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UNITED STATES DISTRICT COURT

14

FOR THE NORTHERN DISTRICT OF CALIFORNIA

15

SAN FRANCISCO DIVISION

16

17 JESSICA FELBER, BRIAN MASSEY

Case No. C 11-01012 RS

18

Plaintiffs,

19

vs.

20

MARK G. YUDOF, PRESIDENT OF
REGENTS OF THE UNIVERSITY OF
CALIFORNIA, BERKELEY; THE
REGENTS OF THE UNIVERSITY OF
CALIFORNIA; ROBERT J. BIRGENEAU,
CHANCELLOR OF THE UNIVERSITY OF
CALIFORNIA, BERKELEY; JONATHAN
POULLARD, DEAN OF STUDENTS OF
THE UNIVERSITY OF CALIFORNIA,
BERKELEY; ASSOCIATED STUDENTS OF
UNIVERSITY OF CALIFORNIA (ASUC);

**DEFENDANT ASSOCIATED STUDENTS OF
THE UNIVERSITY OF CALIFORNIA'S
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF MOTION
TO DISMISS FIRST AMENDED
COMPLAINT**

[Fed. R. Civ. P. Rule 12(b) (6)

Date: September 22, 2011

Time: 1:30 p.m.

Dept: Courtroom 3, 17th Floor

Judge: Hon. Richard Seeborg

Complaint filed: March 4, 2011

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Defendants.

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DEFENDANT'S MEMORANDUM OF PTS. & AUTHS. IN SUPPORT OF MOTION TO
DISMISS FIRST AMENDED COMPLAINT PURSUANT TO FED R. CIV. P.
12(b) (6) (Cause No. C 11-01012 RS)

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I. INTRODUCTION

2 The present action filed by a former student at the
3 University of California, Berkeley, and by a present student,
4 seeks to chill constitutionally protected speech on the campus and
5 its environs related to a public issue; namely, the Israeli-
6 Palestinian conflict in the Middle East. The suit alleges that
7 certain student activity groups funded through the Associated
8 Students of the University of California (ASUC) as part of a
9 University authorized program to fund student extra curricular
10 activities are somehow depriving them of their civil rights
11 through aggressive advocacy of positions on these public issues.
12 Neither the named student organizations nor named individuals of
13 whom plaintiffs complain are included as defendants. Rather, the
14 suit is directed against the University and individuals charged
15 with the administration of the University system-wide and the
16 Berkeley campus in particular.

17 Also named as a defendant is the ASUC, a California, a
18 private, non-profit unincorporated association, which is the
19 student-directed institution charged with the administration of
20 student government and the funding of student activities groups on
21 the Berkeley campus. In order to be funded as a student activity
22 group, the organization must comply with the following steps:

23 1. Fill out an application describing the funding and a line
24 item budget for the next year's budget.

25 2. Present the funding request to a Senator so that a bill
26 can be introduced in the Senate to approve/disapprove the funding
27 request for the next year's budget.

3. The bill is referred to the ASUC Senate Finance Committee (made up of student Senators) for consideration to be approved/disapproved or amended.

4. The bill is reviewed by ASUC and ASUC Auxiliary staff to ensure that it complies with all ASUC and University Rules regarding any discriminatory membership policies (not permitted) and that it aids the overall educational mission of the University to promote a diversity of viewpoint on issues relevant to the campus community.

5. The ASUC Senate approves, disapproves or amends the funding request as part of the overall annual budget for the following academic year.

6. Prior to receiving any funds from the ASUC, the organization must attend and complete the ASUC Agent budget workshop.

(See Request for Judicial Notice, Exhibits A, B, C, D, & E.)

The named student activity groups, The Muslim Student Association (MSA) and Students for Justice in Palestine (SJP) are two of literally hundreds of student activity and publication groups funded by mandatory student fees collected for that purpose, on the Berkeley campus. (See Request for Judicial Notice, Exhibit E).

II. SUMMARY OF RELIEF SOUGHT

Defendant ASUC seeks dismissal of Plaintiffs' claims on the following grounds:

As to the federal claims set forth in the first, third and sixth causes of action, the defense is that the speech and conduct complained of is protected by the First Amendment to the United

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1 States Constitution as part of a University-sponsored program to
 2 fund student activity groups on a content neutral basis with the
 3 use of mandatory student activities fee funds; and, that ASUC, as
 4 a legal entity separate and distinct from the Regents, does not
 5 receive federal funding of any kind which would subject it to
 6 Title VI enforcement.

7 As to the state claims set forth in the second, fourth, fifth
 8 and seventh causes of action, the defense is the same. The
 9 conduct and speech complained of is protected not only by the
 10 First Amendment to the U.S. Constitution but also by Article 1,
 11 Section 2 of the California Constitution; that if no federal
 12 claims lie against ASUC, this is not the proper court to hear
 13 state claims as there would be no basis for pendent jurisdiction;
 14 and, that ASUC is not a subject to the kind of declaratory and
 15 injunctive relief requested by plaintiffs in this action.

16 **III. FACTUAL ALLEGATIONS OF THE COMPLAINT RE ASUC**

17 Plaintiffs' first amended complaint alleges very few facts
 18 concerning the ASUC. The allegations seem to be taken from
 19 newspaper articles and read like a press release rather than a
 20 complaint alleging injuries for which there is a legal remedy.
 21 The essence of plaintiffs' complaint is that as members of the
 22 Jewish student community and as supporters of Israeli political
 23 positions, they have been denied their civil rights due to the
 24 defendants' policies and procedures which permit Muslim student
 25 organizations to rally and protest against the policies of the
 26 Israeli government as they affect the Palestinian people. Citing
 27 alleged incidents as far back as 1995, paragraphs 22 through 37,
 28 40 through 42 and 53 through 59 of the first amended complaint

1 (FAC) are directed at the activities of the two above-named
 2 student activity organizations, yet neither of the organizations
 3 nor any of their members are named as defendants in this lawsuit.

4 The remaining allegations contain conclusions rather than
 5 facts and recite alleged incidents throughout the state which
 6 create unwarranted inferences, none of which can remotely be
 7 connected with the named plaintiffs in this lawsuit. On its face,
 8 plaintiffs' FAC presents no cognizable theory upon which this case
 9 should proceed in Federal court. The speech complained of is
 10 protected under the First Amendment to the United States
 11 Constitution.

12 The actual allegations insofar as they appear to relate to
 13 ASUC are summarized as follows: The ASUC is the student governing
 14 body of the University of California. (FAC, para. 11.) At some
 15 point after 2000, the ASUC registered the Students for Justice in
 16 Palestine (SJP) as a student activity group. (FAC, para. 26.) The
 17 ASUC provided funding to another student group, the Muslim Student
 18 Association (MSA) and its publication Al-Bayan in various amounts
 19 in specified years. (FAC, para. 33.)

20 SJP student activists disrupted a concert in November 2008 by
 21 draping Palestinian flags from the Eshleman Hall balcony
 22 directly over the stage at a hip-hop concert at a Jewish event in
 23 violation of UCB/ASUC policy. (FAC, para. 49.) Students
 24 complained to UCB Dean of Students Jonathan Poulland about the
 25 SJP's threatening conduct at an ASUC Senate meeting on March 3,
 26 2008. (FAC, para. 50.)

27 In addition, the FAC contains generalized allegations
 28 pertaining to all the defendants, summarized as follows:

1 Defendants are empowered by the other defendants to implement the
 2 policies that govern the conduct of persons affected and utilizing
 3 the University of California, Berkeley, Irvine, San Diego, and
 4 other campuses. (FAC, para. 12.) Each of the Defendants is the
 5 agent or employee of the remaining Defendants and was acting
 6 within the course and scope of such agency or employment. (FAC,
 7 para. 13.) Jessica Felber was assaulted as a result of
 8 Defendants' policies which (1) fostered terrorist incitements on
 9 campus from MSA and SJP, (2) turn a blind eye to illegal
 10 activities, (3) failed to discipline MSA and SJP for "their pro-
 11 terrorist" actions despite prior notice, (4) failed to provide
 12 adequate security, and (5) condoned harassment of Jewish students.
 13 (FAC, para. 17.) Defendants had notice of harassment,
 14 intimidation, incitement, and violence committed by the SJP and
 15 MSA against Jewish students at the UC Berkeley, Irvine, and San
 16 Diego campuses. (FAC, para. 39.)

17 Plaintiffs focus much attention to Apartheid Week, however
 18 the FAC itself alleges that the University sanctioned Apartheid
 19 Week (FAC, page 2: 6-9).

20 **IV. ARGUMENT**

21 **A. Standard for Dismissal Pursuant to Fed. R. Civ. P.**
 22 **12(b) (6).**

23 This motion is made under Federal Rules of Civil Procedure
 24 12(b)(6). Rule 12(b)(6) authorizes a court to dismiss a claim on
 25 the basis of a dispositive issue of law. (*Nietzke v. Williams*, 490
 26 U.S. 319, 326 (1989).) The dismissal may be based on lack of a
 27 cognizable legal theory or the lack of sufficient facts to sustain
 28

1 that theory. (*Ballistreri v. Pacifica Police Dept.*, 901 F2d 696,
 2 699 (9th Cir., 1990).)

3 Rule 12(b)(6) empowers federal courts to dismiss a complaint
 4 for failure to state a claim upon which relief can be granted. As
 5 a result of the Supreme Court's decision in *Bell Atlantic Corp. v.*
 6 *Twombly*, 127 S.Ct. 1955, 1964-65 (2007), the standard applicable
 7 to such motions has recently changed. Now, "[a]lthough a
 8 complaint challenged by a Rule 12(b)(6) motion to dismiss need not
 9 provide detailed factual allegations, it must offer 'more than
 10 labels and conclusions' and contain more than a 'formulaic
 11 recitation of the elements of a cause of action.' (*Twombly*,
 12 *supra*, 127 S.Ct. at 1964-65.) "The complaint must indicate more
 13 than mere speculation of a right to relief." (*Id.*, at 1965.)
 14 Where, as here, the complaint fails to adequately state a claim,
 15 such deficiency should be "exposed at the point of minimum
 16 expenditure of time and money by the parties and the court."
 17 (*Id.*, at 1966.) This can occur for one of two reasons: (1)
 18 absence of a cognizable legal theory, or (2) insufficient facts
 19 under a cognizable legal claim. (*Robertson v. Dean Witter*
 20 *Reynolds, Inc.*, 749 F.2d 530, 534 (9th Cir. 1984).) Both
 21 rationales support dismissal here.

22 In *Twombly*, the U.S. Supreme Court "retired" the traditional
 23 test that a complaint should not be dismissed "unless it appears
 24 beyond doubt that the plaintiff can prove no set of facts in
 25 support of his claim which would entitle him to relief."
 26 (*Twombly*, 127 S. Ct. at 1968-69 (quoting *Conley v. Gibson*, 355
 27 U.S. 41, 45-46 (1957)). Now, a complaint is subject to dismissal
 28

1 unless it alleges "enough facts to state a claim to relief that is
 2 plausible on its face." (*Twombly*, 127 S. Ct. at 1974.)

3 In ruling on a Rule 12(b)(6) motion, a court must construe
 4 the complaint in the light most favorable to the plaintiff, accept
 5 all well-pleaded factual allegations as true, and determine
 6 whether the plaintiff can prove any set of facts to support a
 7 claim that would merit relief. (*De La Cruz v. Tormey*, 582 F2d 45,
 8 48 (9th Cir. 1978).) The court should not accept legal
 9 conclusions cast in the form of factual allegations if those
 10 conclusions cannot reasonably be drawn from the facts alleged.
 11 (*Clegg v. Cult Awareness Network*, 18 F.3d 752, 754-55 (9th Cir.
 12 1994).) Moreover, "conclusory allegations of law and unwarranted
 13 inferences are not sufficient to defeat a [Rule 12(b)(6)] motion
 14 to dismiss." (*Pareto v. F.D.I.C.*, 139 F.3d 696, 699 (9th Cir.
 15 1998).)

16 **B. Dismissal of the Complaint.**

17 It is clear from a reading of the unverified FAC that the
 18 allegations as posited are conclusory and create unwarranted
 19 inferences which require dismissal. Rather than alleging specific
 20 acts on the part of defendants which affected the plaintiffs by
 21 allegedly denying them their constitutionally protected civil
 22 rights, the FAC recites a litany of events, some long ago, not
 23 limited to the Berkeley campus, which allege some sort of speech
 24 and conduct (all of which appear to be centered on the
 25 Israeli/Palestinian dispute) which purports to deny to plaintiffs
 26 their civil rights. Relying on an outdated and legally deficient
 27 theory of "in loco parenti", plaintiff seeks to hold the named
 28 defendants responsible for speech and conduct on public issues,

1 which is constitutionally protected. What is presented is a
 2 lawsuit based upon allegations that one group's right to assemble
 3 and aggressively put forth their positions on issues of public
 4 concern on the campus of a public university, which may intimidate
 5 a second group, goes beyond speech protected by the First
 6 Amendment. This is a dispositive issue of law for the court to
 7 decide at this point in the proceedings. It requires dismissal of
 8 the lawsuit.

9 **C. Dismissal of Specific Claims.**

10 **1. *Claim 1 - United States Constitution - Amendment 1.***

11 The United States Constitution will not support an action for
 12 damages where a meaningful alternative remedy in state or federal
 13 law is available. (*Bush v. Lucas*, 462 U.S. 367, 386 (1983).)
 14 Here, Plaintiff's claim for violation of the First Amendment is
 15 improper because 42 U.S.C. § 1983 provides a cause of action for
 16 deprivation of any rights secured by federal law. (*Buckley v.*
 17 *City of Redding*, 66 F.3d 188, 190 (9th Cir. 1995)).

18 The first cause of action should be dismissed.

19 **2. *Claim 2 - Violation of California Constitution Article***
 20 ***1, Section 4.***

21 Plaintiffs may not pursue a claim for violation of the
 22 California Constitution unless they establish either that (1) the
 23 Constitutional provision contains an affirmative intent to
 24 authorize a damages action to remedy the violation, or (2) they
 25 have satisfied the "constitutional tort" analysis adopted by
 26 *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971)
 27 and its progeny, including a showing that no adequate alternative
 28 remedy exists. (*Katzberg v. Regents of University of California*,

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1 29 Cal. 4th 300, 317 (1st Dist. 2002).) Applying this analysis in
 2 *Katzberg*, the California Supreme Court held that Article I of the
 3 California Constitution does not provide a private right of action
 4 for a claim of damages for violation of due process liberty
 5 interests. (*Katzberg v. Regents of University of California*,
 6 *supra*, 29 Cal. 4th at 329 (addressing Article I, Section 7
 7 claims).)

8 California Constitution, Article 1, Section 4 provides:

9 Free exercise and enjoyment of religion without
 10 discrimination or preference are guaranteed. This
 11 liberty of conscience does not excuse acts that are
 12 licentious or inconsistent with the peace or safety of
 13 the State. The Legislature shall make no law
 14 respecting an establishment of religion. A person is
 15 not incompetent to be a witness or juror because of his
 16 or her opinions on religious beliefs.

17 The language of Article I, Section 4 does not indicate any
 18 intent to provide a private right of action for damages. Further,
 19 the existence of alternative statutory remedies is supported by
 20 Plaintiff's own FAC, which pleads violation of California Civil
 21 Code §§ 51 et seq. based on the same alleged deprivation of free
 22 exercise of religion. Under the reasoning of *Katzberg*, there can
 23 be no private right of action for violation of Article I, Section
 24 4 of the California Constitution.

25 In addition, the ASUC has a defense to this claim arising
 26 from the fact that the activities complained of (espousing
 27 positions on public issues) are vigorously protected by
 28 California's constitutional right to free speech contained in

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1 Article 1, Section 2 of the California Constitution, which has
 2 been construed to be "more protective, definitive and inclusive of
 3 rights to expression of speech" than the federal protection
 4 afforded under the First Amendment to the United States
 5 Constitution. (*Robins v. Pruneyard Shopping Center*, 23 C.3d 899,
 6 908, 592 P.2d 341(1979); *Blatty v. New York Times Co.*, 42 C.3d
 7 1033, 1041, 728 P.2d 1177(1986)); *Witkin Summary of California*
 8 *Law, Constitutional Law, Section 312, p.497.*)

9 The second cause of action should be dismissed.

10 **3. *Claim 3 – Violation of 42 U.S.C. § 1983.***

11 The Third Claim for violation of 42 U.S.C. § 1983 fails to
 12 state a claim pursuant to Fed. R. Civ. P. 12(b) (6) because the
 13 First Amendment of the United States Constitution precludes ASUC
 14 from discriminating against student groups based on the content of
 15 their speech.

16 Section 1983 provides in relevant part:

17 Every person who, under color of any statute,
 18 ordinance, regulation, custom, or usage, of any State
 19 or Territory or the District of Columbia, subjects, or
 20 causes to be subjected, any citizen of the United
 21 States or other person within the jurisdiction thereof
 22 to the deprivation of any rights, privileges, or
 23 immunities secured by the Constitution and laws, shall
 24 be liable to the party injured in an action at law,
 25 suit in equity, or other proper proceeding for
 26 redress....

27 The Free Speech Clause of the First Amendment can serve as a
 28 defense in state tort suits. (*Hustler Magazine, Inc. v. Falwell*,
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1 485 U. S. 46, 50-51 (1988) (intentional infliction of emotional
 2 distress). The amount of protection attaching to speech depends
 3 upon whether it pertains to public, rather than private, matters.
 4 (*Snyder v. Phelps*, 562 U. S. ___, 131 S. Ct. 1207 (2011).)
 5 Speech is of public concern when it can "be fairly considered as
 6 relating to any matter of political, social, or other concern to
 7 the community." (*Snyder v. Phelps*, *supra*, 562 U. S. ___ (2011),
 8 quoting *Connick v. Myers* 461 U.S. 138, 146 (1983).) A statement's
 9 arguably "inappropriate or controversial character ... is
 10 irrelevant to the question whether it deals with a matter of
 11 public concern." (*Rankin v. McPherson*, 483 U. S. 378, 387 (1987).)

12 By enacting the First Amendment, the founding fathers ensured
 13 "a profound national commitment to the principle that debate on
 14 public issues should be uninhibited, robust and wide open." (*New*
 15 *York Times v. Sullivan*, 376 U.S. 254, 270 (1964).) That is
 16 because speech concerning public affairs is the essence of self
 17 government, occupies the highest rung of the hierarchy of First
 18 Amendment values and is entitled to special protection. (*Garrison*
 19 *v. Louisiana*, 379 U.S. 64, 74-75 (1964); *Connick v. Myers*, *supra*,
 20 461 U. S. at 145; see also *Snyder v. Phelps*, *supra*, 562 U.S. ___
 21 (2011).)

22 There can be no doubt that speech by members of student
 23 activity groups on a university campus related to the Middle East
 24 conflict, Israel, Palestine, and related issues, is public speech.
 25 The mission of a public university is primarily to educate its
 26 students. The justification for the existence of student
 27 government is to support that educational mission of the
 28 university. (*Widmar v. Vincent*, 454 U.S. 263, 277 (1981); *Alabama*

1 *Student Party v. Student Government Association of the University*
2 *of Alabama*, 867 F.2d 1344 (1989).)

Decisions of the U.S. Supreme Court recognize that the underpinnings of support for student government on the campuses of public universities are mandatory fees assessed students as a condition of enrollment. The constitutional justification for the imposition, collection and use of those fees rests in the proposition that the speech being supported is "student" speech, not university speech, which is used to fund organizations and activities on a content neutral basis. (*Rosenberger v. University of Virginia*, 515 U.S. 819 (1995); *Bd. Of Regents of the Univ. of Wisconsin v. Southworth*, 529 U.S. 217, 235 (2000).)

13 Because "student" rather than "university" speech is
14 involved, the standard used to analyze potential constitutional
15 violations is that of reasonableness rather than the more
16 restrictive "compelling state interest" standard. (Alabama
17 *Student Party v. Student Government Association of the University*
18 *of Alabama, supra*, 867 F.2d at p. 1345; see also *Christian Legal*
19 *Society v. Martinez*, 561 U.S. , 130 S.Ct. 2971 (2010).)

20 The above line of cases was recently reaffirmed by the
21 Supreme Court in *Christian Legal Society v. Martinez*, *supra*, 561
22 U.S. ___, 130 S.Ct. 2971 (2010). Justice Ginsburg delivered that
23 opinion which upheld a University denial of funding to a student
24 group not open to the general student population (it required a
25 religious statement of faith and denied membership to gay persons)
26 on the ground that the funding system in place was "viewpoint
27 neutral" and conditioning access to that funding system by
28 requiring no discrimination on the part of student activity groups

1 was reasonable.

2 Under the "student speech" standard, the ASUC is entitled to
 3 a defense based on First Amendment freedom of speech if its
 4 actions and omissions are reasonable. The scant factual
 5 allegations tying the ASUC to the dispute at bar are insufficient
 6 to show that the ASUC acted unreasonably by funding the Muslim
 7 student organizations as part of the overall funding of student
 8 activity groups on the Berkeley campus. In point of fact, if ASUC
 9 failed to fund the MSA or SJP because of the content of their
 10 message, it would be in violation of its First Amendment
 11 obligations as noted by the settled law created by the United
 12 States Supreme Court. (See Request for Judicial Notice, Exhibits
 13 D & E).

14 The third cause of action should be dismissed.

15 **4. *Claim 4 – Declaratory Relief.***

16 An action for declaratory relief does not create an
 17 independent basis for federal jurisdiction. It is procedural,
 18 only. (*Rutter, California Practice Guide, Civil Procedure Before*
 19 *Trial, Chapter 10, Section 10:14, p. 10-5.*)

20 Before declaratory relief can be granted, federal subject
 21 matter jurisdiction must exist within the body of the allegations
 22 of the complaint. (*Vaden v. Discover Bank (2009) 556 U.S. __, 129*
 23 *S.Ct. 1262, 1278, fn. 19.*)

24 If no substantive cause of action remains, the fourth cause
 25 of action should be dismissed.

26 **5. *Claim 5 – Violations of Civil Code Sections 51, 51.5,***
 27 ***51.7, 52, 52.1.***

28 The Fifth Claim for Violations of Civil Code Sections 51,

DEFENDANT'S MEMORANDUM OF PTS. & AUTHS. IN SUPPORT OF MOTION TO
 DISMISS FIRST AMENDED COMPLAINT PURSUANT TO FED R. CIV. P.
 12(b) (6) 13 (Cause No. C 11-01012 RS)

1 51.5, 51.7, 52, 52.1 (California's Unruh Civil Rights Act) fails
 2 to state a claim upon which relief may be granted pursuant to Fed.
 3 R. Civ. P. 12(b)(6) because the First Amendment of the United
 4 States Constitution precludes ASUC from discriminating against
 5 student groups based on the content of their speech. In addition,
 6 this is a state claim not subject to the jurisdiction of this
 7 court unless a federal claim survives. It is but an alternative
 8 state remedy to the federal civil rights claim discussed above.

9 In addition, the Unruh Civil Rights Act only applies to
 10 business establishments. *California Civil Code, Section 51(b)*.
 11 Although the Act is to be liberally construed, the organization
 12 against whom it is enforced must be engaged in some kind of
 13 business activity. (See *Curran v. Mt. Diablo Council of the Boy*
 14 *Scouts of America*, 17 C.4th 670, 952 P2.d 218 (1998); *Randall v.*
 15 *Orange County Council, Boy Scouts of America*, 17 C.4th 736, 952
 16 P.2d 261 (1998).)

17 There is no allegation in the complaint that ASUC engages in
 18 the kind of business activities which are subject to the Unruh
 19 Act.

20 The fifth cause of action should be dismissed.

21 **6. *Claim 6 – Violation of Title VI of the Civil Rights Act of***
 22 ***1964.***

23 The Title VI of the Civil Rights Act of 1964, 42 USC 2000(d)-
 24 2000(d)(1) is entitled "Title VI - Nondiscrimination In Federally
 25 Assisted Programs." Title VI prevents discrimination by
 26 government agencies that receive federal funds. Section 601 of
 27 Title VI provides:

28

1 This section states the general principle that no person in
2 the United States shall be excluded from participation in or
3 otherwise discriminated against on the ground of race, color,
4 or national origin under any program or activity receiving
5 Federal financial assistance.

6 The ASUC is a private, non-profit, unincorporated
7 association. There is no allegation in the FAC stating that ASUC
8 is a program or activity that receives Federal financial
9 assistance.

The sixth cause of action should be dismissed.

7. **Claim 7 – Violation of Government Code § 11135.**

12 The Seventh Claim for Violation of California Government Code
13 Section 11135 fails to state a claim upon which relief may be
14 granted pursuant to Fed. R. Civ. P. 12(b)(6) because the FAC is
15 devoid of any allegation that Defendant ASUC is "conducted,
16 operated, or administered by the state or by any state agency, is
17 funded directly by the state, or receives any financial assistance
18 from the state", or is an employer for a program which receives
19 state funding.

20 An element of a claim for violation of Government Code §
21 11135 is that the defendant be "any program or activity that is
22 conducted, operated, or administered by the state or by any state
23 agency, is funded directly by the state, or receives any financial
24 assistance from the state." ASUC is not such a "program or
25 activity".

26 Nor is there any allegation in the FAC that plaintiffs are
27 employed in any such program or that ASUC is an employer for any

1 such program. (See Witkin, Summary of California Law, Agency and
2 Employment, Section 334, p. 426).

3 In addition, ASUC has a complete defense against this claim
4 because the conduct complained of is protected by First Amendment
5 guarantees of free speech to students under the California and
6 United States Constitutions.

7 The seventh cause of action should be dismissed.

8 **V. CONCLUSION**

9 The ASUC Senate is a student governmental body that considers
10 applications from student activity groups, student publications
11 and student initiated groups for funding with mandatory student
12 fee funds. It also decides how much each group is to be allocated
13 through an annual budget process. All of this is done without any
14 consideration of the content of the individual group's message as
15 required by law, there being no allegations in the FAC to the
16 contrary.

17 The federal claims should be dismissed because the conduct
18 and speech complained of is protected by the First Amendment to
19 the U.S. Constitution.

20 If the federal claims are dismissed, the state claims should
21 also be dismissed for lack of subject matter jurisdiction and
22 because the conduct and speech complained of is protected speech
23 under the U.S. Constitution and the California Constitution.

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1 For the foregoing reasons, defendants request that
2 plaintiffs' first, second, third, fourth, fifth, sixth, and
3 seventh causes of action for relief against Defendant ASUC be
4 dismissed for failure to state a claim upon which relief may be
5 granted pursuant to Fed. R. Civ. P. 12(b) (6).

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Respectfully submitted,

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Dated: June 23, 2011

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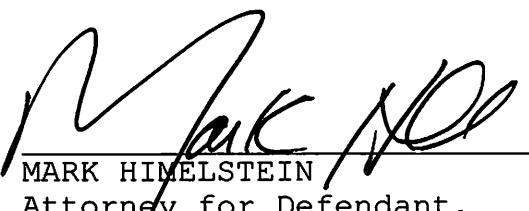
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