plaintiffs have not stated an Equal Protection claim under any of their theories based on any conduct related to the Barkat event.

**D. First Amendment Claim – KYR Fair**

The essence of plaintiffs' First Amendment claim surrounding Hillel's exclusion from the KYR Fair likewise remains the same: plaintiffs were denied the right to assemble, listen or hear, and speak about their rights at the Fair. On the prior round of briefing, this claim was dismissed primarily because plaintiffs failed to allege any facts showing that any Administration Defendant acted to exclude Hillel, and plaintiffs' own specific allegations place responsibility for Hillel's exclusion on the student organizers of the event. March 2018 Order at 20-21.

In the SAC, not surprisingly, the allegations regarding the actual decision makers (students) have been removed. The allegations against the two Administration Defendants

[27] I note that there are no facts alleged about the content of the "established" protocol that plaintiffs allege the Administration Defendants violated when issuing the stand down order. Plaintiffs simply assert the established protocol was "to remove the disruptors to the designated protest area," *see* SAC ¶ 83, but allege nothing about the origin, content, or application of that protocol in any circumstance. In paragraph 171 of the SAC plaintiffs' merely assert that "[o]n information and belief, 'stand down' orders were not promulgated to the UPD for events where other viewpoints were expressed." That conclusory allegation provides no details about any other events, much less whether the Administration Defendants were faced with conditions similar to those during the Barkat event.

three identified Administration Defendants. *See also* SAC ¶ 125 (describing the planning committee as "self-organized and self-appointed"). Plaintiffs do not allege that any of the Administration Defendants were organizers, nor do they assert that the KYRF Report (or the Response on the appeal from the Report issued by the CSU Chancellor's office) identified any misconduct by any Administration Defendant with respect to the KYR Fair. This is significant and undercuts plaintiffs' continued reliance on the *OSU* opinion.

In *OSU*, the Ninth Circuit concluded that when dealing with the application of a law or official policy that impacted free speech rights, supervisors could be liable for their knowing acquiescence in the acts of their subordinates. *OSU*, 699 F.3d at 1075. Here we are not dealing with application of a law or official policy with respect to the KYRF Fair and the student organizers are not employee-subordinates of the Administration Defendants. As I noted in the prior Order, plaintiffs are attempting to stretch this line of cases into a wholly different context than the employee-employer context out of which it arose.[30]

As to plaintiffs' theory that these Administration Defendants' failure to stop the organizers "ratified" the unconstitutional exclusion of Hillel making them personally liable, plaintiffs cite only one case to support their theory. That case is, again, inapposite. *See Christie v. Iopa*, 176 F.3d 1231, 1239 (9th Cir. 1999) (recognizing established precedent that a "policymaker's knowledge of an unconstitutional act does not, by itself, constitute ratification. Instead, a plaintiff must prove that the policymaker approved of the subordinate's act," and finding sufficient evidence of approval in light of affirmative acts by the supervisor in support of the subordinate's actions).

The allegations against Birello and Jaramilla on this claim are even thinner. Plaintiffs

[30] In addition, while plaintiffs repeatedly argue they have adequately alleged viewpoint discrimination by these three Administration Defendants, in order to fall within the holding of *OSU*, they continue to ignore that with respect to the KYR Fair exclusion they have failed to allege the existence of any *policy* that these defendants were allegedly applying in a viewpoint-discriminatory manner. *But see* OSU, 699 F.3d 1066-67 (concluding plaintiffs pleaded sufficient facts to support inference that officials were "enforcing the policy in a viewpoint-discriminatory fashion."). Putting the policy issue aside, there are no facts supporting an inference that *these defendants* acted in order to favor one viewpoint over another with respect to their alleged failure to require the organizers to admit Hillel or their failure to shut the KYR Fair down.

specifically noted that the inclusion of another group representing Jews could create an insurmountable barrier to this claim. *Id.* at 25. Plaintiffs attempt to avoid this issue by characterizing Hillel in the SAC as the only group representing all Jews on campus, a position as noted above that is disputed by proposed Amicus Open Hillel. Taking plaintiffs' allegation about Hillel as true for purposes of this motion and ignoring that in Abdulhadi's blog post (of which I have now taken judicial notice) there is mention of "Jews for Peace" attending the KYRF, this claim still fails. Plaintiffs have not alleged facts showing that the Administration Defendants were required upon notice to step in and either force Hillel's inclusion or shut down the Fair. Even if they had cleared that hurdle, they still fail to allege facts supporting the inference that Hillel was excluded because it represented the interests or viewpoint of Jews and that the Administration Defendants treated other groups, representing other interests or viewpoints, differently.

Despite being given multiple opportunities and guidance about how they could allege their Section 1983 claims against the Administration Defendants, and despite trying new theories, plaintiffs have failed to state their claims. The Section 1983 claims against the Administration Defendants are DISMISSED WITH PREJUDICE.

## II. SECTION 1983 CLAIMS AGAINST ABDULHADI

In the prior Order, I dismissed the Section 1983 claims against Abdulhadi with respect to the Barkat event and the KYR Fair because of the lack of facts supporting a plausible inference that Abdulhadi played any role with respect to what happened at those events, as well as the lack of facts that she acted with specific intent to discriminate against plaintiffs. March 2018 Order at 34-37. I specifically rejected plaintiffs "attempt to build a bridge between Abdulhadi's alleged anti-Zionist and anti-Israel stances, her pro-Palestinian resistance support, and her academic pursuits to support an inference that she must have encouraged GUPS or others to engage in the acts of discrimination complained of." *Id.* at 37.

The SAC made one helpful clarification; plaintiffs repeatedly state that they only sue Abdulhadi in her personal capacity, apparently acknowledging that there was no unconstitutional SFSU "policy" that she is alleged to have created or imposed on plaintiffs. Despite that acknowledgment, they now try to pin on her responsibility for imposing her "anti-normalization"

on the plaintiffs. And, as noted above, this is not an "official policy" or "supervisory liability" case where post-hoc ratification by an official of actions of their supervised-employee make the supervisor or policymaker liable or support an inference of the existence of an official policy. *See, e.g., Dorger v. City of Napa*, 12-CV-440 YGR, 2012 WL 3791447, at *5 (N.D. Cal. Aug. 31, 2012) (recognizing that post-hoc conduct by policymakers and supervisors of their employee or subordinate's behaviors can constitute evidence of an official policy under *Monell*); *see also OSU*, 699 F.3d at 1076.

Plaintiffs, again, complain that their lack facts plausibly supporting the claim that Abdulhadi took direct action (or knowing inaction) with respect to the students' conduct during the Barkat event or KYR Fair is due to those facts being within Abdulhabi's possession. That, again, ignores that there have been investigations into these events (conducted or initiated by SFSU or CSU) and reports issued that plaintiffs themselves repeatedly cite as support for their other factual assertions. But more significantly, the only facts plaintiffs have alleged are: Abdulhadi subscribes to anti-Zionist and anti-normalization policies; Abdulhadi is a faculty member of COES and AMED and COES and AMED have sponsored anti-Zionist events at SFSU; Abdulhadi is the faculty advisor to GUPS; and Abdulhadi has a mentee relationship with some of the students who disrupted the Barkat event and excluded Hillel. These allegations do not, contrary to plaintiffs' assertion, plausibly or even reasonably suggest Abdulhadi directed or caused the injuries to the plaintiffs.

The claims against Abdulhadi are DISMISSED, and given the multiple opportunities plaintiffs have had to amend, it is dismissed WITH PREJUDICE.[31]

## III. TITLE VI CLAIMS

In dismissing the Title VI claim in the FAC, I found that plaintiffs had not adequately alleged facts: (i) showing a pervasive hostile environment towards Jewish students (created either

[31] As such, I need not consider Abdulhadi's additional arguments that plaintiffs lack standing, that Abdulhadi was not acting as a "state actor" and did not exercise sufficient control over the students to satisfy the "joint action" test, that Abdulhadi is protected by qualified immunity, and that plaintiffs' theory impermissibly seeks to hold Abdulhadi liable for her own First Amendment protected academic freedom and speech.

discrimination was intentional, and (3) that the discrimination was a substantial or motivating factor for defendants' actions.")." March 2018 Order at 27.

These incidents of direct discrimination are identified as including "but are hardly limited to" "President Wong's intimation that Jews who want to be Jews are not welcome on campus, Defendant Abdulhadi's statement that Zionists being welcome on campus was 'a declaration of war,' and the statements offered in support by other faculty and academic departments." Oppo. at 12. However, even plaintiffs do not contend that these discrete statements constitute direct discrimination *against* Jewish or Israeli students on campus that led directly to a denial of equal access to education or educational opportunities. Instead, they say that these allegations are part of their showing of a hostile environment and the administration's alleged failure to respond appropriately.

**B. Hostile Environment**

A hostile environment is one that is "so severe, pervasive, and objectively offensive, and that so detracts from the victims' educational experience, that the victims are effectively denied equal access to an institution's resources and opportunities." *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 652 (1999) (discussing the standard for harassment claims under the analogous Title IX framework); *see also Monteiro*, 158 F.3d at 1033 (a "hostile environment" adequately alleged "if it is sufficiently severe that it would interfere with the educational program of a reasonable person of the same age and race as the victim"); *Hayut v. State U. of New York*, 352 F.3d 733, 745 (2d Cir. 2003) (pervasive means more than episodic, they must be sufficiently continuous and concerted).[33]

As to peer-to-peer conduct, those incidents include: (i) anti-Zionist and anti-Israeli graffiti and posters on campus;[34] (ii) Mandel being stared down immediately after the Barkat event and at

[33] In the March 2018 Order I explained that the incidents that could support a hostile environment claim under Title VI should have occurred shortly before and during the time the Title VI plaintiffs attended SFSU so that plaintiffs were aware of those incidents. March 2018 Order at 29-30; *see also Felber v. Yudof*, 851 F.Supp.2d 1182, 1188 (N.D. Cal. 2011) ("[A]cts occurring years before plaintiffs ever enrolled at UC Berkeley, and/or on different campuses entirely, does little to demonstrate that plaintiffs suffered severe and pervasive harassment.").

[34] The only indication of the contents of this graffiti and these flyers is found in paragraph 105:

As to the conduct by the Administration, the alleged failures to address the concerns of students are more appropriately considered in the "adequacy of the response" section below. Plaintiffs cite no case law holding that University's response to complaints can, itself, be considered part of the *creation* of the hostile environment. The conduct with respect to Gershon's professor could be considered hostile as to Gershon herself, but plaintiffs do not allege that any other students knew of this conduct or that it impacted *their* environment; it is instead offered as evidence that anti-Jewish or anti-Israeli sentiment is pervasive in COES. But this is the only first-hand allegation of discrimination towards Jewish or Israeli-identified students from professors within COES. This set of incidents between Gershon and her professor are more appropriately considered in weighing the allegations of a deficient response by the Administration to complaints of harassment. *See, e.g., Thomas v. City College of San Francisco*, 15-CV-05504-HSG, 2017 WL 1315592, at *3 (N.D. Cal. Apr. 7, 2017), *aff'd sub nom. Thomas v. San Francisco Community College Dist.*, 708 Fed. Appx. 398 (9th Cir. 2017) (unpublished) (rejecting Title VI claim based on conduct between a professor and students because allegations "address only [professor's] conduct rather than any failure on the part of [College], and could not support a finding that Plaintiff was exposed to a racially hostile environment of which [the College] had notice, and to which [the College] failed to respond.").

The only remaining affirmative conduct alleged are the anti-Zionist statements by Wong and Abdulhadi (and then offers of support to Abdulhadi), the alleged efforts of Abdulhadi and Monteiro to have COED and AMED adopt anti-normalization as their official policy, and the one instance of tabling permits being denied.[35] As to the tabling permits, there are no facts alleged that the Jewish-identified groups were denied permits *because of* their Jewish-identity or assumed Israeli ancestry. This discrete incident can only be assumed to have occurred because the groups were Jewish-identified, and assumption by itself is not enough. As to the imposition of the anti-

[35] Plaintiffs also allege that SFSU's "cultivation" of the hostile environment is supported by an email Monteiro sent to Defendants del Valle, Hong and Begley after the Barkat event comparing Mayor Barkat to "a member of the KKK or Nazi party." Oppo. at 12; SAC ¶ 88. However, there is no evidence that any student knew of this email and no allegation that and defendant other than Monteiro adopted this sentiment.

other words, we must decide whether, on this record, one could find that the College made 'an official decision . . . not to remedy the violation.'" *Oden v. Northern Marianas College*, 440 F.3d 1085, 1089 (9th Cir. 2006) (quoting Davis v. Monroe County Bd. of Educ., 526 U.S. 629, 641 (1999) and *Gebser v. Lago Vista Independent School District*, 524 U.S. 274, 290 (1998)).

To "meet this high standard there must, in essence, be an official decision not to remedy the violation and this decision must be clearly unreasonable." *Doe v. Willits Unified School Dist.*, 473 Fed. Appx. at 775–76; *see also Monteiro*, 158 F.3d at 1034 (quoting *City of Canton, Ohio v. Harris*, 489 U.S. 378, 388–92 (1989)) ("[T]he district is liable for its failure to act if the need for intervention was so obvious, or if inaction was so likely to result in discrimination, that 'it can be said to have been deliberately indifferent to the need.'").

In the SAC, plaintiffs admit that the University has investigated both the Barkat and the KYR Fair incidents. Plaintiffs do not allege there were unreasonable delays or inadequate efforts in those investigations. *See Oden*, 440 F.3d at 1089 ("[T]his record does not permit an inference that the delay was a deliberate attempt to sabotage Plaintiff's complaint or its orderly resolution."). Instead, plaintiffs complain about the outcome of those investigations, in particular that no students or student groups were disciplined as a result of the Barkat and KYR Fair events. They do not allege that the University has not met with the complaining students or student groups. Instead, they complain that in those meetings (and after the meetings) administrators (including Wong) invoked anti-Semitic tropes about undue access of Jewish students to Wong and that little has occurred to resolve the students' and community members' concerns about the environment for Jews and Israeli ancestry students on campus. SAC ¶¶ 100-102.

Plaintiffs are obviously upset that none of the students have been disciplined who were involved in disrupting the Barkat event or in excluding Hillel from the KYR Fair. They may also be upset that none of the administrators who were faulted for not preparing adequately for the protests expected at the Barkat event were sanctioned for their conduct nor otherwise publicly criticized by Wong or others.[36] But plaintiffs are entitled to a fair process, not "the precise remedy

[36] Plaintiffs complain that "[d]espite a finding in the University's own commissioned investigation of the KYRF incident that Hillel was intentionally excluded, there has not been a single

unreasonably long, or whether the University resolved them in a way that Mandel felt was insufficient under Title VI. These allegations do not rise to the level of deliberate indifference.

As to Ben-David, the plaintiff who believes she was the target of threats by the former student and GUPS member, plaintiffs admit that she was given a separate room to take her final exam (presumably so she would not be exposed to the student) and that the then-Dean of Students heard her complaints and "offered a psychological referral and a campus security escort if she felt unsafe." Plaintiffs complain that the then-Dean and other administrators "refused to do anything to actually address the problem itself—Hammad and his violent threats." *Id.* ¶¶ 47- 48. But they also state that Ben-David made sure that someone knew where she was at all times during finals week and walked on campus with a Campus Police security escort. She did not allege that she was unable to attend classes or that her education suffered as a result of the threats. *Id.* The allegations regarding SFSU's response to Ben-David do not rise to the level of deliberate indifference.

As to Gershon, plaintiffs admit that her EO 1097 complaint was responded to the next day by an SFSU official, although the follow up meeting had not taken place between its May 22, 2018 filing the June 13, 2018 filing of plaintiffs' supplement. Clearly, that process is ongoing and plaintiffs have not alleged facts amounting to deliberate indifference.[38]

Considering the totality of the allegations, plaintiffs' own allegations show that SFSU is not ignoring the hostile environment alleged by plaintiffs, but at most assert that SFSU's responses were not sufficient to satisfy plaintiffs and that some of the processes are still ongoing. Deliberate indifference has not been alleged.

**D. Impact on Education**

Finally, the plaintiffs who are or were students during the relevant time must show that the hostile environment they were subjected to caused "concrete, negative effect" on the victims' education, for example creating "disparately hostile educational environment" relative to a peer,

[38] To the extent that Gershon might have a standalone Title VI claim, my Order dismissing her allegations as part of this action, essentially because they are not ripe, would not preclude Gershon from filing a separate claim on her own behalf.

1188 (noting "it was not clear that activities on Sproul Plaza or at Sather Gate necessarily would significantly impede any student's access to the educational services offered by the University" when the incidents alleged "did not occur in the context of her educational pursuits" but when plaintiff was attempting to exercise free speech).

Reviewing the totality of the Title VI claims on behalf of Jewish students and Israeli-ancestry students, they do not survive because the allegations do not amount to deliberate indifference nor allege sufficient impact on the education of the complaining plaintiffs.

As with the other claims, plaintiffs were given detailed explanations of the multiple deficiencies in their FAC and an opportunity to amend their Title VI claims. They amended but still do not state a claim. In their Opposition to the Administration Defendants' Motion to Dismiss, plaintiffs assert that they are "aware of a large body of information supporting their Title VI claims that are in the possession of third party Hillel" and assume other supporting facts are in defendants' possession. Oppo. to Admin. Defs. at 16. Plaintiffs provide no reason why these facts from Hillel were not included in their SAC and did not explain in their opposition (or at the hearing given my tentative ruling) what those facts are or how they would save the Title VI claims. Plaintiffs are represented by numerous experienced counsel. They have had ample opportunities to attempt to state their Title VI claims but have not been able to do so. Plaintiffs' Title VI claims are DISMISSED WITH PREJUDICE.[39]

**CONCLUSION**

For the foregoing reasons, plaintiffs' SAC is DISMISSED WITH PREJUDICE. The Clerk shall enter Judgment.

**IT IS SO ORDERED.**

Dated: October 29, 2018

William H. Orrick
United States District Judge

[39] Having dismissed with prejudice each of the substantive claims, the attendant declaratory relief claim likewise fails and must be dismissed.