

INTRODUCTION

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2 This case involves a classic vague, overbroad, and content-based regulation
3 used to punish core political speech because government officials and listeners oppose
4 the speech as “offensive” and, thus, “disruptive.” The university rule challenged here
5 is found in California Code of Regulations (“CCR”) §41301(d), which provides that:
6 “Obstruction or disruption, on or off campus property, of the campus education
7 process, administrative process, or other campus function.” Plaintiff seeks a temporary
8 restraining order to enjoin enforcement of CCR §41301(d), which is expressly
9 incorporated into Defendants’ student code of conduct, and to enjoin Defendants from
10 disciplining Plaintiff for posting leaflets on campus announcing speakers, whose ideas
11 some members of the university community view as “offensive.”

12 The chill to First Amendment rights is especially serious here, where the rule
13 has been used by defendants for content-based discipline at a public college, a place
14 where free speech principles are inextricably intertwined with the pursuit of
15 education. Plaintiff Hinkle was disciplined by California Polytechnic State University
16 (“Cal Poly”) for “disruption” based on his attempt to post a flier announcing a speech
17 by a black conservative author on a public bulletin board in a student lounge. The sole
18 basis for the finding of “disruption” was that the flier's content “offended” a group of
19 minority students who observed Plaintiff posting the flier.

20 The United States and California Supreme Courts have repeatedly instructed
21 that restraints on speech may not be based on the reaction of the listener, even if some
22 believe it to be “offensive.” There can be no doubt that Defendants’ rule violates
23 black letter First Amendment law. Thus, an injunction is necessary to permit Plaintiff
24 and others to speak freely without the threat and reality of being disciplined for
25 “disruption” based on nothing more than the listener’s reaction to the speech.
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STATEMENT OF FACTS

The Posting of the Event Announcement

On the evening of Tuesday, November 12, 2002, Steven Hinkle was posting a flier on bulletin boards around the Cal Poly campus. Verified Complaint at 13. A copy of the flier is attached as Exhibit 1 to the Complaint. Hinkle Dec. ¶2. It advertised a speech by Mason Weaver, author of *It's OK to Leave the Plantation*, listing the speaker, his book's title, and the date and place of the lecture. In that book, Weaver, an African-American, argues that dependence on government programs places many African Americans in circumstances analogous to slavery. C. Mason Weaver, *It's OK to Leave the Plantation: the New Underground Railroad* (1998). See also Complaint, ¶ 13.

Hinkle was posting the fliers on behalf of a chartered student group recognized by the university, the Cal Poly College Republicans, of which he was Vice President. Moreover, Weaver's speech was an event scheduled in accordance with university regulations. Complaint at ¶ 14.

Hinkle entered Building No. 65, the University Union, and placed the flier on bulletin boards in areas frequented by students for purposes of socializing. Complaint, ¶ 15. Among the bulletin boards on which he sought to post a flier was one located behind glass double doors in a small student lounge. See *id.*; see also Ex. 2, pp.24,25 (Report of Hearing Officer, March 3, 2003, Findings of Fact, ¶¶ 2,14). The lounge is frequently used by students for casual socializing and relaxation. Complaint, ¶ 15; see also Ex. 2, p. 25, ¶ 14 (used "as a student lounge area"). Couches for students to recline on were located both inside and outside the lounge. Complaint ¶ 17. Students could pass through the lounge from multiple directions. *Id.* Beyond the glass doors was not just the lounge but also a hallway leading to offices used by the University's Multicultural Center and its Office of Student Life and Leadership. The doors of the lounge welcomed students to the Multicultural Center. *Id.* Inside the lounge was a partially-empty bulletin board that was large enough to hold more than a dozen fliers.

1 Nothing on the bulletin board suggested that posting fliers on it was limited in any
2 way. *Id.* On the bulletin board were a handful of fliers, none of which bore any stamp
3 or other sign that it had been approved by any university administrator. *Id.* Hinkle
4 entered the lounge through the glass doors, seeking to post his flier on the bulletin
5 board inside it. Complaint ¶18; *see also* Ex. 2, p. 24, ¶ 2. Inside the lounge were no
6 more than seven individuals, some of whom were eating pizza. Complaint, ¶ 18.

7 When Hinkle approached the bulletin board to post the flier, however, he was
8 confronted by individuals inside the room, who demanded that he not post the flier
9 and told him that the flier offended them. Complaint, ¶ 19. Hinkle briefly attempted
10 to ascertain why they felt the flier was offensive before exiting the lounge without
11 posting the flier. Complaint, ¶ 19; Ex. 2, p 24, ¶¶ 5-6, 8.

12 One of the individuals inside the lounge threatened to call the campus police
13 and in fact did so. Complaint, ¶ 20; Ex. 2, p. 24 , ¶¶ 7-8. The Cal Poly police arrived
14 within minutes, Complaint, ¶ 20; Ex. 2, p. 24, ¶ 8, and reported that they had been
15 "dispatched to the multi-cultural center to investigate a suspicious white male passing
16 out literature of an offensive racial nature," who had "attempted to post [a] flier with
17 [a] racially oriented message." Complaint, ¶ 20.

18 The next day, Mason Weaver's speech took place without incident and was
19 featured in a news story in the student newspaper the *Mustang Daily*. Comp., ¶ 21.
20 On December 6, 2003, defendant Tregenza, Cal Poly's Judicial Affairs Director, wrote
21 to Hinkle that he was being investigated for a potential violation of the regulations
22 governing student conduct. Complaint, ¶ 22.

23 **The Disciplinary Action Against Hinkle**

24 On January 10, 2003, defendants Tregenza and Morton met with Hinkle, his
25 parents, and the club advisor to the Cal Poly College Republicans, Laura Freberg.
26 Complaint, ¶ 23. Tregenza and Morton repeatedly emphasized how offensive the
27 fliers were to the students in the lounge and provided formal statements from students
28 in the lounge to this effect. *Id.* Defendants made clear that the basis for potential

1 disciplinary action was how upset the complaining students felt about the flier. *Id.*
2 They also pressured Plaintiff to accept discipline for attempting to post the flier,
3 warning that his punishment could be much more severe if he were convicted after a
4 formal hearing. *Id.* Morton indicated he had the power to halt the proceedings but
5 would do so only if Hinkle would agree to reach a settlement. Hinkle was also told
6 that any discipline he received would go in his educational records. Complaint, ¶ 23.

7 On January 29, 2003, Hinkle was formally charged with violating California
8 Code of Regulations, Title 5, Section 41301(d), prohibiting "obstruction or disruption,
9 on or off campus property, of the campus educational process, administrative process,
10 or other campus function." Complaint, ¶ 24; Ex. 2, p. 25, ¶ 18. The university has
11 expressly adopted these regulations as its Code of Conduct. Exhibit 3, p.27. Tregenza
12 informed Hinkle in a letter dated January 28 that this charge was supported by the fact
13 that the complaining students were "very upset by you attempting to post a flier," and
14 that she "relied upon" this fact "in deciding to proceed with the formal disciplinary
15 process" against Hinkle. Exhibit 4, p. 34; Comp., ¶ 24.

16 On February 19, 2003, a hearing was held on the charges against Hinkle.
17 Complaint, ¶ 25; Ex. 2, p. 22. On March 3, 2003, the hearing officer recommended
18 that Hinkle be found guilty of "disruption" of a "campus event," and ordered "to
19 express an apology in writing" to the offended students. Ex. 2, p. 26. The hearing
20 officer's finding of "disruption" was based on the premise that the offended students
21 were having a Bible Study that Hinkle disrupted. Ex. 2, p. 24, ¶ 3. But the evidence
22 did not support this finding. *Id.* at ¶¶ 3, 11. No bibles were visible, much less open,
23 and the students were not reading the Bible. Complaint, ¶ 32. No notices posted
24 outside the lounge indicated that any meeting was taking place inside. Ex. 2, p. 24, ¶
25 10; Complaint, ¶ 34. Moreover, the hearing officer found that "there was no evidence
26 that [Hinkle] entered the room with intent to disrupt" a meeting. Ex. 2, p.26. Even
27 "the police log and responding officer statement [did] not indicate that the call was for
28 disruptive conduct." Ex. 2, p. 25, ¶ 16 (emphasis in original.); Complaint, ¶ 36. In

1 sum, the evidence at the disciplinary hearing proved only that there was a "brief
2 discussion" over the merits of the flier, and that Hinkle ultimately left the room
3 without ever posting the flier. Ex. 2, p. 24, ¶ 5; Complaint, ¶ 35.

4 Despite the lack of evidence, the hearing officer found that Hinkle was guilty of
5 "disruption" because he had been "contentious" when confronted by the offended
6 students who demanded that he not post the flier, "press[ing] those present and
7 objecting to engage then and there in discussion." Ex. 2, p. 24, ¶ 6; Complaint, ¶ 37.
8 The hearing officer conceded, however, that even before Plaintiff entered the room
9 "some of the participants were discussing the nature of the announcement-fliers then
10 being circulated on campus [about the speech Hinkle was publicizing], as well as the
11 speaker and program announced by the fliers." Ex. 2, p. 24, ¶ 3; Complaint, ¶ 37.

12 Second, the hearing officer found that "[t]he arrival, investigation and search
13 efforts of the Police in response to the call contributed to a disruption of the Bible
14 Study session." Ex. 2, p. 24, ¶ 9; Complaint, ¶ 38. However, it was not Hinkle, but
15 one of students in the lounge, who chose to summon the police. Ex. 2, p.24, ¶¶ 7-8.

16 This recommendation was forwarded to Vice Provost W. David Conn, who was
17 designated to decide Hinkle's case by Cal Poly president Warren Baker. *Id.* On
18 March 12, 2003, defendant Conn sent Hinkle a letter adopting the hearing officer's
19 recommendations. Ex. 5; Complaint, ¶ 26. Hinkle was found guilty of "disruption"
20 and ordered to write a letter of apology by the 18th or 19th of April 2003. Ex. 5;
21 Complaint, ¶ 26. Conn's letter warned that "there is no parameter or guarantee
22 regarding the confidentiality of the letter [of apology]" and that "this decision is final."
23 Ex. 5; Complaint, ¶ 26. Moreover, an accompanying document from the Office of
24 Judicial Affairs also warned Hinkle that if he did not accept this punishment, he would
25 face much stiffer penalties, up to expulsion. Complaint, ¶ 26.

26 Before, during, and after the hearing, Hinkle argued that he had simply been
27 exercising his First Amendment rights in posting a flier about an upcoming speech.
28 Complaint, ¶ 27. Hinkle accordingly refused defendants' demand that he apologize,

1 and instead sought assistance from the Foundation for Individual Rights in Education
2 ("FIRE"). Complaint, ¶ 27. FIRE repeatedly wrote to defendants Baker, Zingg,
3 Morton, Trezenga and other Cal Poly administrators, asking them to overturn Hinkle's
4 discipline, respect his First Amendment rights, and expunge the "conviction" from
5 Plaintiff's record. Complaint, ¶ 28. The defendants declined to do any of these
6 things, and instead defended the discipline. *Id.*

7 The university's discipline of Hinkle attracted considerable negative publicity
8 from the press. Complaint, ¶ 29. Lamenting the "broad publicity" and "public and
9 press inquiries we have receiving concerning this matter," Provost Paul Zingg wrote to
10 Hinkle on July 14, 2003, stating that Cal Poly would not "pursue [the disciplinary
11 proceedings against Hinkle] any further." Complaint, ¶ 30. However, Zingg also
12 urged Hinkle "to accept" the university's "hearing officer's recommendation that [he]
13 issue a letter of apology." Complaint, ¶ 30. Rather than taking action to expunge
14 references to the allegations of "disruption" from Hinkle's records, Zingg instead
15 defended the hearing officer's finding of "disruption" as correct. Complaint, ¶ 30.
16 Thus, the discipline remains in Hinkle's educational records and the University
17 continues to assert the enforceability of the code of conduct regarding "disruption."

18 **The Evidence of "Offense" as the Basis for Disruption:**

19 The students who accused Hinkle of disruption conceded that they were not
20 concerned with the amount of time he spent in the room, but the content of his flier
21 and their resultant emotional reaction. Complaint, ¶ 44. The students admitted that
22 "if [Hinkle] had just gone through" to post something on the bulletin board, that would
23 not have been disruptive, but that the content of the flier and the students' reaction to
24 it afterwards were what prevented their "Bible study" from proceeding. Ex. 7, p. 46
25 (Excerpts of transcript of hearing, p.80); Complaint, ¶ 44.

26 The student who called the police testified at the disciplinary hearing that she
27 had not said anything about disruption in her call to the police, only about "post[ing]
28 offensive literature." Ex. 7, p. 45; Complaint, ¶ 45. She recounted demanding that

1 Hinkle not post the flier on the grounds that "it's offensive" and "I just told you it's
2 offensive" before threatening to "call public safety." Ex. 7, p. 43; Complaint, ¶ 45.
3 Moreover, she objected to the content of the flier, not the manner in which Hinkle
4 expressed himself, admitting that his "demeanor" was neither "threatening" or
5 abusive." Exhibit 7, p. 45 (Transcript at 74); Complaint, ¶ 45. In short, the charge of
6 "disruption" was a post hoc rationalization for punishing "offensive" speech.

7 **Prior Penalties for "Offensive" Speech:**

8 Cal Poly's policy of targeting fliers based on their content is not an anomaly
9 confined to Steve Hinkle's case, but rather a recurring practice. Plaintiff Cal Poly
10 College Republicans, the student club on whose behalf Hinkle was handing out fliers,
11 has previously been condemned and investigated by Cal Poly's administration based
12 specifically and expressly on the content of fliers disseminated by its members. For
13 example, in February 2002, the club invited Reginald Jones, a conservative African-
14 American, to give a speech at Cal Poly. Complaint, ¶ 47. On March 14, 2002, the
15 student newspaper *Mustang Daily* carried a letter to the editor from defendant Zingg
16 and a former administrator at the college, "condemn[ing] the content of the unfortunate
17 fliers" announcing this event, which college officials claimed "deeply offended and
18 distressed many members of our community," although they also stated that the fliers
19 "may not have been authorized by the sponsoring club." Complaint, ¶46. On April 12,
20 2002, Cal Poly's Director of Student Life and Leadership, Kenneth Barclay, informed
21 the club's advisor, Laura Freberg, that an investigation of the club was proceeding
22 based on allegations that the "Coll. Rep. Club distributed posters/fliers that . . . were
23 hurtful and offensive." Complaint, ¶ 47. To hear the charges against the club, Cal
24 Poly convened a hearing panel that included Defendant Tregenza, who then ruled
25 against the club, directing it to write a letter of apology to be printed in the *Mustang*
26 *Daily*. *Id.* Hinkle is still an officer of the Cal Poly College Republicans and wants to
27 continue to post fliers for the club in the University Union because this building is a
28 central gathering point on campus. He fears that if he posts an announcement for an

1 event or speaker deemed “offensive” to some members of the University community,
2 he will be subject to disciplinary proceedings again, and possibly even expulsion.
3 Complaint, ¶ 48; Hinkle Declaration at ¶ 10.

4 **I. PLAINTIFF HAS STANDING TO BRING THIS ACTION**

5 Plaintiff has standing to bring this facial challenge as one who has suffered a
6 direct injury to his constitutional rights and under the well-established exception to the
7 general rule of Article III, permitting challenges to “laws that are written so broadly
8 that they may inhibit the constitutionally protected speech of third parties. [Citation.]”
9 *S.O.C., Inc. v. County of Clark*, 152 F.3d 1136, 1142 (9th Cir. 1998) (citation
10 omitted). Hinkle was disciplined for engaging in protected expression. Complaint at
11 ¶25. Plaintiff faces the risk of additional discipline if he distributes fliers in the same
12 manner in public fora on campus and those fliers raise similar objections in the college
13 community. He has alleged that he wants to distribute fliers in the immediate future
14 in the University Union building, but fears he will be disciplined again, including
15 facing expulsion, if he does so and other members of the university community find
16 his speech “offensive.” Hinkle Dec. at ¶10 .

17 The First Amendment “needs breathing space.” *Broadrick v. Oklahoma*, 413
18 U.S. 601, 611 (1973). Plaintiff may challenge the university’s discipline code and the
19 de facto restriction on posting “disruptive” fliers in the University Union “not because
20 [his] own rights of free expression are violated, but because of a judicial prediction or
21 assumption that the statute’s very existence may cause others not before the court to
22 refrain from constitutionally protected speech or expression.” *Id.* at 612.

23 **II. THE UNIVERSITY’S CONDUCT CODE, INCORPORATING THE** 24 **PROVISION ON “DISRUPTION” IN THE CALIFORNIA CODE OF** 25 **REGULATIONS, VIOLATES THE FIRST AMENDMENT**

26 **A. The Application of the First Amendment on a College Campus**

27 It is black letter law that “[s]tate colleges and universities are not enclaves
28 immune from the sweep of the First Amendment.” *See Healy v. James*, 408 U.S.
169, 180 (1972). Indeed, “the precedents of [the Supreme Court] leave no room for

1 the view that . . . First Amendment protections should apply with less force on college
2 campuses than in the community at large.” *Id.* The high Court has held that “the
3 campus of a public university, at least for its students, possesses many of the
4 characteristics of a public forum.” *Widmar v. Vincent*, 454 U.S. 263, n.5 (1981).
5 “The college classroom, with its surrounding environs, is peculiarly ‘the marketplace
6 of ideas.’” *Healy*, 408 U.S. at 195. Thus, the university’s ban on “disruptive” speech
7 is subject to the same constitutional rules as apply to a similar regulation in a public
8 forum off campus.

9 The university’s regulation applies to all areas of the campus, including public
10 fora such as the bulletin board on which Hinkle sought to post his announcement.
11 This Circuit has held that campus bulletin boards are designated public fora. *See*
12 *Giebel v. Sylvester*, 244 F.3d 1182, 1188 (9th Cir.), *cert. denied*, 534 U.S. 858
13 (2001) (university’s bulletin boards were designated public forum, where the
14 university had no general policy of regulating the content of materials placed on the
15 bulletin boards). In a designated public forum, “[r]estrictions on expressive
16 activity . . . are subject to the same limitations that govern a traditional public forum,’
17 i.e., strict scrutiny.” *Hopper v. Pasco*, 241 F.3d 1067, 1074 (9th Cir. 2001) (citation
18 omitted). In these fora, the government may exclude speakers “only when the
19 exclusion is necessary to serve a compelling state interest and the exclusion is
20 narrowly drawn to achieve that interest.” *Id.*, citing *Cornelius v. NAACP Legal*
21 *Defense & Education Fund*, 473 U.S. 788, 800 (1985). Defendants cannot meet this
22 high burden.

23 **B. The University’s Regulation is Not Content-Neutral**

24 **1. The Code of Conduct and CCR 41301(d)**

25 The code of conduct for the college expressly incorporates the language of
26 Section 41301, Title V, California Code of Regulations. This provision authorizes
27 discipline of students for, *inter alia*:

1 D. Obstruction or disruption, on or off campus property, of the campus
2 education process, administrative process, or other campus function.

3 **2. The regulation is not content-neutral**

4 In a designated public forum, the government may not differentiate between
5 speakers based on expressive content or viewpoint and even in a non-public forum,
6 viewpoint discrimination is forbidden. *See Hopper*, 241 F.3d at 1079 (speech may
7 not be excluded because it is deemed to be “controversial”); *Burnham v. Ianni*, 119
8 F.3d 668, 675-76 (8th Cir. 1998) (en banc) (viewpoint discrimination forbidden in
9 departmental display case exhibit, even if it was a non-public forum).

10 Defendants’ regulation is content-based because it differentiates between
11 speakers based on a subjective determination of whether the speech is “disruptive”
12 and the reaction of the listener to the speech. It permits school administrators to
13 examine the speech and decide whether it has a “disruptive” effect based, as here, on
14 nothing more than the content of the expression and its effect on listeners.

15 The Supreme Court has repeatedly held that “listeners’ reaction to speech is not
16 a content-neutral basis for regulation.” *Forsyth County v. National Movement*, 505
17 U.S. 123, 134 (1992) (state could not charge demonstrators more for a parade permit
18 because of adverse public reaction to their racist message); *Boos v. Barry*, 485 U.S.
19 312, 321 (1988) (ban on speech opposing policy of foreign governments was content
20 and viewpoint-based and could not justify ban on picketing outside those embassies);
21 *R.A.V. v. St. Paul*, 505 U.S. 377 (1992) (ban on “fighting words” that aroused “anger,
22 alarm, or resentment” in others based on race was viewpoint-discriminatory as well as
23 content-based).

24 **C. CCR Section 41301 is Impermissibly Vague**

25 It is well-established that “[b]ecause First Amendment freedoms need
26 breathing space to survive, government may regulate in the area only with narrow
27 specificity.” *NAACP v. Button*, 371 U.S. 415, 433 (1963). “Where the guarantees of
28

1 the First Amendment are at stake the [Supreme] Court applies its vagueness analysis
2 strictly.” *Bullfrog Films, Inc. v. Wick*, 847 F.2d 501, 512 (9th Cir. 1988).

3 The United States Supreme Court has condemned vague laws that burden the
4 exercise of First Amendment rights for three reasons. First, a vague law does not
5 provide adequate notice of what is permitted and what is prohibited by the regulation
6 so that individuals may conform their expression to defined standards. Second, a
7 vague law allows for arbitrary and discriminatory enforcement by government officials
8 based on content and viewpoint of the speaker. Third, a vague law may have a
9 chilling effect on protected expression because few will be willing to risk the
10 possibility of violating the law and will, instead, engage in self-censorship. *Grayned*
11 *v. City of Rockford*, 408 U.S. 104, 108-09 (1972); *accord, Cohen v. San Bernardino*
12 *Valley College*, 92 F.3d 968, 972 (9th Cir. 1996), *cert. denied*, 520 U.S. 1140 (1997).
13 Section 41301 and the University’s code of student conduct suffer from all three vices
14 of a vague law.

15 Neither §41301 nor the university’s code of conduct provide any definitions or
16 standards to limit the term “disruption.” The regulations fail due process guarantees
17 as they provide no notice of what is permissible and what is prohibited by this
18 regulation. The failure to provide any guidelines for the application of these
19 provisions is constitutionally fatal to the university’s disciplinary policy. *Grayned*,
20 408 U.S. at 109; *Cohen*, 92 F.3d at 972, (university’s sexual harassment policy used
21 to punish professor for “controversial” teaching style and subject matter violated
22 professor’s First Amendment due process rights).

23 This Circuit has followed the Supreme Court’s instruction that the “suppression
24 of speech under [a] defective standard requires closer scrutiny.” *Hopper*, 241 F.3d at
25 1078 (citation omitted). “[S]tandards for inclusion and exclusion’ in a limited public
26 forum ‘must be unambiguous and definite’ if the ‘concept of a designated public
27 forum is to retain any vitality whatever.’” *Hopper*, 241 F.3d at 1077, citing *Christ’s*
28 *Bride Ministries, Inc. v. SEPTA*, 148 F.3d 242, 251 (3d Cir. 1998), *cert. denied*, 525

1 U.S. 1068 (1999). The reason for this rule is clear. “Absent objective standards,
2 government officials may use their discretion to interpret the policy as a pretext for
3 censorship.” *Hopper*, 241 F.3d at 1078. A standardless regulation also creates the
4 “possibility of discriminatory application of the policy based on viewpoint.” *Id.*
5 (citation omitted).

6 The potential for abuse of such unbounded discretion is heightened by
7 the inherently subjective nature of the standard itself. A ban on
8 “[disruptive speech]” may all too easily lend itself to viewpoint
9 discrimination, a practice forbidden even in limited public fora.

10 *Hopper*, 241 F.3d at 1079.

11 Yet, this is precisely what has occurred here. Defendants applied a rule that
12 lacks any definitions as a post-hoc rationalization to penalize expression that some
13 listeners found to be “offensive.” The First Amendment does not permit such a
14 result. **D. Section 41301(d) is Overbroad**

15 A regulation that restricts or punishes a substantial amount of protected speech
16 will be invalidated on the grounds that it is overbroad. *Broadrick*, 413 U.S. at 611-
17 612. “Any enforcement of a statute thus placed at issue is forbidden until and unless
18 a limiting construction or partial invalidation so narrows it as to remove the seeming
19 threat or deterrence to constitutionally protected expression.” *Id.* at 613. By its plain
20 language, the Code of Conduct, as adopted verbatim from CCR Section 41301,
21 punishes “disruption” of any kind, without defining or limiting the term, in the
22 “marketplace of ideas” offered at a public college campus. It is an overbroad and,
23 thus, unconstitutional law.

24 Although this Court must consider any narrowing construction applied by the
25 government before finding a regulation to be unconstitutional, in this instance, the
26 construction given the Code of Conduct by Defendants does not cure the
27 constitutional deficiencies. To the contrary, the constitutional infirmities are only
28 exacerbated by Defendants’ definition of “disruption” to include “caus[ing] people to

1 do something other than they would normally do, have planned to do, [or] anticipate
2 doing, [or] shake [them] up." Ex. 7, p. 50; Complaint, ¶ 43. None of these effects
3 may support a limit on otherwise protected speech.

4 Indeed, the core purpose of the First Amendment is to protect contentious
5 speech that not only angers the listener but "has profoundly unsettling effect" and
6 "induces a condition of unrest." *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949).

7 A function of free speech under our system of government is to invite
8 dispute. It may indeed serve its high purpose when it induces a
9 condition of unrest, creates dissatisfaction with conditions as they are, or
10 even stirs people to anger. Speech is often provocative and challenging.
11 It may strike at prejudices and preconceptions and have profound
12 unsettling effects as it presses for acceptance of an idea. That is why
13 freedom of speech, though not absolute, [citation], is nevertheless
14 protected against censorship or punishment, unless shown likely to
15 produce a clear and present danger of a serious substantive evil that rises
16 far above public inconvenience, annoyance or unrest. [Citation.] There
17 is no room under our Constitution for a more restrictive view. For the
18 alternative would lead to standardization of ideas either by legislatures,
19 courts or dominant political or community groups.

20 *Terminiello*, 337 U.S. at pp. 4-5 (emphasis supplied).

21 Defendants' policy, as construed, runs afoul of the "bedrock principle
22 underlying the First Amendment . . . that the government may not prohibit the
23 expression of an idea simply because society finds the idea itself offensive or
24 disagreeable." *Texas v. Johnson*, 491 U.S. 397, 414 (1989). Even very offensive
25 speech is protected on campus. "The mere dissemination of ideas, no matter how
26 offensive to good taste, on a state university campus may not be shut off in the name
27 of conventions of decency." See *Papish v. Curators of the Univ. of Missouri*, 410
28 U.S. 667, 670 (1973) (per curiam) (student could not be punished for distributing a

1 political cartoon depicting policemen raping the Statue of Liberty and an article using
2 the phrase "Mother-fucker"). Indeed, a university could not function effectively
3 without debate on controversial, highly-charged social issues. *See Blum v. Schlegel*,
4 18 F.3d 1005 (2d Cir. 1994) ("free and open debate on issues of public concern are
5 essential to a law school's mission," and its "efficient provision of services" requires
6 the dissemination of "controversial speech").

7 Speech about racial issues also remains protected on a college campus, even if
8 it deeply offends listeners. *Iota Xi Chapter of Sigma Chi Fraternity v. George*
9 *Mason Univ.*, 993 F.2d 386 (4th Cir. 1993) (students' offensive black-face "ugly
10 woman" skit that was perceived as creating a "hostile and distracting learning
11 environment" was protected speech); *Levin v. Harleston*, 966 F.2d 85 (2d Cir. 1992)
12 (professor had First Amendment right to publish his belief that blacks are inferior to
13 whites); *Dambrot v. Central Michigan University*, 55 F.3d 1177 (6th Cir. 1995) (ban
14 on "symbols, [epithets] or slogans that infer negative connotations about an
15 individual's racial or ethnic affiliation" and fostered hostile environment was
16 overbroad).

17 Yet precisely that speech is prohibited at Cal Poly under the Code of Conduct,
18 as the defendant administrator who prosecuted Hinkle confirmed, by defining
19 disruption to include "caus[ing] people to do something other than they would
20 normally do, have planned to do, [or] anticipated doing, [or] to shake [them] up."
21 Exhibit 7, p. 50. The regulation, as construed, applies the same unconstitutional
22 approach condemned in *Terminiello*, *Forsyth County*, *Boos*, and *R.A.V.* It seeks to
23 suppress speech precisely because some listeners object to the content of the speech.
24 "Such 'censorship by public opinion' only adds to the risk of constitutional
25 impropriety." *Hopper*, 241 F.3d at 1080.

26 The university's discipline of Hinkle illustrates the constitutional failure of the
27 university's regulation and CCR §41301(d), both as codified and as construed by
28 Defendants. Hinkle's flier simply gave the time and place of an author's speech and

1 the title of his book. Defendants claim that the poster was “disruptive” because it
2 caused other students to be offended. Defendants' failure to acknowledge any such
3 limitation, either in their written prohibition against disruption, or at any point in the
4 proceedings against Hinkle, makes their ban on "disruption" patently overbroad and
5 vague.

6 Moreover, even if any disruption occurred, it was caused by the university and
7 the “offended” students, not by Hinkle. The hearing officer blamed Hinkle for the
8 "disruption" resulting from the students' calling the university police and taking time
9 away from their “meeting” to address the questions of the police they themselves
10 invited to investigate and search for Hinkle. Hinkle was doing nothing more than he
11 had a constitutional right to do on a public college campus: posting a leaflet for a
12 speech. *See Giebel*, 244 F.3d 1182. The university cannot rely on the students’ self-
13 inflicted "disruption" to justify disciplining Hinkle or to prevent others from posting
14 fliers announcing speakers to whom some take offense. *See, e.g., Roth v. Veteran's*
15 *Administration*, 856 F.2d 1401, 1408 (9th Cir. 1988) ("Defendants cannot rely on
16 disruption which they instigated or exacerbated to outweigh [plaintiff]s First
17 Amendment rights"); *accord O'Connor v. Steeves*, 994 F.2d 905, 916 (1st Cir. 1993);
18 *Zamboni v. Stamler*, 847 F.2d 73, 79 (3d Cir. 1988). For similar reasons, the students
19 should not be able to rely on their voluntary choice to discuss the flier, rather than the
20 Bible, after Hinkle left, as a purported "disruption" of their Bible study.

21 Even if Hinkle's mere entry into a room could be deemed a disruption (an
22 interpretation the complaining students themselves rejected), the university could not
23 rely on that to punish him since its real motivation was hostility to the message on his
24 flier. *See Waters v. Churchill*, 511 U.S. 663 (1994) (final part of plurality opinion;
25 employer could not rely on employee's unprotected speech attacking her department to
26 punish her for her protected speech about cross-training); *Locurto v. Safir*, 264 F.3d
27 154 (2d Cir. 2001) (public employer could not discipline employee for speech (a
28 racially insensitive float) that allegedly was disruptive, even if it in fact was

1 disruptive, if its subjective intent was to suppress speech based on its message rather
2 than to prevent disruption). And the Transcript of Hinkle's disciplinary hearing leaves
3 little doubt that the content of his flier was a motivating factor behind Judicial Affairs
4 Director Ardith Tregenza's decision to prosecute him, as well as being a motivating
5 factor for the students' complaints against him. Ex. 7, p. 51.

6 Simply because some "disruptive" speech, as a category, may be prohibited by
7 the university does not mean that it may punish such speech without first providing
8 advance notice of what constitutes a disruption. *See Nitzberg v. Parks*, 525 F.2d 378
9 (4th Cir. 1975) (school rule parroting *Tinker* standard for unprotected speech
10 ("substantial disruption or material interference") was unconstitutionally vague). *See*
11 *also, Cohen, supra*, 92 F.3d at 972.

12 **E. Defendants' Regulation is Not Narrowly-Tailored**

13 This Circuit has held that a regulation that is unconstitutionally vague is,
14 necessarily, not narrowly tailored. *Guadiya Vaishnava Society v. City of San*
15 *Francisco*, 952 F.2d 1059, 1062, 1065 (9th Cir. 1990). Because Defendants'
16 regulation, both as written and as construed, lacks any definite standards to ensure
17 consistent and lawful application, and because it reaches a substantial amount of
18 protected – if, to some, “offensive” – speech, it fails strict scrutiny as a permissible
19 regulation of expression in a public forum. Defendants cannot establish that the
20 exclusion of “disruptive” speech, as defined and applied at their campus, “is necessary
21 to serve a compelling state interest and [that] the exclusion is narrowly drawn to
22 achieve that interest.” *Hopper*, 241 F.3d at 1074. For these reasons, the regulation
23 must be invalidated as a violation of the First Amendment.

24 **III. DEFENDANTS' REGULATIONS VIOLATE CALIFORNIA LAW**

25 Three decades ago, the California Supreme Court invalidated a similar
26 ordinance penalizing “disruptive” speech on a public college campus. *Braxton v.*
27 *Superior Court*, 10 Cal.3d 138 (1973). In *Braxton*, the California Supreme Court
28 held that “[p]eaceful activities such as leafletting and canvassing enjoy broad

1 protection under the First Amendment; those forms of `speech conduct' are rarely
2 `incompatible' with classes, research, or the administrative functions of an educational
3 institution"). *Id.* at 147.

4 The California high Court rejected a broad restriction on "disruptive"
5 expression, relying on the United States Supreme Court's decision in *Terminiello*,
6 *supra*, to limit the prohibition based on this classification. The Court noted that,
7 while it is certainly true that "the content of a speech can `disrupt' the equanimity of an
8 audience," that is not enough to justify prohibiting the speech pursuant to a campus
9 rule against disruptive conduct. *Braxton* at 144 (limiting the reach of California
10 Penal Code § 626.4(d), which allows campus officials to bar a person from campus
11 based on "reasonable cause to believe that such person has willfully disrupted the
12 orderly operation of such campus").

13 Thus, under the decision of the California Supreme Court, "neither the `content'
14 of speech nor freedom of association can be restricted merely because such expression
15 or association disrupts the tranquility of a campus or offends the tastes of school
16 administrators or the public." *Braxton, supra*, at 144. "Protest may disturb the
17 placidity of the vacant mind just as a stone may disturb the tranquility of the surface
18 waters, but the courts have never held that such `disruption' falls outside the
19 boundaries of the First Amendment." *Id.* at 146.

20 A disruption prohibition, so "literally applied, would succumb to constitutional
21 attack both because of First Amendment vagueness and overbreadth." *Braxton*, 10
22 Cal.3d at 144 ("A literal construction of the terms of the statute -- `willfully disrupted
23 the orderly operation of [the] campus -- would violate constitutional mandates in that
24 such vague language would include many forms of constitutionally protected
25 expression and risk a chilling of free speech. Obviously the very sound of a voice can
26 `disrupt' the silence, and the content of a speech can `disrupt' the equanimity of an
27 audience"). *Braxton* held that, "[i]n the campus context, disrupt means a physical or
28 forcible interference with normal college activities." *Id.* at 150. Yet, neither the

1 literal terms of Defendants’ regulation, not its purportedly narrowing construction
2 contain any such limits. For this reason, Defendants’ conduct code is unconstitutional
3 under California law, as well.

4 **IV. PLAINTIFF HAS DEMONSTRATED AN ENTITLEMENT TO A**
5 **TEMPORARY RESTRAINING ORDER**

6 **A. Plaintiff Has Shown An Entitlement to a Restraining Order Under**
7 **Ninth Circuit Standards**

8 The Ninth Circuit’s standards for granting a temporary restraining order to
9 enjoin an unlawful regulation are clear.

10 The moving party may meet its burden by demonstrating either (1) a
11 combination of probable success on the merits and the possibility of
12 irreparable injury, or (2) that serious questions are raised and the balance
13 of hardships tips sharply in its favor. [Citation.]

14 *Topanga Press v. City of Los Angeles*, 989 F.2d 1524, 1528 (9th Cir. 1993). These
15 are not separate tests, but the outer reaches “of a single continuum.” [Citations.]
16 *Chalk v. United States Dist. Court*, 840 F.2d 701, 704 (9th Cir. 1988) (citations
17 omitted).

18 As has already been explained, Plaintiff has shown a strong probability of
19 success on the merits. Plaintiff has also shown that Defendants are presently enforcing
20 the regulation and will continue to violate Plaintiff’s First Amendment rights. The
21 irreparable injury to Plaintiff is clear. As long as Defendants continue with this
22 deliberate course of conduct, Plaintiff suffers the loss of First Amendment rights to
23 speak on political issues on a college campus. It is black letter law that “[t]he loss of
24 First Amendment freedoms, for even minimal periods of time unquestionably
25 constitutes irreparable injury.” *Elrod v. Burns*, 427 U.S. 347, 373 (1976). *Accord*,
26 *Brown v. California Dept. of Transportation*, 321 F.3d 1217, 1226 (9th Cir. 2003);
27 *see also* 11 Wright & Miller, *Federal Practice & Procedure*, § 2948, at 440 (1973)
28 (“When an alleged deprivation of a constitutional right is involved, most courts hold

1 that no further showing of irreparable injury is necessary.”). Thus, the First
2 Amendment violations already suffered and the ongoing chill to Plaintiffs’ speech by
3 Defendants’ unconstitutional policy constitute irreparable harm.

4 The balance of hardship also tips sharply in Plaintiff’s favor. While Plaintiff
5 will suffer irreparable harm to his free speech rights if an injunction is not granted, the
6 defendants will not suffer at all from being enjoined to follow the First Amendment.
7 A university's mission is furthered, not undermined, by requiring it to tolerate open
8 debate on controversial subjects. *See Blum*, 18 F.3d 1005 ("free and open debate on
9 issues of public concern are essential to a law school's mission," and its "efficient
10 provision of services" requires the dissemination of "controversial speech").

11 Moreover, the public interest also favors an injunction, since "it is always in the
12 public interest to prevent the violation of a party's constitutional rights." *G&V Lounge*
13 *v. Michigan Liquor Control Commission*, 23 F.3d 1071, 1079 (6th Cir. 1994).
14 *Accord Iowa Right to Life Committee v. Williams*, 187 F.3d 963, 969 (8th Cir.
15 1999).

16 **B. Plaintiff is Entitled to a Restraining Order Under California**
17 **Education Code §66301**

18 California Education Code §66301 prohibits a public community college from
19 “mak[ing] or enforc[ing] any rule subjecting any student to disciplinary sanction solely
20 on the basis of conduct that is speech or other communication that, when engaged in
21 outside a campus of those institutions, is protected from governmental restriction by
22 the First Amendment to the United States Constiutiton or Section 2, Article 1 of the
23 California Constitution.” EC §66301(a). A student subjected to any such regulation
24 may seek an injunction to bar its enforcement. Ed. Code §66301(b). For the reasons
25 stated above, Defendants’ regulation of “disruptive” speech on campus violates both
26 the First Amendment and the California Constitution. Consequently, Plaintiff is
27 entitled to an injunction against the enforcement of CCR §41301(d) and the
28 university’s Code of Conduct, incorporating this provision.

