

1 HAILYN J. CHEN (State Bar No. 237436)
2 hailyn.chen@mto.com
3 MUNGER, TOLLES & OLSON LLP
350 South Grand Avenue, 50th Floor
4 Los Angeles, California 90071
Telephone: (213) 683-9100
Facsimile: (213) 687-3702

5 BRYAN H. HECKENLIVELY (State Bar No. 279140)
6 bryan.heckenlively@mto.com
7 MUNGER, TOLLES & OLSON LLP
560 Mission Street, 27th Floor
8 San Francisco, California 94105
Telephone: (415) 512-4000

9 *Attorneys for Defendants*

10 * Additional counsel listed on following page.

11 **UNITED STATES DISTRICT COURT**
12 **NORTHERN DISTRICT OF CALIFORNIA**
13 **SAN FRANCISCO DIVISION**

14
15 THE LOUIS D. BRANDEIS CENTER, INC.;
16 JEWISH AMERICANS FOR FAIRNESS IN
EDUCATION (JAFE),

17 Plaintiffs,

18 vs.

19 REGENTS OF THE UNIVERSITY OF
CALIFORNIA; UNIVERSITY OF
20 CALIFORNIA AT BERKELEY; BERKELEY
LAW SCHOOL; MICHAEL DRAKE, in his
21 official capacity as President of the University
of California; CAROL T. CHRIST, in her
22 official capacity as Chancellor of the
University of California, Berkeley; BEN
23 HERMALIN, in his official capacity as
Provost of the University of California,

24 Defendants.

25 Case No. 3:23-cv-06133-JD

26 **MOTION TO DISMISS FIRST AMENDED
COMPLAINT**

27 Hearing Date: August 8, 2024
Time: 10:00 am
Place: Courtroom 11
Judge: Hon. James Donato

28

Case No. 3:23-cv-06133-JD

MOTION TO DISMISS FIRST AMENDED COMPLAINT

1 CHARLES F. ROBINSON (State Bar No. 113197)
2 RHONDA GOLDSTEIN (State Bar No. 250387)
3 KATHARINE ESSICK (State Bar No. 219426)
4 CAROL LYNN THOMPSON (State Bar No. 148079)
5 Carol.thompson@ucop.edu
6 UNIVERSITY OF CALIFORNIA
7 Office of the General Counsel
8 1111 Franklin Street, 8th Floor
9 Oakland, CA 94607-9800
10 Telephone: (510) 987-9800
11 Facsimile: (510) 987-9757

12
13 HELEN E. WHITE (pro hac vice forthcoming)
14 helen.white@mto.com
15 MUNGER, TOLLES & OLSON LLP
16 601 Massachusetts Ave NW, Ste. 500E
17 Washington, District of Columbia 20001-5369
18 Telephone: (202) 220-1136
19 Facsimile: (202) 220-2300

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1 **PLEASE TAKE NOTICE** that on August 8, 2024, before the Honorable James Donato in
 2 Courtroom 11, Defendants (collectively, “the University”) will and hereby do move for an order
 3 dismissing Plaintiffs’ First Amended Complaint (“FAC”) with prejudice. This Motion is based on
 4 the Notice of Motion and Memorandum of Points and Authorities, all papers on file, and any
 5 authority or argument presented in the reply and at any hearing.

6 **STATEMENT OF RELIEF SOUGHT**

7 Defendants seek dismissal of all claims pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6).

8 **MEMORANDUM OF POINTS AND AUTHORITIES**

9 **I. INTRODUCTION**

10 Plaintiffs’ FAC seeks to transform this case regarding student organization bylaws into an
 11 open forum for litigating incidents at UC Berkeley as they hit the news. The University is deeply
 12 committed to protecting all students from harassment and discrimination and has spoken with a
 13 clear voice in condemning acts of antisemitism, but neither the Constitution nor federal civil rights
 14 statutes make universities automatically liable for even abhorrent conduct by their students.
 15 Instead, UC Berkeley can be held liable only if it engages in wrongful actions or is “deliberately
 16 indifferent” to harassment by others—neither of which Plaintiffs plausibly allege here. Plaintiffs
 17 do not allege that *the University*’s response was motivated by antisemitism. Nor do they plausibly
 18 allege deliberate indifference to the acts of others. Indeed, the FAC demonstrates that the
 19 University was *not* deliberately indifferent, expressly alleging that the University denounced
 20 offensive conduct, offered support to Jewish members of the University community, and took
 21 action where appropriate—such as by opening a criminal investigation into the February 26
 22 incident and denying academic credit to journals that adopted the bylaws Plaintiffs challenge.

23 What is more, to the extent that Plaintiffs’ claims turn on ripped-from-the-headlines
 24 additions to their FAC, those claims are unripe. Because the University is liable only for its own
 25 response to student misconduct—and not for the misconduct itself—the University cannot be sued
 26 until its process is complete. Plaintiffs attempt to flip that on its head by citing actions that
 27 occurred just a few weeks—and in one case *two days*—before filing the FAC, while blaming the
 28 University for failing to investigate and then complete disciplinary proceedings in that short time.

1 Permitting claims against universities on such fresh allegations of student misconduct would
 2 transform the federal courts into campus administrators and require courts to speculate about how
 3 universities will mete out student discipline. That is not how “deliberate indifference” operates.

4 As for the law school student group bylaws that Plaintiffs started with, the complaint has
 5 not meaningfully changed. Plaintiffs still allege that certain student groups adopted bylaws
 6 refusing to invite speakers or publish articles by authors that support Zionism and requiring
 7 leaders of their groups to attend a training session. Consistent with constitutional principles, the
 8 University did not discipline students for their speech. The University, however, swiftly
 9 denounced the policies, expressed support for Jewish students, and announced that it would not
 10 grant academic credit for participation in any student organization that adopted the bylaws.

11 All of Plaintiffs’ claims should be dismissed, but that does not mean that the University
 12 can or will ignore the underlying issues. These are critical issues that the University is working
 13 hard to address.

14 **II. THE ALLEGATIONS IN THE COMPLAINT**

15 **A. The University’s Commitment to Nondiscrimination and Free Expression.**

16 The University of California stands firmly against antisemitism and has long been
 17 committed to “civil rights and equal treatment of all persons regardless of race, ethnicity, national
 18 origin, gender, sexual preference, faith, military status, physical disability and/or heritage.” FAC
 19 ¶ 56. The University’s written policy prohibits a broad swath of discrimination, including on the
 20 basis of race, religion, color, citizenship, national or ethnic origin, and ancestry. *Id.* ¶¶ 58–60.
 21 Berkeley Law, which is relevant to some of the allegations, thus requires student groups to adopt
 22 an “all-comers” policy providing that groups “may not impose membership restrictions” based on
 23 protected classes, including race, national origin, religion, citizenship, or ancestry. *Id.* ¶ 64.

24 As a public university, the University is also bound to protect the free speech rights of its
 25 students. *See id.* ¶¶ 64–65. Thus, while the University has adopted time, place, and manner
 26 restrictions that limit when, where, and how students may protest (*see id.* ¶¶ 65–67), it does not
 27 and cannot limit the content or the viewpoints expressed during on-campus protests (*see id.*).

1 **B. Plaintiffs Allegations of Antisemitism on UC Berkeley's Campus and The**
 2 **University's Response.**

3 The core FAC allegations are that the University's response to a series of actions by
 4 students and others violates the Constitution and federal civil rights statutes, focusing first on law
 5 school student organization bylaws and then post-amendment on a series of campus protests that
 6 occurred after the filing of the original complaint.

7 ***Student Organization Bylaws.*** Plaintiffs allege that certain law student groups adopted
 8 bylaws that (1) asserted that they will not invite outside speakers that support Zionism, *id.* ¶ 118;
 9 (2) required student leaders to participate in "Palestine 101" training, *id.*; and (3) refused to
 10 publish in their journal authors that supported Zionism, *id.* ¶ 122. Plaintiffs also allege that
 11 Berkeley Law Dean Erwin Chemerinsky told the student body that the school would not award
 12 academic credit for work in groups that adopted the bylaws. *Id.* Ex. C. Dean Chemerinsky's
 13 email also indicated that student organizations would not face discipline for adopting the bylaws
 14 because the First Amendment entitled them to exclude speakers based on viewpoint. *Id.*

15 ***Spring Semester Protests.*** Plaintiffs also allege that a series of protests in the spring of
 16 2024 involved antisemitic harassment of Jewish students. *First*, on February 26, 2024, "Jewish
 17 students at UC Berkeley were forced to evacuate a campus theater after a riot led by Bears for
 18 Palestine . . . forcibly shut it down." FAC ¶ 67. Upon learning that Bears for Palestine intended to
 19 protest the event, the University allegedly worked with Jewish student leaders to move the event
 20 to another location to better guarantee the safety of attendees. *Id.* ¶¶ 70–71. Plaintiffs also allege
 21 that the University deployed multiple campus police officers, including the chief of campus police,
 22 to secure the event. *Id.* ¶¶ 72–73. The University allegedly shut down the event after campus
 23 police "were quickly overwhelmed" when individuals "gained unauthorized entry into the
 24 building." *Id.* Plaintiffs allege that several Jewish attendees were called antisemitic slurs, spit on,
 25 or were physically assaulted. *Id.* ¶ 80. Plaintiffs also allege that the University's police
 26 department is "investigating the incidents [on February 26, 2024] as hate crimes." *Id.* ¶ 81.

27 ***Second***, Plaintiffs allege that in March 2024 a student organization called for law students
 28 to boycott graduation dinners hosted by Dean Chemerinsky via electronic and paper posters

1 featuring an antisemitic caricature of the Dean which were denounced by the Dean as antisemitic.
 2 *See id.* ¶¶ 85–87. A group of students then attended one of the dinners at the Dean’s home and
 3 staged a disruptive protest. After the event, University of California President Michael Drake
 4 called the students’ actions “antisemitic [and] threatening” and explained that they “do not reflect
 5 the values of this university.” *Id.* ¶ 91. The Chair of the Board of Regents, Rich Leib, called the
 6 students’ actions “deplorable.” *Id.* The remaining dinners took place with additional security. *Id.*

7 *Third*, Plaintiffs allege that protesters hung banners and yellow police tape blocking the
 8 middle portion of Sather Gate, while leaving the two side portals of the gate free for foot traffic.
 9 *Id.* ¶ 93. Plaintiffs allege that these protestors harassed Jewish students. *Id.* ¶ 95. Plaintiffs allege
 10 the Sather Gate protest violated the University’s time, place and manner policies and that the
 11 University has said it is “making efforts to end those aspects of the nonviolent protest at Sather
 12 Gate that violate those . . . restrictions.” *Id.* ¶ 99. Plaintiffs allege that the University said that
 13 “using law enforcement to clear [the gate] would create turmoil,” and so did not do so. *Id.*
 14 According to the FAC, the University expressed commitment to “posting monitors at the gate to
 15 ensure that the harassment is halted” and “reporting any violations to the police,” *id.* ¶ 100, but
 16 “students” who are in touch with Plaintiffs have “reported” not seeing monitors. *Id.*

17 *Fourth*, Plaintiffs allege that from April 22 to April 29, a 175-tent-encampment protest
 18 appeared outside Sproul Hall, which houses the Registrar and Financial Aid. *Id.* ¶ 101. Plaintiffs
 19 allege that Jewish and Israeli students who have gone to “observ[e]” have had their movement
 20 obstructed and been physically and/or verbally assaulted by demonstrators. Plaintiffs allege that
 21 the University has stated it is “observing the demonstration,” but that the students who have been
 22 harassed have not seen any police officers or university observers. *Id.* ¶ 107. Plaintiffs also allege
 23 that in the eleven days after the encampment began and before the FAC was filed, no student or
 24 group has been disciplined by the University. *Id.*

25 *Finally*, Plaintiffs allege a series of incidents from fall 2023 in which Jewish students and
 26 faculty were subjected to antisemitism but do not make any allegations about the University’s
 27 response other than to allege that in one case, the University sent an email the day after a robbery
 28 identifying it as a potential hate crime. *Id.* ¶ 115.

1 **III. LEGAL STANDARD**

2 Rule 12(b)(6) requires sufficient facts to “state a claim to relief that is plausible on its
 3 face.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citation omitted). The same is true for a facial
 4 Rule 12(b)(1) motion. *Terenkian v. Republic of Iraq*, 694 F.3d 1122, 1131 (9th Cir. 2012).

5 **IV. ARGUMENT**

6 **A. Plaintiffs’ Claims Should Be Dismissed Under Article III and Rule 12(b)(1).**

7 **1. Plaintiffs’ Title VI Claim Should Be Dismissed As Unripe.**

8 Plaintiffs’ Title VI claim is not ripe. “A claim is not ripe for adjudication if it rests upon
 9 ‘contingent future events that may not occur as anticipated, or indeed may not occur at all.’”
 10 *Texas v. United States*, 523 U.S. 296, 300 (1998) (citation omitted). “[W]here further factual
 11 development would aid the court’s consideration,” a case is unripe “until the pertinent facts have
 12 been well-developed.” *In re Coleman*, 560 F.3d 1000, 1009 (9th Cir. 2009). Until then, it is “too
 13 ‘impermissibly speculative’ to present a justiciable controversy.” *Id.* at 1005 (citation omitted).

14 That is the case here. Plaintiffs do not allege that the University carried out, endorsed, or
 15 promoted any of the actions they challenge. And the University “cannot be held vicariously
 16 liable” under Title VI for the bad actions of third parties. *United States v. Cnty. of Maricopa*, 889
 17 F.3d 648, 652 (9th Cir. 2018). Instead, the essence of Plaintiffs’ Title VI claim is that the
 18 University has been deliberately indifferent to actions by others during a series of protests from
 19 February to May of this year. *See* FAC ¶¶ 69–117, 187–88. But whether the University’s
 20 response is deliberately indifferent cannot be decided until the University actually has had an
 21 opportunity to respond. At a minimum, “further factual development would aid the court’s
 22 consideration” of the adequacy of the University’s response. *Coleman*, 560 F.3d at 1009.

23 The allegations in the FAC make clear that the University’s response to harassment is
 24 ongoing. For example, Plaintiffs allege that students and faculty have filed reports with campus
 25 police and sent letters to the University administration, FAC ¶ 25, that Congress has opened an
 26 investigation, *id.* ¶¶ 16, 109, and that the University’s police department “is investigating,” *id.*
 27 ¶ 81. The protests at the heart of Plaintiffs’ claim, *id.* ¶¶ 69–107, allegedly took place between
 28 February and May 1, 2024—just two days before they filed the FAC. *See* *id.* ¶¶ 93, 104. The

1 encampment appeared *eleven days* before the FAC. *Id.* ¶ 101. The interrupted dinner at Dean
 2 Chemerinsky’s home occurred, in Plaintiffs’ words, “[l]ess than a month” before the filing of the
 3 FAC. *Id.* ¶ 11. Even as to the earliest event, the late-February event at Zellerbach Hall, Plaintiffs
 4 allege the police department—in the present tense—“*is investigating.*” *Id.* ¶ 81 (emphasis added).

5 The law (and the University’s policies) allow it substantially more time to initiate and
 6 complete a response before the response can be challenged as deliberately indifferent. In the Title
 7 IX context—which is interpreted “consistently with Title VI,” *Barnes v. Gorman*, 536 U.S. 181,
 8 185 (2002)—an investigation that takes more than *eight months* to impose any discipline is not
 9 unlawful, even if the complainant is unaware that any such investigation is underway. *See*
 10 *Karasek v. Regents of the Univ. of Cal.*, 956 F.3d 1093, 1106 (9th Cir. 2020). Dismissal on
 11 ripeness grounds is therefore warranted where, as here, the complaint is filed before the university
 12 has had time to conclude a reasonable investigation. *See Doe v. Oberlin Coll.*, 60 F.4th 345, 356
 13 (6th Cir. 2023) (“the district court was correct to dismiss the selective enforcement claim on
 14 ripeness grounds” because as of the filing of the complaint, “there was no certainty about what
 15 action Oberlin would take,” including the “possibility that Oberlin could have opened an
 16 investigation”); *Peloe v. Univ. of Cincinnati*, No. 1:14-cv-404, 2015 WL 728309, at *14 (S.D.
 17 Ohio Feb. 19, 2015) (claim that university “acted with deliberate indifference by failing to correct
 18 misconduct is premature because the University has not made an enforceable final decision”
 19 regarding the misconduct). If Plaintiffs attempt to rescue the isolated set of fall 2023 incidents or
 20 law school student group allegations as individually ripe for purposes of their Title VI claim, the
 21 spring protests clearly are not—and should be severed from this action as unripe. *See Mandel v.*
 22 *Bd. of Trs. of Cal. State Univ.*, No. 17-cv-03511-WHO, 2018 WL 5458739, at *22, *25 & n.38
 23 (N.D. Cal. Oct. 29, 2018) (individual allegations may be severed as unripe in Title VI action).

24 Finally, Plaintiffs have not “show[n] that withholding review would result in direct and
 25 immediate hardship.” *US W. Commc’ns v. MFS Intelenet, Inc.*, 193 F.3d 1112, 1118 (9th Cir.
 26 1999) (citation omitted). The academic year is over, and there is no allegation that the
 27 encampment or Sather Gate protest will continue. (Nor could there be—they have ended.)
 28

2. Plaintiffs Lack Standing to Challenge the Student Group Bylaws.

There is another 12(b)(1) issue: Plaintiffs lack standing to challenge the bylaws.

3 **No Injury to Scholars.** Plaintiffs do not allege that any JAFE member would have been
4 invited by the relevant student groups but for the bylaws such that their non-invitation is “fairly
5 traceable” to the bylaws. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992); *see Wash.*
6 *Env’t Council v. Bellon*, 732 F.3d 1131, 1142 (9th Cir. 2013); FAC ¶¶ 23–37. If the University
7 were allowed to force student groups to drop the bylaws, there is no reason to infer that those
8 groups would invite JAFE members to speak. Nor do Plaintiffs allege that any JAFE member has
9 written or imminently will write—much less submit—an article appropriate for publication in the
10 *Gender, Law, and Justice* journal that adopted the bylaw limiting publication. *See* FAC ¶¶ 23–37.

11 ***No Injury to Students.*** JAFE similarly fails to allege that any of its student members has
12 standing. JAFE makes only the conclusory allegation that its law student members have been
13 “constructively expelled” from student groups that have adopted the bylaws. But they notably do
14 not allege that any law student has been excluded from membership or leadership in any group.

15 **No Organizational Injury.** The Brandeis Center has no “organizational” injury related to
16 the bylaws because it has not alleged that it diverted resources to addressing them or would have
17 suffered injury had it not done so. *See Friends of the Earth v. Sanderson Farms, Inc.*, 992 F.3d
18 939, 942 (9th Cir. 2021). The Center “cannot manufacture the injury by incurring litigation costs”
19 such as the Public Records Act action it filed to prepare this one. *La Asociacion de Trabajadores*
20 *de Lake Forest v. City of Lake Forest*, 624 F.3d 1083, 1088 (9th Cir. 2010); *see* FAC ¶ 25.

21 **No Redressability.** Regardless, Plaintiffs' alleged injuries are not redressable because they
22 seek relief that this Court cannot award. The challenged bylaws are speech protected by the First
23 Amendment: The bylaws exclude speakers in order to preserve a desired message, *Hurley v.
24 Irish-Am. Gay, Lesbian, & Bisexual Grp. Of Boston*, 515 U.S. 557 (1995), allow editorial
25 judgment about what speech and who to publish, *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S.
26 241 (1974), implicate student groups' rights to associate with outside groups and one another, *see*
27 *Healy v. James*, 408 U.S. 169, 187 (1972), and assert students' right to obtain access to particular
28 ideas, *see, e.g.*, *Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 867

1 (1982). Disciplining students for this speech activity would violate the First Amendment. *See*
 2 *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 831 (1995) (public universities
 3 violate the First Amendment when they “select[] for disfavored treatment” student organizations
 4 based on their particular “viewpoint”). And because Plaintiffs ask this Court to order Defendants
 5 to do what the Constitution prohibits, their injuries are not redressable. *See M.S. v. Brown*, 902
 6 F.3d 1076, 1086 (9th Cir. 2018) (injuries not redressable when relief sought would violate
 7 Constitution); *Reeves v. Nago*, 535 F. Supp. 3d 943, 956 (D. Haw. 2021) (same).

8 **B. All of the Claims Should be Dismissed Under Rule 12(b)(6).**

9 **1. Plaintiffs Fail to State an Equal Protection Claim.**

10 Plaintiffs’ Equal Protection claim fails because they have not alleged that the University’s
 11 action (or inaction) was motivated by a discriminatory intent. *Monteiro v. Tempe Union High Sch.*
 12 *Dist.*, 158 F.3d 1022, 1026 (9th Cir. 1998) (citing *Washington v. Davis*, 426 U.S. 229 (1976)).
 13 Discriminatory animus must be shown by alleging either “direct” or “circumstantial” evidence of
 14 its existence. *Ballou v. McElvain*, 29 F.4th 413, 422 (9th Cir. 2022). Here, Plaintiffs do neither.

15 Plaintiffs allege no direct evidence of animus by the University, as opposed to by
 16 protestors or other students. Just the opposite: the FAC quotes extensively from public statements
 17 by Dean Chemerinsky and other University officials *condemning* the conduct Plaintiffs allege as
 18 antisemitic. *See* FAC ¶¶ 13, 15, 141, 143. Nor do Plaintiffs allege circumstantial evidence of
 19 animus, such as “a relevant comparator” who was treated better by the University despite being
 20 similar to Plaintiffs’ members “in all material respects.” *Ballou*, 29 F.4th at 423–24 (citation
 21 omitted). Plaintiffs make no allegation that the University has enforced its policies differently to
 22 favor other groups. The most Plaintiffs allege is that the University “would enforce these policies
 23 to prevent discrimination against other protected classes” and “intentionally chose not to enforce
 24 [the school’s] policies in an evenhanded way.” FAC ¶¶ 159, 160. But that conclusory allegation
 25 is not sufficient to state a claim. *See Shooter v. Arizona*, 4 F.4th 955, 960 (9th Cir. 2021) (bare
 26 allegation of differential treatment insufficient to plead discriminatory intent).

27 **2. Plaintiffs Fail to State a Free Exercise Claim**

28 Plaintiffs’ Free Exercise claim likewise fails. To allege such a claim, a plaintiff must

1 identify “official expressions of hostility” or show that a policy is not neutral and not generally
 2 applicable. *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2421–22 & n.1 (2022) (citation
 3 omitted). The FAC identifies neither official expressions of hostility nor a non-neutral policy
 4 attributable to the University. Nor does the FAC plead facts showing that the University has
 5 disciplined another student group for offensive speech about other protected groups, but chose not
 6 to punish similar speech about Jewish students. Plaintiffs thus have not alleged that the University
 7 has “treat[ed] *any* comparable secular activity more favorably than religious exercise.” *Tandon v.*
 8 *Newsom*, 593 U.S. 61, 62 (2021) (emphasis original). To the extent that Plaintiffs premise their
 9 Free Exercise claim on the actions of students in creating an allegedly hostile environment, the
 10 University cannot be held liable for the actions of those private actors. *Felber v. Yudof*, 851 F.
 11 Supp. 2d 1182, 1186 (N.D. Cal. 2011).

12 **3. Plaintiffs Fail to State a Claim Under Section 1981.**

13 Plaintiffs’ section 1981 claim should be dismissed. Section 1981 prohibits racial
 14 discrimination in “mak[ing] and enforc[ing] contracts.” 42 U.S.C. § 1981(a). It applies only to
 15 *intentional* race discrimination. *Gen. Bldg. Contractors Ass’n, Inc. v. Pennsylvania*, 458 U.S. 375,
 16 396 (1982). Plaintiffs do not allege that anyone was denied a contract by the University because
 17 of race. Plaintiffs allege only that “[r]egistered student groups … routinely contract with outside
 18 speakers.” FAC ¶ 136 (italics added). But they make no allegation that *the University* contracts
 19 with those speakers—much less that the University refused to contract with anyone *because of*
 20 race (or religion, national origin, or shared ancestry, which section 1981 does not reach).

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

22 Plaintiffs’ Title VI claim fails because Plaintiffs have not alleged that the University
 23 intentionally discriminated against anyone. Indeed, Title VI authorizes an implied private cause of
 24 action only for “intentional conduct.” *Barnes*, 536 U.S. at 186–87; *Mandel v. Bd. of Trs. of Cal.*
 25 *State Univ.*, No. 17-cv-03511-WHO, 2018 WL 1242067, at *17 (N.D. Cal. Mar. 9, 2018).
 26 Plaintiffs have not plausibly alleged either direct discrimination by the University or deliberate
 27 indifference to the actions of others.

(a) Plaintiffs Fail to State a Claim for Direct Discrimination.

2 Plaintiffs' direct discrimination theory fails because they have not alleged animus by
3 University officials. *See Students for Fair Admissions, Inc. v. President & Fellows of Harvard*
4 *Coll.*, 600 U.S. 181, 198 n.2 (2023); *The Comm. Concerning Cnty. Improvement v. City of*
5 *Modesto*, 583 F.3d 690, 702–03 (9th Cir. 2011).

(b) Plaintiffs Fail to State a “Hostile Environment” Claim Because They Have Not Alleged Deliberate Indifference.

8 Nor have Plaintiffs stated a Title VI claim based on the theory that the University acted
9 with “deliberate indifference” to known harassment. *Davis v. Monroe Cnty. Bd. of Educ.*, 526
10 U.S. 629, 633, 642–43 (1999). A school is deliberately indifferent only if its response to a hostile
11 environment is “clearly unreasonable in light of the known circumstances.” *Id.* at 648. This does
12 not “mean that recipients can avoid liability only by purging their schools of actionable peer
13 harassment.” *Id.* Nor does it mean “that administrators must engage in particular disciplinary
14 action.” *Id.* Indeed, it would be “entirely reasonable for a school to refrain from a form of
15 disciplinary action that would expose it to constitutional or statutory claims.” *Id.* at 649.
16 Universities have many other options for responding to harassment on campus to satisfy Title VI,
17 including denouncing the harassment, expressing university values, and providing support to
18 affected students. *See* Dear Colleague Letter, Dep’t of Educ., Office for Civil Rights (May 7,
19 2024). Here, Plaintiffs have not plausibly alleged that the University’s response—which, again, is
20 still ongoing—has been deliberately indifferent. To the contrary, their allegations show the
21 University has not been deliberately indifferent.

22 **Law Student Organizations.** With respect to the law school student group bylaws,
23 Plaintiffs have alleged at least as robust of a response as those held not to be “clearly
24 unreasonable.” In *Mandel*, for example, San Francisco State had investigated complaints of
25 antisemitism at protest events and wrote reports in response detailing where administrators had
26 erred and what corrective steps could be taken in the future, but no student was disciplined. 2018
27 WL 1242067, at *3, *19. Here, Plaintiffs allege that the University forcefully denounced the
28 bylaws, communicated directly to affected students expressing their support and explaining their

1 response, and denied academic credit where appropriate. *See supra* pp. 3–4; *see also* FAC Ex. C.
 2 Going further and disciplining student groups would violate the First Amendment—and “it would
 3 be entirely reasonable for a school to refrain from a form of disciplinary action that would expose
 4 it to constitutional or statutory claims.” *Davis*, 526 U.S. at 649; *Felber*, 851 F. Supp. 2d at 1188.

5 **February 26, 2024, Event.** The FAC fails to allege that the University’s response to a mob
 6 that “shut down a speaking engagement organized by Jewish students” was deliberately
 7 indifferent. FAC ¶ 3. Plaintiffs allege that the University “fail[ed] to stop the mob” or otherwise
 8 “take any meaningful action.” *Id.* ¶ 4. But the FAC shows that the University took proactive and
 9 concrete steps before and during the event. It moved the event to a more secure location, deployed
 10 multiple campus police officers (including the chief of police), physically intervened to protect
 11 students from rioters, and cancelled the event and evacuated attendees. *See id.* ¶¶ 71–75. The
 12 University also took action after the fact. *Id.* ¶ 15. As the FAC says, “UC Berkeley Police
 13 Department is investigating [the rioters’ conduct] as hate crimes.” *Id.* ¶ 81. And University
 14 officials denounced the rioters and their “overt[] antisemitic expression.” *See id.* ¶¶ 81, 141.

15 Plaintiffs’ primary issue with the University’s response appears to be that “Bears for
 16 Palestine has not been suspended or disciplined.” *Id.* ¶ 83. Yet the FAC does not allege facts to
 17 show that Bears for Palestine was responsible for *any* conduct that violated University policy.
 18 Plaintiffs’ allegation that “Defendant Christ acknowledged that students from *Bears for Palestine*
 19 had ‘gained unauthorized entry into the building’” is demonstrably wrong. *Id.* ¶ 73 (emphasis
 20 added). Plaintiffs selectively quote from Chancellor Christ’s statement, impermissibly “selecting
 21 only portions of documents that support their claims” while “omitting portions” of the quotation
 22 “that weaken—or doom—their claims.” *Khoja v. Orexigen Therapeutics, Inc.*, 899 F.3d 988,
 23 1002 (9th Cir. 2018). In fact, Chancellor Christ states only that “*protesters* gained unauthorized
 24 entry to the building,” not Bears for Palestine (or any other students).¹ The only other allegations

25 _____
 26 ¹ Chancellor Christ’s full quote appears in her official statement, *Upholding Our Values*, Berkeley
 27 News, Feb. 27, 2024, <https://news.berkeley.edu/2024/02/27/upholding-our-values/>, which is
 28 named and cited via a hyperlink at paragraph 139 of the FAC. It may therefore be considered by
 this Court as incorporated by reference. *Swartz v. KPMG LLP*, 476 F.3d 756, 763 (9th Cir. 2007);
see also *Lazy Y Ranch Ltd. v. Behrens*, 546 F.3d 580, 588 (9th Cir. 2008) (“we need not accept as

1 about Bears for Palestine involve protected speech—posting publicly on social media and
 2 organizing a protest, *id.* ¶¶ 69–70—which would be insufficient without more for the University
 3 to impose discipline, even if the message is contrary to the University’s values.

4 Moreover, failure to discipline students within two and half months of an incident is not
 5 deliberately indifferent. Rather, the Ninth Circuit has held that disciplinary processes can take as
 6 many as eight months without crossing over into being unlawfully slow. *Karasek*, 956 F.3d at
 7 1106; *see also Oden v. N. Marianas Coll.*, 440 F.3d 1085, 1089 (9th Cir. 2006). It is reasonable to
 8 await the results of the active investigation by campus police before starting disciplinary
 9 proceedings. *See* FAC ¶ 81; *Moore v. Regents of the Univ. of Cal.*, No. 15-CV-05779-RS, 2016
 10 WL 2961984, at *6 (N.D. Cal. May 23, 2016).

11 Nor would discipline necessarily be required to avoid deliberate indifference. *See Mandel*,
 12 2018 WL 1242067 at *1, *4. In *Mandel*, plaintiffs alleged that the campus was deliberately
 13 indifferent in its response to a speech that was interrupted by protestors because it “confirmed that
 14 violations of the Student Conduct Code had occurred” but “no actions were taken . . . other than
 15 verbal warnings.” *Id.* at *4. That was not deliberate indifference because the school had taken
 16 “broader steps to address the shutdown of [the] event and anti-Semitism . . . in general.” *Id.* at
 17 *19. The University’s response here has been more robust than in *Mandel*, as it has clearly
 18 condemned the activity as antisemitic and initiated a criminal investigation, which is underway.

19 **Sather Gate Protests.** The FAC fails to allege that the University’s response to the partial
 20 blockade of Sather Gate was deliberately indifferent. Here, Plaintiffs’ primary objection appears
 21 to be that the University did not clear the protests. This aspect of Plaintiffs’ FAC faults the
 22 University for not clearing—perhaps forcibly—a protest that contained *both* undeniably protected
 23 political speech and allegedly offensive harassment of Jewish students. Clearing a protest at
 24 which *some* students (even if not *all* participants) are expressing political speech is a “form of
 25 disciplinary action that would expose [the University] to constitutional . . . claims” from *those*

26
 27 true allegations contradicting documents that are referenced in the complaint”). Alternatively,
 28 Defendants request judicial notice of the Chancellor’s statement in a concurrently filed request.

1 *students* and is therefore not required by Title VI. *Davis*, 526 U.S. at 649 (Title IX case, but as
 2 noted, courts interpret Title VI and Title IX consistently.)

3 Plaintiffs also suggest that the University could have and should have shut down the
 4 protest entirely because aspects of it violate time, place, and manner restrictions. FAC ¶ 99. But
 5 again, Title VI does not command particular disciplinary actions. *Davis*, 526 U.S. at 648. There
 6 is no allegation that the *entirety* of the protest violated that policy. And Plaintiffs allege that the
 7 University was “making efforts to end *those aspects of* the nonviolent protest at Sather Gate that
 8 violate [its] time, place, and manner restrictions.” FAC ¶ 99 (emphasis added). In any event, the
 9 University stated that it did not use law enforcement to clear the protest because it did not want to
 10 “create turmoil,” *id.*, which is the sort of on-the-ground judgment that courts are not supposed to
 11 second guess. *Davis*, 526 U.S. at 648; *see also Moore*, 2016 WL 2961984, at *6.

12 ***Sproul Hall Encampment.*** Nor have Plaintiffs plausibly alleged deliberate indifference to
 13 the encampments in front of Sproul Hall. FAC ¶ 101. That is due in no small part to the fact that
 14 the encampment appeared *just eleven days* before Plaintiffs filed their FAC. Courts have held
 15 delays in responses that lasted weeks were not “clearly unreasonable.” *See, e.g., Tanjaya v.*
 16 *Regents of Univ. of Cal.*, No. CV 19-2956-GW(FFMx), 2019 WL 13252681, at *5 (C.D. Cal. Dec.
 17 12, 2019), *aff’d*, 830 F. App’x 526 (9th Cir. 2020) (holding a weeks-long delay followed by an
 18 eight-month investigation was not clearly unreasonable). But Plaintiffs allege the University
 19 assured the community that it is “observing the demonstration.” FAC ¶ 107. If Plaintiffs’ issue is
 20 that the University did not discipline anyone for the encampment or (accepting the allegations as
 21 true for now) take various other actions in the eleven days between when the encampment started
 22 and the FAC, *see id.*, that only underscores that the claim is premature. The need for deliberation
 23 and patience is especially important due to the complexity of the issue and competing
 24 considerations facing the University, including the risk of potential constitutional concerns
 25 associated with taking action to address the encampment. *See supra* pp. 10–11.

26 ***Dean Chemerinsky Event.*** The FAC also fails to allege that the University has been
 27 deliberately indifferent to harassment related to the Dean Chemerinsky event. FAC ¶ 11. The
 28 FAC alleges that LSJP members disrupted a dinner that the Dean hosted for graduating students,

1 refused to leave when asked to do so, and circulated an antisemitic caricature of the Dean. *Id.*
 2 ¶¶ 11, 12. Yet the FAC also makes clear that the University took firm and sweeping action in
 3 response, denouncing the antisemitic images and supporting Dean Chemerinsky. The FAC
 4 acknowledges that “the University condemned the actions of the students involved and recognized
 5 that they were anti-Semitic.” *Id.* ¶ 143. President Drake issued a statement acknowledging that
 6 the actions of the students “were antisemitic, threatening, and do not reflect the values of this
 7 university.” *Id.* ¶ 91. Board of Regents Chair Leib called the actions “deplorable.” *Id.*

8 Plaintiffs are not satisfied because “LSJP has not had its registered student organization
 9 status revoked,” *id.* ¶ 143, but that does not establish deliberate indifference. The University’s
 10 clear condemnation is exactly the type of response imagined in Education Department guidance on
 11 Title VI. *See* Dear Colleague Letter at 3; *see also* *Feminist Majority Found. v. Hurley*, 911 F.3d
 12 674, 693 (4th Cir. 2018) (suggesting “vigorously denounc[ing] the harassing and threatening
 13 conduct” as an appropriate response). And revoking LSJP’s status in the present circumstances
 14 would create risk of potential constitutional concerns. *See Davis*, 526 U.S. at 648. At least one
 15 other university has been sued for just that. *See Columbia Students for Justice in Palestine v.*
 16 *Columbia Univ.*, No. 152220 (N.Y. Sup. Ct. Mar. 11, 2024). At a minimum, the University should
 17 be given time to respond before the Court can determine whether it has responded adequately.

18 ***Other Incidents of Alleged Harassment.*** Plaintiffs also include “a number of additional
 19 conclusory allegations that lack the date they occurred, how frequently they occurred, and who
 20 was involved.” *Mandel*, 2018 WL 1242067 at *5. Plaintiffs cannot rely on these sparse
 21 allegations. But even if they could, they do not support deliberate indifference. Plaintiffs make no
 22 allegations at all about the University’s response, other than to fault the University for initially
 23 calling one incident a “hate crime” without saying that it was antisemitic in nature. FAC ¶ 115.

24 **5. Plaintiffs Fail to State an ADA Claim.**

25 Plaintiffs’ ADA claim also fails. The FAC alleges that student protests have partially
 26 obstructed Plaintiffs’ access to two locations on the University’s campus: Sather Gate and Sproul
 27 Hall. FAC ¶ 191. To state a claim under Title II, a plaintiff must show that they were either
 28 excluded from participation in or denied the benefits of a public entity’s services, programs, or

1 activities *solely* because of their disability. *Weinreich v. L.A. Cnty. Metro. Transp. Auth.*, 114 F.3d
 2 976, 978 (9th Cir. 1997); *Does 1-5 v. Chandler*, 83 F.3d 1150, 1155 (9th Cir. 1996). “An entity is
 3 ‘not required to produce the identical result for handicapped and nonhandicapped persons,’ but
 4 they nevertheless ‘must afford handicapped persons equal opportunity to gain the same benefit.’”
 5 *Bassiliros v. City of Torrance, CA*, 166 F. Supp. 3d 1061, 1077 (C.D. Cal. 2015) (citation omitted).

6 Plaintiffs do not meet this standard. First, they do not allege that the protest at Sather Gate
 7 denies them access to the University’s services, which means they fall short of the requirement to
 8 plead that there are locations that the plaintiff cannot reach at all “because of access barriers.”
 9 *Kirola v. City & Cnty. of San Francisco*, 860 F.3d 1164, 1183 (9th Cir. 2017). The FAC alleges
 10 that the protest prevents use of one portion of Sather Gate, while leaving two separate portions of
 11 the gate open to traffic. FAC ¶ 96. And the FAC does not allege that the protest prevents JAFE
 12 Member #1 from accessing classes; only that the student has had to go to class via other routes.
 13 *Id.* Second, Plaintiffs do not allege that Sproul Hall is inaccessible to individuals *due to disability*;
 14 they allege that students feel unable to access Sproul Hall due to *harassment*. *Id.* ¶ 102.
 15 Antisemitic harassment should not occur on campus, but if it does, it does not implicate the ADA.

16 **V. CONCLUSION**

17 For these reasons, the Court should dismiss Plaintiffs’ claims.²

18 DATED: June 10, 2024

MUNGER, TOLLES & OLSON LLP

20 By: Bryan H. Heckenlively
 21 BRYAN H. HECKENLIVELY
 22 Attorneys for Defendants

25 ² The Court should dismiss Counts I to III against The Regents of the University of California,
 26 which cannot be sued under sections 1981 or 1983 because it is an arm of the state. *Armstrong v.*
Meyers, 964 F.2d 948, 949–50 (9th Cir. 1992); *Pittman v. Or., Emp. Dep’t*, 509 F.3d 1065, 1066
 27 (9th Cir. 2007). “UC Berkeley” and “Berkeley Law School” should be dismissed in full because
 28 they are not legal entities distinct from The Regents. *See Mihan v. Regents of the Univ. of Cal.*,
 No. 2:16-cv-01390-KJM-CMK, 2016 WL 6875911, at *3 (E.D. Cal. Nov. 21, 2016).