

United States District Court  
Northern District of California

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

KIARA ROBLES,  
Plaintiff,

v.

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

Case No. 17-cv-04864-CW

ORDER ON MOTIONS TO DISMISS  
FIRST AMENDED COMPLAINT

(Dkt. Nos. 60, 61, 62)

On July 9, 2018, Defendants Janet Napolitano, Nicholas Dirks, and The Regents of the University of California (the Regents)<sup>1</sup> (collectively, the Regents Defendants) brought a motion to dismiss the First Amended Complaint (FAC). On the same day, Defendant the City of Berkeley (Berkeley) brought its own motion to dismiss the FAC. On July 16, 2018, Defendant Raha Mirabdal also brought a motion to dismiss the FAC. Plaintiff Kiara Robles

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<sup>1</sup> The Regents responds to the FAC on behalf of the University of California Police Department (UCPD). The Regents' position is that the UCPD is not a separate legal entity from the Regents.

1 opposes all three motions. The Court found these motions to  
2 dismiss suitable for disposition on the papers. Having reviewed  
3 the papers and the record, the Court GRANTS the Regents  
4 Defendants' motion to dismiss, GRANTS Berkeley's motion to  
5 dismiss, and GRANTS in part Mirabdal's motion to dismiss.

#### 6 BACKGROUND

##### 7 I. Factual Background

8 Unless otherwise noted, the factual background is taken from  
9 the FAC, which is assumed to be true for purposes of Defendants'  
10 motions to dismiss. Docket No. 58 (FAC).

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

18 Around 1,500 protestors associated with Defendant In the  
19 Name of Humanity, We Refuse to Accept a Fascist America  
20 (hereinafter ANTIFA) also gathered at Sproul Plaza. Id.  
21 According to Robles, ANTIFA is "a radical American, left wing,  
22 anti-Trump, non-profit organization that organizes demonstrations  
23 to achieve its political agenda." Id. at 4. ANTIFA protestors  
24 soon "erupted into violence." Id. at 3. ANTIFA orchestrated the  
25 violence in order to disrupt the Yiannopoulos event. Id. ¶ 51.  
26 While Robles was being interviewed by news station KGO-TV about  
27 her thoughts related to the event, protestors surrounded her  
28 "combatively" and yelled that she was a "fascist." Id. ¶ 52.

1 At the time of the attack, there were "no campus police"  
2 present near Robles. Id. at 3, ¶ 56. Robles alleges that  
3 "nearly 100 campus police and SWAT members waited in the Student  
4 Union building, within eyesight of the violence happening  
5 outside, watching the protestors become more belligerent and  
6 dangerous." Id. at 3-4 (emphasis omitted). Robles alleges that  
7 officers from UCPD and the City of Berkeley Police Department  
8 (BPD) could see the attacks, yet they did not act to protect any  
9 of the victims. Id. at 10-11, ¶ 58. Robles claims that the  
10 Regents Defendants, "acting in furtherance of their own political  
11 and other beliefs, intentionally withheld the police support of  
12 UCPD and BPD . . . from pro-President Trump/pro-Milo Yiannopoulos  
13 attendees at an event which it knew could likely become hostile  
14 and violent, because these . . . attendees represented political  
15 beliefs that went against their own radical, leftist belief."  
16 Id. ¶ 75.

17 Soon after, Robles and others were again attacked by  
18 protestors. Ian Dabney Miller, an ANTIFA protestor, "struck"  
19 Robles "in the face and body with flagpoles" until she "was  
20 forced to escape by jumping over a metal barrier." Id. ¶ 59.  
21 Mirabdal, another ANTIFA protestor, and several unknown  
22 assailants "surrounded" her "combatively," and Mirabdal "shined a  
23 flashlight aggressively" in Robles' face, "blinding" her and  
24 "placing her in fear and apprehension of harm." Id. ¶ 69.  
25 Robles claims that Mirabdal was shining flashlights in the eyes  
26 of Yiannopoulos supporters "to incapacitate them" so others could  
27 physically assault them. Id. ¶ 70. Robles was attacked by other  
28 masked and unmasked assailants with pepper spray and bear mace.

1 Id. at 3, ¶ 53. Mirabdal claims that, as a result of the pepper  
2 spray, bear mace, and bright light being directed at her by  
3 various ANTIFA members, she "suffered significant trauma and  
4 injury to her eyes." Id. ¶ 73. As a result of being beaten by  
5 flagpoles, she "suffered significant injuries to her body." Id.  
6 ¶ 74. Again, neither the UCPD or BPD assisted Robles or  
7 apprehended her attackers. Id. ¶ 66.

## 8 II. Procedural Background

9 On June 5, 2017, Robles filed a related suit, Robles I,  
10 against the Regents, UCPD, BPD, ANTIFA, Miller, Napolitano,  
11 Dirks, and several other defendants. Robles v. Regents et al.  
12 (Robles I), Case No. 17-3235, Docket No. 1. Id. In her Robles I  
13 complaint, she asserted claims for: (1) violation of First  
14 Amendment rights under 42 U.S.C. § 1983; (2) violation of Equal  
15 Protection rights under 42 U.S.C. § 1983; (3) negligence;  
16 (4) gross negligence; (5) premises liability; (6) negligent  
17 infliction of emotional distress; (7) intentional infliction of  
18 emotional distress; (8) assault; (9) battery; and (10) violation  
19 of the Bane Act, California Civil Code section 52.1. Id. In  
20 July 2017, several defendants moved to dismiss the complaint.  
21 Id., Docket Nos. 46, 51, 52. Before the motions could be  
22 decided, Robles requested that the undersigned voluntarily recuse  
23 from the case. Id., Docket No. 50. The Court denied this  
24 request on July 25, 2017. Id., Docket No. 56. On that same day,  
25 Robles voluntarily dismissed the case. Id., Docket No. 57.

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

1 the same set of facts as Robles I and nearly the same set of  
2 asserted claims, adding only one additional claim for a violation  
3 of the Ralph Act, California Civil Code section 51.7. Id.  
4 Berkeley filed a motion to relate the two cases, which the Court  
5 granted. Robles I, Case No. 17-3235, Docket Nos. 58, 59.  
6 Berkeley, the Regents, and Mirabdal all moved to dismiss or  
7 strike the complaint. Docket Nos. 11, 16, 43. On June 4, 2018,  
8 the Court granted the Regents and Berkeley's respective motions  
9 to dismiss and granted in part Mirabdal's motion to dismiss.  
10 Docket No. 51. The Court gave Robles leave to file an amended  
11 complaint within twenty-one days. Id. Robles did so on June 25,  
12 2018. FAC. The present motions followed.

#### 13 LEGAL STANDARD

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

27 In considering whether the complaint is sufficient to state  
28 a claim, the court will take all material allegations as true and

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

10 When granting a motion to dismiss, the court is generally  
11 required to grant the plaintiff leave to amend, even if no  
12 request to amend the pleading was made, unless amendment would be  
13 futile. Cook, Perkiss & Liehe, Inc. v. N. Cal. Collection Serv.  
14 Inc., 911 F.2d 242, 246-47 (9th Cir. 1990). In determining  
15 whether amendment would be futile, the court examines whether the  
16 complaint could be amended to cure the defect requiring dismissal  
17 "without contradicting any of the allegations of [the] original  
18 complaint." Reddy v. Litton Indus., Inc., 912 F.2d 291, 296 (9th  
19 Cir. 1990). "Leave to amend may [] be denied for repeated  
20 failure[s] to cure deficiencies by previous amendment."  
21 Abagninin v. AMVAC Chem. Corp., 545 F.3d 733, 742 (9th Cir.  
22 2008).

#### 23 DISCUSSION

##### 24 I. The Regents Defendants' Motion to Dismiss

25 Robles asserts six claims against the Regents Defendants:  
26 (1) violation of her First Amendment rights based on their  
27 alleged withholding of police protection, (2) violation of equal  
28 protection based on her gender and sexual orientation,

1 (3) negligence, (4) gross negligence, (5) intentional infliction  
2 of emotional distress, and (6) violation of California's Bane  
3 Act, California Civil Code section 52.1. The Regents Defendants  
4 contend that all these claims should be dismissed.

5 A. Claims against UCPD

6 In its June 4, 2018 Order, the Court held that the Eleventh  
7 Amendment bars all of Robles' claims against the Regents, which  
8 are dismissed from the case. See Order at 7-10; see also Will v.  
9 Michigan Dep't of State Police, 491 U.S. 58, 68 (1989); Pennhurst  
10 State Sch. & Hosp. v. Halderman, 465 U.S. 89, 100, 104 (1984).  
11 The Court held that the "Regents, a corporation created by the  
12 California constitution, is an arm of the state for Eleventh  
13 Amendment purposes, and therefore is not a 'person' within the  
14 meaning of section 1983." Id. at 7 (quoting Armstrong v. Meyers,  
15 964 F.2d 948, 949-50 (9th Cir. 1992)). The Court further held  
16 that the Regents was immune against state law claims brought into  
17 federal court under pendent jurisdiction. Pennhurst State Sch. &  
18 Hosp., 465 U.S. at 121. The UCPD, which is part of the Regents  
19 and not a distinct legal entity, is also an arm of the state for  
20 Eleventh Amendment purposes. Thus, Robles' § 1983 and state law  
21 claims against the UCPD also cannot be sustained.

22 In Robles' opposition, she asks to dismiss without prejudice  
23 the claims against UCPD from her FAC. Opp. at 1 n.1. Because  
24 this is the second time that Robles attempted to sue UCPD on  
25 nearly identical grounds, Robles' claims against UCPD are  
26 dismissed with prejudice and without leave to amend. See Fed. R.  
27 Civ. P. 41(a)(1)(B); see also Robles I, Case No. 17-3235, Docket  
28 No. 1.

## B. Claims against Individual Defendants

1 The Court did grant Robles leave to amend to attempt to  
2 avoid Eleventh Amendment immunity by alleging her claims against  
3 individual actors in their personal capacities. Robles now names  
4 Napolitano, the President of the University of California, and  
5 Dirks, the Chancellor of UC Berkeley (the Individual Defendants)  
6 instead of the Regents. FAC ¶¶ 5-6.

7 The Individual Defendants move to dismiss Robles' claims  
8 against them, arguing that Robles does not allege any actions or  
9 decisions made by the Individual Defendants in their personal  
10 capacities. "To determine whether the defendants are sued in  
11 their personal capacities, the court must examine the specifics  
12 of the conduct involved and not merely look at the caption of the  
13 complaint." Peralta v. California Franchise Tax Bd., 124 F.  
14 Supp. 3d 993, 1001 (N.D. Cal. 2015). The "complaint must set  
15 forth allegations from which the court can infer that the  
16 individuals acted in their individual capacities." Id.

17 Robles points to her allegations that, even though it was  
18 reasonably foreseeable that violence would erupt at the  
19 Yiannopoulos event, the Individual Defendants ordered the  
20 withholding of police protection. FAC ¶ 16. According to  
21 Robles, the Individual Defendants did so because "Yiannopoulos'  
22 conservative viewpoint conflicts with the radical, leftist  
23 viewpoint shared by the Regents and the majority of the UC  
24 Berkeley student body and administration." Id. ¶ 45. In other  
25 words, the Individual Defendants acted pursuant to their own  
26 political beliefs. In support, Robles points to one instance  
27 when Dirks called Yiannopoulos "a troll and provocateur who uses  
28



1 odious behavior in part to 'entertain,' but also to deflect any  
2 serious engagement with ideas," id. ¶ 76, and another instance  
3 where the Individual Defendants allegedly "offered Ann Coulter a  
4 speaking time on May 2, during Dead Week, where there are no  
5 classes and students are studying for final exams," id. ¶¶ 77-80.

6 1. Section 1983 - First Amendment claim

7 Robles' allegations do not amount to a claim for violation  
8 of the First Amendment pursuant to § 1983. Robles' theory of  
9 liability is essentially that the Individual Defendants' "refusal  
10 to adequately secure and monitor a known hostile campus  
11 environment" allowed third parties to interfere with her First  
12 Amendment rights of freedom of speech and freedom of assembly.  
13 Id. ¶ 99.

14 To state a claim for infringement of free speech, "a  
15 plaintiff must allege facts showing that by his actions the  
16 defendant deterred or chilled the plaintiff's speech and such  
17 deterrence was a substantial motivating factor in the defendant's  
18 conduct." Mandel v. Bd. of Trustees of California State Univ.,  
19 No. 17-CV-03511, 2018 WL 1242067, at \*10 (N.D. Cal. Mar. 9, 2018)  
20 (quoting Mendocino Env'tl. Ctr. v. Mendocino Cty., 192 F.3d 1283,  
21 1300 (9th Cir. 1999)) (internal punctuation marks omitted). To  
22 state a claim for infringement of free assembly, "a plaintiff  
23 must show that the defendant imposed a serious burden upon, or  
24 affected in a significant way, or substantially restrained the  
25 plaintiff's ability to associate." Id. (quoting San Jose  
26 Christian Coll. v. City of Morgan Hill, 360 F.3d 1024, 1033 (9th  
27 Cir. 2004)) (internal punctuation marks omitted). Robles alleges  
28 no affirmative acts by the Individual Defendants that deterred

1 her speech or imposed a serious burden upon her ability to  
2 associate. Instead, her allegation is that they stood idly by as  
3 third parties interfered with her rights. But the First  
4 Amendment does not require the Individual Defendants to protect  
5 Robles against the actions of others. See Haitian Refugee Ctr.,  
6 Inc. v. Baker, 953 F.2d 1498, 1513 (11th Cir. 1992) (holding that  
7 "associational freedom in no way implies a right to compel the  
8 Government to provide access to those with whom one wishes to  
9 associate); see also DeShaney v. Winnebago Cty. Dep't of Soc.  
10 Servs., 489 U.S. 189, 195 (1989) (the Due Process Clause "forbids  
11 the State itself to deprive individuals of life, liberty, or  
12 property without 'due process of law,' but its language cannot  
13 fairly be extended to impose an affirmative obligation on the  
14 State to ensure that those interests do not come to harm through  
15 other means.").

16 2. Section 1983 - Fourteenth Amendment claim

17 The same is true of Robles' claim for equal protection. The  
18 plaintiff must allege "that the defendant acted in a  
19 discriminatory manner and that the discrimination was  
20 intentional." Fed. Deposit Ins. Corp. v. Henderson, 940 F.2d  
21 465, 471 (9th Cir. 1991). Robles alleges that the Individual  
22 Defendants discriminated against her on the basis of sexual  
23 orientation and gender because she is a gay woman. FAC ¶¶ 94-96.  
24 But Robles has not pled any facts showing that it is plausible  
25 that the Individual Defendants knew that she was a gay woman and  
26 intentionally discriminated against her on this basis. Thus,  
27 this claim must be dismissed.

28

## 3. State-law tort claims

1 The Individual Defendants assert that Robles' state-law tort  
2 claims (negligence, gross negligence, and intentional infliction  
3 of emotional distress) are barred under California Government  
4 Code.

5 California Government Code section 815(a) provides: "Except  
6 as otherwise provided by statute: (a) A public entity is not  
7 liable for an injury, whether such injury arises out of an act or  
8 omission of the public entity or a public employee or any other  
9 person." It is well-settled that this section "abolishes common  
10 law tort liability for public entities," including the Regents.  
11 Miklosy v. Regents of Univ. of California, 44 Cal. 4th 876, 899  
12 (2008). This statutory immunity to common-law tort claims  
13 extends to the employees of public entities under certain  
14 circumstances. California Government Code section 820.2 states:  
15 "Except as otherwise provided by statute, a public employee is  
16 not liable for an injury resulting from his act or omission where  
17 the act or omission was the result of the exercise of the  
18 discretion vested in him, whether or not such discretion be  
19 abused." Thus, the Court must determine whether the acts in  
20 question are discretionary acts covered by the statute.  
21 "Generally speaking, a discretionary act is one which requires  
22 the exercise of judgment or choice." Nicole M. By & Through  
23 Jacqueline M. v. Martinez Unified Sch. Dist., 964 F. Supp. 1369,  
24 1389 (N.D. Cal. 1997) (distinguishing between discretionary and  
25 ministerial acts).

26 Here, the state-law tort claims are based on the allegation  
27 that the Individual Defendants withheld effective police  
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1 protection from Robles. FAC ¶¶ 105, 111, 116. The decision of  
2 how to manage safety on campus is a discretionary act. See  
3 Nicole M. By & Through Jacqueline M. v. Martinez Unified Sch.  
4 Dist., 964 F. Supp. at 1389 (maintenance of safety of the  
5 educational environment "necessarily" required "the exercise of  
6 judgment or choice," and so claims for negligence and intentional  
7 infliction of emotional distress were barred). Robles does not  
8 contest this, arguing only that this argument is "erroneously"  
9 asserted and, to the "extent that Cal. Gov't Code § 815(a)  
10 applies, it is clearly limited solely to Plaintiff's tort  
11 claims." Accordingly, Robles' state-law tort claims against the  
12 Individual Defendants are barred.

13 4. Bane Act claim

14 The Individual Defendants contend that Robles' Bane Act  
15 claim must also fail.

16 The Bane Act authorizes a civil action for damages,  
17 injunctive relief, and other appropriate equitable relief against  
18 a person who "interferes by threat, intimidation, or coercion, or  
19 attempts to interfere by threat, intimidation, or coercion, with  
20 the exercise or enjoyment by any individual or individuals of  
21 rights secured by the Constitution or laws of the United States,  
22 or of the rights secured by the Constitution or laws of this  
23 state." Cal. Civ. Code § 52.1(a) and (b).

24 Robles' Bane Act claim against the Individual Defendants  
25 rests on the same allegations and theory of liability as her  
26 § 1983 claims. Specifically, Robles asserts that the Individual  
27 Defendants violated her First and Fourteenth Amendment rights by  
28 withholding police protection because of their own political

1 beliefs. For the same reasons stated above with respect to the  
2 § 1983 claims, Robles' Bane Act claim fails as well. Because the  
3 FAC fails to state a claim for First and Fourteenth Amendment  
4 violations, it also does not state a claim for a violation of the  
5 Bane Act on the same basis.

6 II. Berkeley's Motion to Dismiss

7 Robles asserts the following causes of action against  
8 Berkeley: (1) 42 U.S.C. § 1983 claim alleging violation of her  
9 First Amendment right to freedom of speech and assembly, (2) 42  
10 U.S.C. § 1983 claim alleging violation of the equal protection  
11 clause for discrimination based on sexual orientation,  
12 (5) intentional infliction of emotional distress, and  
13 (6) violation of the Bane Act, California Civil Code § 52.1.  
14 Berkeley moves to dismiss these claims based on the following  
15 grounds. With respect to the first and second claims, the § 1983  
16 claims, Berkeley contends that Robles fails to state a claim with  
17 respect to Monell liability and the underlying constitutional  
18 violations. With respect to the fifth and eighth claims, the  
19 state law claims, Berkeley contends that Robles failed to exhaust  
20 administrative remedies.

21 The Court previously dismissed these claims on similar  
22 grounds. The Court dismissed the § 1983 claims for failure to  
23 state a claim for Monell liability. June 4, 2018 Order at 10-11.  
24 The Court did, however, grant Robles leave to amend these claims  
25 to attempt to state a claim for Monell liability. Id. at 12.  
26 The Court also dismissed her state law claims for failure to  
27 exhaust administrative remedies. Id. at 11-12. The Court noted  
28 that Robles had already conceded that she did not present her

1 claims to the city pursuant to the California Tort Claims Act,  
2 and so amendment would appear to be futile. Id. The Court then  
3 stated that it would not grant leave to amend these claims, but  
4 Robles could seek leave to amend if she could allege "new facts  
5 showing compliance with the California Tort Claims Act." Id. at  
6 13, see also n.2.

7 Robles did not seek leave to amend her state law claims. In  
8 her opposition, she confirms that those claims should be  
9 dismissed. Opp. at 2. Again, because this is the second time  
10 that Robles attempted to sue Berkeley on nearly identical  
11 grounds, Robles' claims against Berkeley are dismissed with  
12 prejudice and without leave to amend. See Fed. R. Civ. P.  
13 41(a)(1)(B); see also Robles I, Case No. 17-3235, Docket No. 1.

14 A. Monell liability

15 Berkeley again moves to dismiss Robles' § 1983 claims for  
16 failure to state a claim.

17 It is well-established that "a local government may not be  
18 sued under § 1983 for an injury inflicted solely by its employees  
19 or agents." Monell v. Dep't of Soc. Servs. of City of New York,  
20 436 U.S. 658, 694 (1978). A municipality only faces liability  
21 under § 1983 when the "execution of a government's policy or  
22 custom, whether made by its lawmakers or by those whose edicts or  
23 acts may fairly be said to represent official policy, inflicts  
24 the injury." Id. While the Ninth Circuit previously allowed  
25 "plaintiffs in civil rights actions against local government to  
26 set forth no more than a bare allegation that government  
27 officials' conduct conformed to some unidentified government  
28 policy or custom," now, Iqbal and Twombly's heightened pleading

1 standards apply to Monell claims. AE ex rel. Hernandez v. Cty.  
2 of Tulare, 666 F.3d 631, 637 (9th Cir. 2012). This means that  
3 "the factual allegations that are taken as true must plausibly  
4 suggest an entitlement to relief, such that it is not unfair to  
5 require the opposing party to be subjected to the expense of  
6 discovery and continued litigation." Id. (citation omitted).

7 Robles' FAC alleges that Berkeley failed to provide police  
8 protection to Robles "pursuant to its policy and custom of  
9 selectively providing police support and withholding police  
10 support to conservative events, rallies, and protests." FAC  
11 ¶ 82. In support, Robles alleges that in August 2017, Berkeley  
12 provided "500 officers" for a protest against President Trump.  
13 Id. ¶ 83. Robles contrasts this with the Yiannopoulos event, a  
14 conservative event for which Berkeley did not provide adequate  
15 police presence. Opp. at 5.<sup>2</sup>

16 Robles has not stated sufficient factual allegations to  
17 plausibly suggest an entitlement to relief. There are simply not  
18 enough factual allegations to show that it is plausible that  
19 Berkeley has an official policy or custom of "selectively  
20 providing police support and withholding police support to  
21 conservative events, rallies, and protests." Robles' description  
22 of the policy itself is vague: she does not allege what  
23 "conservative" means, nor does she allege how Berkeley determines  
24 an event is "conservative." See Bagley v. City of Sunnyvale, No.

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25  
26 <sup>2</sup> Robles also adds allegations that were not in the FAC, but  
27 appear to be from an article that she referenced in a footnote in  
28 the FAC. Because the FAC does not include these facts, or even  
incorporate the facts of the article by reference, the Court does  
not consider these facts.

1 16-CV-02250-LHK, 2017 WL 344998, at \*16 (N.D. Cal. Jan. 24, 2017)  
2 (a court in this district found that plaintiff's allegation that  
3 the city of Sunnyvale has a policy to "use or tolerate the use of  
4 excessive and/or unjustified force" was too vague to sufficiently  
5 allege a policy under A.E." ).

6 Indeed, Robles' only allegation in support of her conclusory  
7 claim is an incident where Berkeley provided 500 officers for a  
8 protest against President Trump. Robles states nothing about how  
9 many Berkeley officers were present at the Yiannopoulos event.  
10 She also states nothing about whether the police officers at the  
11 protest against President Trump faced violence by third parties  
12 and whether police did anything to intervene. This is  
13 insufficient to state a claim for Monell liability. As the Ninth  
14 Circuit has previously stated, "Liability for improper custom may  
15 not be predicated on isolated or sporadic incidents; it must be  
16 founded upon practices of sufficient duration, frequency and  
17 consistency that the conduct has become a traditional method of  
18 carrying out policy." Trevino v. Gates, 99 F.3d 911, 918 (9th  
19 Cir. 1996). Although a plaintiff does not have to allege more  
20 than one constitutional violation if her claim is based on  
21 improper custom rather than improper policy, even then, the  
22 plaintiff must allege the violation "was caused by an existing,  
23 unconstitutional municipal policy, which policy can be attributed  
24 to a municipal policymaker." La v. San Mateo Cty. Transit Dist.,  
25 No. 14-CV-01768-WHO, 2014 WL 4632224, at \*8 (N.D. Cal. Sept. 16,  
26 2014) (quoting City of Oklahoma City v. Tuttle, 471 U.S. 808,  
27 823-24 (1985)).



## 1 B. Failure to state a claim

2 Berkeley also argues that Robles' § 1983 causes of action  
3 for violations of the First and Fourteenth Amendments fail to  
4 state a claim for the underlying constitutional violations.

5 For the same reasons stated above with respect to Robles'  
6 First Amendment claim against the Individual Defendants, Robles'  
7 First Amendment claim against Berkeley also fails. Robles  
8 alleges conclusorily that Berkeley, "with each and every named  
9 Defendant, jointly and severally, worked in concert to deny  
10 numerous individuals who attended the Milo Yiannopolous event,  
11 including Plaintiff Robles, their constitutional right of freedom  
12 of speech and freedom of assembly . . ." FAC ¶ 15. The FAC also  
13 alleges that Berkeley withheld aid to attendees of the event.  
14 Id. ¶¶ 28, 58. The FAC's allegations with respect to Berkeley  
15 are merely conclusory and must be dismissed. Iqbal, 556 U.S. at  
16 679 ("While legal conclusions can provide the complaint's  
17 framework, they must be supported by factual allegations.").  
18 Moreover, Robles does not allege any facts showing that Berkeley  
19 took any affirmative acts to burden or infringe upon Robles'  
20 First Amendment rights. As stated previously, the First  
21 Amendment does not require Berkeley to protect Robles against the  
22 actions of others.

23 Robles' claim for equal protection violation also fails.  
24 The plaintiff must allege "that the defendant acted in a  
25 discriminatory manner and that the discrimination was  
26 intentional." Fed. Deposit Ins. Corp. v. Henderson, 940 F.2d  
27 465, 471 (9th Cir. 1991). Robles asserts the same bare  
28 allegations against Berkeley as she did against the Individual

1 Defendants: that they discriminated against her on the basis of  
2 sexual orientation and gender because she is a gay woman. FAC  
3 ¶¶ 94-96. Because Robles has not pled any facts showing that it  
4 is plausible that Berkeley knew that she was a gay woman and  
5 intentionally discriminated against her on this basis, this claim  
6 must be dismissed.

### 7 III. Mirabdal's Motion to Dismiss or Strike

#### 8 A. Motion to Dismiss

9 Mirabdal again asserts that the complaint fails sufficiently  
10 to plead the assault and battery claims, which were previously  
11 dismissed with leave to amend. She renews her motion to dismiss  
12 the Bane Act claims asserted, which the Court previously denied.

13 Previously, Robles essentially alleged that Mirabdal  
14 "surrounded" her "combatively" and "shined a flashlight  
15 aggressively" in her face, "blinding" her and "placing her in  
16 fear and apprehension of harm." Now, Robles has added  
17 allegations that "Mirabdal was shining flashlights in  
18 Yiannopoulos supporters' eyes in order to incapacitate them, so  
19 that her fellow ANTIFA members . . . could physically assault  
20 Yiannopoulos supporters, including Plaintiff Robles." Id. ¶ 70.  
21 Mirabdal also stated that, as a "result of the pepper spray, bear  
22 mace, and bright light being directed at her" by various ANTIFA  
23 members, she "suffered significant trauma and injury to her  
24 eyes." Id. ¶ 73.

#### 25 1. Battery

26 In California, the elements of battery are: "(1) defendant  
27 touched plaintiff, or caused plaintiff to be touched, with the  
28 intent to harm or offend plaintiff; (2) plaintiff did not consent

1 to the touching; (3) plaintiff was harmed or offended by  
2 defendant's conduct; and (4) a reasonable person in plaintiff's  
3 position would have been offended by the touching." Lawrence v.  
4 City & Cty. of San Francisco, 258 F. Supp. 3d 977, 998 (N.D. Cal.  
5 2017) (quoting So v. Shin, 212 Cal. App. 4th 652, 669 (2013)).  
6 Citing Adams v. Virginia, 33 Va. App. 463, 469-70 (2000), the  
7 Court previously noted:

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

22 June 4, 2018 Order at 16.

23 Previously, Robles alleged that Mirabdal shined a flashlight  
24 beam at her, "blinding" her. Id. The Court noted that if Robles  
25 could truthfully allege that she was "blinded" such that she  
26 suffered serious, permanent physical eye injury, she could  
27 satisfy the third and fourth elements of battery. Id. Because  
28 the allegation of "blinding" appeared to be figurative rather  
than literal, the Court held that the requirements for battery  
were not satisfied. Id.

Robles' amended allegations fare no better. She does not  
allege that the light directed by Mirabdal itself caused her  
harm. She alleges only that the combination of the pepper spray,  
bear mace, and bright light harmed her eyes. But assailants

1 other than Mirabdal inflicted the pepper spray and bear mace.  
2 FAC ¶ 53. Robles' allegations that Mirabdal was motivated to  
3 shine "flashlights in Yiannopoulos supporters' eyes in order to  
4 incapacitate them" also does not show that Mirabdal inflicted  
5 harm on Robles. It is not clear whether Robles alleges, or can  
6 allege, that Mirabdal's shining of her flashlight at Robles led  
7 directly to other individuals causing her physical harm. Even if  
8 this were true, in the context of battery, the harm must be "by  
9 defendant's conduct." Lawrence, 258 F. Supp. 3d at 998.

10 Accordingly, Robles has not alleged that Mirabdal's conduct  
11 either harmed or offended her such that a reasonable person in  
12 her position would have been offended.

## 13 2. Assault

14 In California, a claim for assault requires a plaintiff to  
15 show: "(1) defendant acted with intent to cause harmful or  
16 offensive contact, or threatened to touch plaintiff in a harmful  
17 or offensive manner; (2) plaintiff reasonably believed she was  
18 about to be touched in a harmful or offensive manner or it  
19 reasonably appeared to plaintiff that defendant was about to  
20 carry out the threat; (3) plaintiff did not consent to  
21 defendant's conduct; (4) plaintiff was harmed; and  
22 (5) defendant's conduct was a substantial factor in causing  
23 plaintiff's harm." Id. (quoting So, 212 Cal. App. 4th at 668-  
24 69).

25 Mirabdal contends that the FAC still does not allege the  
26 elements of assault. Indeed, the FAC does not allege that  
27 Mirabdal acted with intent to cause harmful or offensive contact.  
28 As stated previously, Robles' allegation that Mirabdal was

1 motivated to shine the flashlight at Yiannopoulos supporters to  
2 incapacitate them so others could attack them is vague and not  
3 necessarily relevant to Mirabdal's conduct towards Robles. In  
4 any event, this allegation does not show that Mirabdal herself  
5 intended to cause harmful or offensive contact; at best, it shows  
6 that Mirabdal intended to help others to cause harmful or  
7 offensive contact. See Plotnik v. Meihaus, 208 Cal. App. 4th  
8 1590, 1603-04 (2012) (describing assault as a "demonstration of  
9 an unlawful intent by one person to inflict immediate injury on  
10 the person of another then present"). Thus, this claim must be  
11 dismissed.

### 12 3. Bane Act

13 As noted above, the Bane Act authorizes a civil action for  
14 damages, injunctive relief, and other appropriate equitable  
15 relief against a person when there is "(1) intentional  
16 interference or attempted interference with a state or federal  
17 constitutional or legal right, and (2) the interference or  
18 attempted interference was by threats, intimidation or coercion.  
19 Allen v. City of Sacramento, 234 Cal. App. 4th 41, 66 (2015); see  
20 also Cal. Civ. Code § 52.1(a) and (b). The Bane Act "was  
21 intended to address only egregious interferences with  
22 constitutional rights, not just any tort." Shoyoye v. Cty. of  
23 Los Angeles, 203 Cal. App. 4th 947, 959 (2012). "The act of  
24 interference with a constitutional right must itself be  
25 deliberate or spiteful." Id.

26 Robles alleges that Mirabdal's acts of surrounding her,  
27 preventing her escape, and shining a flashlight at her interfered  
28 with her right to assemble peacefully. The Court previously

1 rejected Mirabdal's argument that these allegations are not  
2 serious enough to constitute "threat, intimidation, or coercion"  
3 sufficient under the Bane Act. June 4, 2018 Order at 19.  
4 Mirabdal now argues that these allegations are "purely  
5 conclusory" and insufficient under Iqbal and Twombly.

6 Robles has not sufficiently alleged that Mirabdal engaged in  
7 "a volitional act intended to interfere with the exercise or  
8 enjoyment of the constitutional right," as opposed to merely  
9 tortious activity. Shoyoye, 203 Cal. App. 4th at 957-58. Robles  
10 does not allege specific facts demonstrating Mirabdal's intent to  
11 prevent Robles from exercising her First Amendment right of free  
12 association. Robles argues that she alleged that Mirabdal, as a  
13 member of ANTIFA, fomented a riot "as part of a conspiracy to  
14 violently shut down the Yiannopolous event." FAC 21-22. But  
15 this allegation is conclusory and not supported by factual  
16 content. Robles does not explain why Mirabdal is likely to be a  
17 member of ANTIFA, stating this fact only on "information and  
18 belief." She also does not allege facts showing that Mirabdal  
19 acted in concert with other members of ANTIFA.

20 IV. Leave to Amend

21 Because the Court already gave Robles a chance to amend all  
22 of her claims except the Bane Act claim against Mirabdal, all  
23 claims except the Bane Act claim against Mirabdal are dismissed  
24 with prejudice and without leave to amend. Abagninin, 545 F.3d  
25 at 742.

26 V. Other Defendants

27 ANTIFA has not filed an answer or motion to dismiss. In its  
28 June 4, 2018 Order, the Court ordered Robles to file proof of

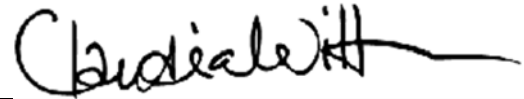
1 service for ANTIFA within fourteen days. Because Robles has not  
2 done so, her claims against ANTIFA are DISMISSED with prejudice.<sup>3</sup>

3 CONCLUSION

4 The Court GRANTS the Regents' motion to dismiss (Docket No.  
5 61) with prejudice and without leave to amend. The Court GRANTS  
6 Berkeley's motion to dismiss (Docket No. 60) with prejudice and  
7 without leave to amend. The Court GRANTS Mirabdal's motion to  
8 dismiss (Docket No. 62) with respect to the assault and battery  
9 claims without leave to amend. With respect to the Bane Act  
10 claim against Mirabdal, Plaintiff shall have twenty-one days to  
11 file her Second Amended Complaint if she elects to amend her Bane  
12 Act claim against Mirabdal.

13 IT IS SO ORDERED.

14  
15 Dated: September 14, 2018



16 CLAUDIA WILKEN  
17 United States District Judge

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27 <sup>3</sup> The Court also ordered Robles to file proof of service on  
28 UCPD within fourteen days. Robles also failed to comply with  
this order and provided no explanation for her failure to do so.  
Robles' noncompliance provides another ground for dismissing the  
claims against UCPD.

United States District Court  
Northern District of California