No. 25-6934

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

YOUNG AMERICA'S FOUNDATION; BROOKE BROLL; and MACY ROEPKE,

Plaintiffs – Appellants

v.

GENE D. BLOCK, Former Chancellor, University of California, Los Angeles, in his personal capacity; DARNELL HUNT, Interim Chancellor, University of California, Los Angeles, in his personal and official capacities; MICHAEL S. LEVINE, Interim Executive Vice Chancellor and Provost, University of California, Los Angeles, in his personal and official capacities; MICHAEL BECK, Administrative Vice Chancellor, University of California, Los Angeles, in his personal and official capacities; MONROE GORDEN, JR., Vice Chancellor, University of California, Los Angeles, in his personal and official capacities; MICK DELUCA, Associate Vice Chancellor, University of California, Los Angeles, in his personal and official capacities; MIKE COHN, Director, Student Organizations, Leadership & Engagement, University of California, Los Angeles, in his personal and official capacities; JASMINE RUSH, Dean of Students, University of California, Los Angeles, in her personal and official capacities; and RICK BRAZIEL, Assistant Vice Chancellor, University of California, Los Angeles, in his personal and official capacities,

Defendants – Appellees

Appeal from the United States District Court for the Central District of California
No. 2:24−cv−8507 ODW (AGRx)
Hon. Otis D. Wright II

APPELLANTS' OPENING BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page**

Statutes & Rules

Other Authorities

INTRODUCTION

This is an absolutely vital case about what public universities must do when violent protestors are prepared to shut down free speech on campus, again and again. May schools simply knuckle under and accede to the protestors? Worse, may schools affirmatively side with the protestors, if administrators largely agree with their political beliefs?

The University of California, Los Angeles ("UCLA") holds itself out as a special place where people of good faith can debate the most contentious and difficult issues of the day in a spirit of open inquiry, without fear of sanction or censorship. 2-ER-111 (UCLA's Mem. ISO Mot. to Dismiss (describing itself as an institution "committed to freedom of speech," as both a "protected right," and because it's "core mission" of pursuing knowledge "depends on it."). The reality is very different.

Contrary to its lofty statements, UCLA allows (and even encourages) a culture of "cancellation," in which ideas deemed upsetting or heretical can be readily shouted down and excluded. The problem of campus "shout downs" is not new. It has festered for years, and has only grown stronger due to schools like UCLA giving effect to these censorship efforts.

This case is about UCLA's duty to protect the rights of speakers who face the mob—authorities may only silence such speakers if strictly necessary to

advance a compelling interest in preventing violence or serious disruption. They may not do so merely because it is easier than the alternative of addressing the hecklers' misconduct and criminality.

But, as Appellants Young America's Foundation, Brooke Broll, and Macy Roepke (collectively "YAF") have properly pled, UCLA regularly takes the easy way out—mounting essentially no opposition at all to disruptive and potentially violent hecklers, and simply silencing speakers who "provoke" the mob's ire. In the facts of this case, UCLA's conduct was even worse than usual: it silenced a conservative, pro-Israel speaker based on *mere anticipation* that a left-wing/anti-Israel shout down mob might materialize and cause problems.

If a public institution like UCLA may ever silence a peaceful speaker in response to potential misconduct by hecklers, it must do so only as a last resort, after making meaningful attempts to address disruption at its source. Failing this amounts to unconstitutional viewpoint discrimination, even in cases where the government's motives are purely security-driven. Accordingly, even taking UCLA at its word that its sole motivation for silencing Appellants' speech was security, it still violated the Constitution.

But as Appellants' have properly pleaded, Appellees, who are UCLA's decision makers, were not motivated solely by security concerns when they shut down YAF's speech. Instead, they acted out of ideological bias against

Appellants' pro-Israel and conservative points of view. Silencing speech due to personal disagreement with its point of view is an independent and egregious violation of the First Amendment.

JURISDICTIONAL STATEMENT

Appellants brought claims pursuant to 42 U.S.C. § 1983 for deprivations of their right to free speech secured by the First and Fourteenth Amendments to the United States Constitution. 3-ER-185 *et seq*. Appellants' claims arise out of UCLA's decision to silence conservative and pro-Israel speakers, rather than to address potential disruption caused by left-wing and anti-Israel "shout down" counter protest mobs. The District Court had jurisdiction over these claims pursuant to 28 U.S.C. § 1331 and § 1343.

Pursuant to Appellees' Fed. R. Civ. P. 12(b)(6) motion, the District Court dismissed Appellants' claims of viewpoint discrimination under a heckler's veto theory, and under an ideological bias theory in an order dated August 11, 2025. 1-ER-005 to 1-ER-027. The District Court denied in part Appellees' motion to dismiss Appellants' facial challenge to UCLA's written policies governing campus speaking events. 1-ER-026. But UCLA subsequently amended its written policies, such that the parties thereafter entered into a stipulation consenting to entry of final judgment dismissing the facial challenge, while preserving

Appellants' right to appeal the prior dismissal of their other claims. 2-ER-029 to 2-ER-037.

By order dated October 1, 2025, the District Court entered final judgment in favor of Appellees, dismissing all of Appellants' claims. 1-ER-002. The deadline to appeal was 30 days from the date of that order, or October 31, 2025. Fed. R. App. P. 4(a)(1)(A). Appellants timely filed their Notice of Appeal on October 30, 2025. Pursuant to 28 U.S.C. § 1291, this Court has jurisdiction over all final decisions from the U.S. District Court for the Central District of California.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1) Did Appellants properly allege a viewpoint discrimination claim under a heckler's veto theory?

2) Did Appellants properly allege an alternative claim for viewpoint discrimination under a theory that the individual decision-makers harbored animus against Appellants' point of view, and that their claimed security justification for silencing Appellants was pretextual?

STATEMENT OF THE CASE

I. Statement of Facts

A. UCLA is dominated by left-wing and anti-Israel orthodoxies, and the university has a long history of allowing activists to shout down their ideological opponents

UCLA has been named a "hotspot" for anti-Israel and antisemitic activism, and one of the worst campuses in the United States for ideological diversity,

especially on the topic of the Israel-Palestinian conflict. 3-ER-199 to 3-ER-201 ¶¶ 37-40 & n.1; *see also id.* ¶ 39 ("[F]ifty percent of Jewish UCLA students expressed discomfort about stating their opinions on the Israel-Palestinian conflict on campus due to the anti-Israel environment."). Anti-Israel orthodoxy pervades essentially all of UCLA's institutional structures: from the official faculty and administrative level—including an avowedly left-wing and anti-Israel "activist in residence" program, 3-ER-209 ¶ 60, and curricular instruction on the theory that Israel is a "settler colonialist" project, 3-ER-204 ¶ 48—to student government—including the UCLA Cultural Affairs Commissioner, who "honored" Hamas terrorists in an official statement immediately after they slaughtered hundreds of civilians on October 7, 2023, 3-ER-206 ¶ 53; *see also* 3-ER-202 ¶ 43 (citing anti-Israel activities by the official Undergraduate Student Association Council)—and all the way down to the level of student and faculty activist groups, 3-ER-201 ¶ 42 (UCLA student group Students for Justice in Palestine promoted libelous claims such as that Israeli soldiers "shoot Palestinian children for sport, entice them like mice, and then shoot them for no reason often just because the soldiers are bored." (cleaned up)).

UCLA's top leadership has, time and again, turned a blind eye to, or even encouraged, virulent left-wing antisemitic and anti-Israel misconduct. 3-ER-203 to 3-ER-208 ¶¶ 46-47, 51-55 (activists chanting "slaughter the Jews," "death to

Jews," and "beat that fucking Jew" without consequence), 3-ER-207 ¶ 55 (targeting Jewish UCLA faculty for abuse, including calling them "Loudmouth Jew[s]"); *id.* ¶ 56 (defendants, including specifically Defendant Block, knew but did nothing about these incidents), 3-ER-208 ¶ 58 (Block knew but let slide intimidation of Jews and Israelis by masked activists who used large knives to stab and remove Israeli hostage posters), 3-ER-214 ¶ 71 (Defendant Block instructed campus police to stand down and not to enforce criminal laws and campus rules against anti-Israel lawbreakers); *id.* ¶ 72 (UCLA security facilitated the exclusion of Jewish students from parts of campus by anti-Israel activists).

Unsurprisingly, given consistent signals by UCLA leadership that anything goes for left-wing groups, activists have been emboldened to shout down those with whom they disagree. 3-ER-216 ¶ 78; *see also* 3-ER-241 to 3-ER-242 ¶¶ 152, 159-60 (citing history of shout down efforts against conservative and pro-Israel speakers). For example, in February 2024, a talk by the former Israeli Minister of Foreign Affairs was scuttled and forced to retreat to an online-only format when UCLA did nothing to address threats by anti-Israel activists. 3-ER-216 to 3-ER-217 ¶¶ 78-79. As detailed below, Appellants came in for the same treatment a few months later.[1]

[1] Other university campuses similarly allow shout down mobs to silence and cancel views with which they disagree. The problem is so widespread that the

B. Appellants sought to bring a different perspective to campus, but UCLA did everything it could to hamstring the presentation and ultimately shut it down

Appellant Young America's Foundation ("YAF") is a non-profit organization that promotes ideas of individual freedom, free enterprise, a strong national defense, and traditional values. 3-ER-193 ¶ 19. Along with Appellants Brooke Broll and Macy Roepke and the YAF at UCLA student organization, YAF sponsors and organizes activities at UCLA, including bringing conservative and pro-Israel speakers to campus. 3-ER-193 to 3-ER-195 ¶¶ 20-22, 3-ER-217 *et seq.* ¶¶ 80 *et seq*.

In April 2024, Appellants arranged to have Middle East expert Robert Spencer give a lecture and Q&A on the Israel/Hamas conflict. 3-ER-217 ¶ 80. Mr. Spencer is the founder of Jihad Watch, an organization dedicated to exposing dangerous and radical strains of Islamic thought. 3-ER-218 ¶ 81. Mr. Spencer's views contrast starkly with the campus activist class and UCLA's leadership. 3-ER-271 ¶ 80. YAF did not expect that Spencer would immediately persuade pro-Hamas ideologues to change their minds; it sought only to expose them to other ways of thinking. 3-ER-219 to 3-ER-220 ¶ 86 ("Plaintiffs hoped to reach a

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Foundation for Individual Rights and Expression has created a database to track such incidents. *See* https://www.thefire.org/research-learn/campus-deplatforming-database (last visited Jan. 5, 2026).

significant number of individuals and welcomed especially students who held anti-Israel views. . . . Even if anti-Israel students were not ultimately persuaded by Mr. Spencer, Plaintiffs would have viewed the event to be a success simply by raising questions that had not previously occurred to those students."). Of course, Plaintiffs are not naïve, and they knew that some anti-Israel activists would be displeased and would predictably (and sadly) try to "deplatform" Spencer by shouting him down. Knowing this, YAF sought to engage UCLA's administrators at the earliest opportunity, with plenty of time to prepare for the hecklers. *See, e.g.*, 3-ER-219 ¶¶ 84-85. UCLA responded with a campaign of obstruction.

1. The pre-event planning process

On April 13, 2024, more than a month in advance, YAF started the process of reserving a room at the Student Union and arranging for security. 3-ER-218 ¶ 82. The talk was targeted for May 15, 2024. Although a suitable lecture room in the Student Union was identified by April 16, 2024, 3-ER-218 ¶ 83, UCLA did not finalize the necessary approvals until May 6, 2024, 3-ER-223 ¶ 98, and then only after being prodded several times and being threatened with a lawsuit due to its unexplained delays, 3-ER-219 to 3-ER-223 ¶¶ 84-85, 88-90, 92-93, 95-97. UCLA's approval incorporated assurances that security would be provided at the Student Union building. Indeed, a major focus of the pre-event planning was

YAF's request for security against potential hecklers. 3-ER-219 to 3-ER-223 ¶¶ 84-85, 90-93, 97-98.

Because UCLA's policies forbid publicizing an event prior to "final approval," the delays were not just frustrating; they also undermined YAF's ability to get the word out and to generate audience interest. 3-ER-220 ¶¶ 87-88. Because of UCLA's delays, YAF was unable to advertise at all until May 6, 2024, a concern YAF had expressly raised. 3-ER-223 to 3-ER-224 ¶¶ 96-101, 3-ER-297 (Compl. Ex. B, May 1, 2024 Ltr. to UCLA Interim Chief Campus Counsel (noting that the "window for adequate pre-event publicity [was] rapidly closing.")). Although YAF did its best to publicize the event in the short time left, the lack of lead time blunted the effectiveness of traditional methods such as passing out flyers. 3-ER-223 to 3-ER-224 ¶¶ 98-101. The night before the event, YAF attempted a last-minute publicity push by projecting an announcement on the outside of a campus building but was again frustrated when Defendant Rush invented a "rule" (that did not exist) against projected announcements and threatened to cancel the event in deference to the wishes of anti-Israel activists. 3-ER-224 to 3-ER-225 ¶¶ 101-105. As everyone knew they would, anti-Israel activists signaled they would demonstrate against the Robert Spencer event, and that they'd attempt to shout it down. 3-ER-224 ¶ 103.

2. On the day of the event, UCLA suddenly reversed itself, ordering the event to shut down unless moved to a satellite location

Despite having had more than a month to prepare and having previously determined that security arrangements were adequate, on the day of the event, UCLA suddenly changed its tune. YAF representatives who had arrived to set up audio-visual equipment were literally locked out and made to wait for hours before any explanation was given. 3-ER-225 to 3-ER-226 ¶¶ 107-109. But even then, the "explanation," was no such thing. Instead, Defendant Braziel simply told YAF that UCLA was "unprepared" to secure the event against a counter-protest. 3-ER-226 ¶ 109. Braziel ordered that the event be shut down unless YAF agreed to move it to a location approximately half a mile away at the outer edge of campus, in a lecture hall at the back of a computer science building. 3-ER-227 ¶ 111. At the time Braziel issued his order, no counter-protest activity had taken place. 3-ER-226 ¶ 110. It was therefore impossible for UCLA to have actually attempted to address potential disruption at its source before imposing limits on Mr. Spencer.

In any event, UCLA's demand that the lecture be moved the outer-campus location effectively canceled the event. In addition to the fact that it would dramatically reduce planned attendance, the limited foot traffic in that part of campus would further suppress spontaneous turnout, and the room was not able to accommodate the audio-visual equipment YAF required for creating a

documentary film to be broadcast at a later time. 3-ER-229 ¶¶ 117-118. Moreover, it was simply not true that moving the event to the computer science building annex would have increased security in any appreciable way. 3-ER-227 to 3-ER-229 ¶¶ 113-115, 119. While UCLA said it would put up signage to help audience members find their way along the half-mile route, 2-ER-180 ¶ 8, it did not explain why anti-Israel activists could not also have followed the signs or simply removed them to suppress turnout. And, importantly, there was a real and significant symbolic penalty with being shunted to an outer-campus location. As alleged in the complaint,

> [H]olding the event in the central Student Union complex was part of the communicative message. Plaintiffs deserved not only to host a pro-Israel event, they deserved to host it in the center of campus life to show that there are other legitimate views worth discussing on the issue of Israel and that their speech did not represent a second class point of view . . . Forcing the event to retreat to an outer-campus computer science lecture hall, on the other hand, would also have sent a message—that UCLA disagreed with the distasteful opinions of pro-Israel speakers like Robert Spencer; that the university sided with the counter-protestors who sought to shut Spencer down; and that the university's commitment to 'free expression' was merely a front.

3-ER-229 to 3-ER-230 ¶¶ 120-21.

As a result of UCLA's machinations, the event was canceled. 3-ER-231 ¶ 124. An anti-Israel activist issued this tweet celebrating UCLA's censorship:

3-ER-231 ¶ 125.

Another activist posted this:

2-ER-073.

Message apparently received.

II. Procedural history

Appellants filed this action on October 3, 2024, asserting the following: (1) a claim of viewpoint discrimination based on a heckler's veto theory, 3-ER-190 to 3-ER-191 ¶¶ 12-13, 3-ER-245 to 3-ER-246 ¶¶ 171-175; (2) a claim of viewpoint discrimination based on an ideological bias theory, 3-ER-190 ¶ 11, 3-ER-243 to 3-ER-45 ¶¶ 163-170; and (3) a facial challenge to UCLA's then-current written policies governing campus speaking events, 3-ER-191 ¶ 14, 3-ER-246 to 3-ER-248 ¶¶ 176-184. Appellants sought damages, injunctive relief and declaratory relief. 3-ER-244 to 3-ER-250 ¶¶ 169-170, 175, A-O.

The District Court granted Appellees' motion to dismiss the heckler's veto claim. The Court acknowledged that even in "a limited public for[u]m . . . viewpoint discrimination [is forbidden]," 1-ER-015 (quotation marks, citation omitted), but then simply categorized heckler's vetoes as merely "content- [but not viewpoint-]based speech restriction[s]," without further analysis. *Id.* The Court noted that when governments acting in their proprietary capacity impose "content-based restrictions" on speech (but not viewpoint-based ones), they are generally subject only to a highly forgiving standard of review. 1-ER-017. Such content-based restrictions are constitutional as long as they are "reasonable in light of the purpose served by the forum." 1-ER-017 (citing *Amalgamated Trans. Union Loc. 1015 v. Spokane Trans. Auth.*, 929 F.3d 643, 650 (9th Cir. 2019)). The Court

found this test satisfied on the ground that "the First Amendment does not impose a duty on public universities to take reasonable action to protect speakers from hecklers in limited public fora." 1-ER-018. The Court also determined that, to the extent the claim sought damages, it was barred by the doctrine of qualified immunity. *Id.*

The Court also dismissed Appellant's alternative viewpoint discrimination claim alleging ideological bias against pro-Israel speech. 1-ER-011 to 1-ER-015. The Court found UCLA's assertion that it was motivated solely by security concerns to be plausible and that, on the Court's reading of the complaint, there were insufficient facts alleged to support an inference that UCLA's decision makers harbor anti-Israel ideological bias, and that their security rationale was pretextual. 1-ER-014 to 1-ER-015.

SUMMARY OF THE ARGUMENT

Appellants have properly and plausibly alleged that UCLA engages in viewpoint discrimination against conservative and pro-Israel speech on campus. Appellants have pleaded two alternative theories of viewpoint discrimination.

First, even taking UCLA at its word that it silences provocative speakers like Robert Spencer out of a desire to keep the peace (and without any political motivation), its actions amount to ratifying the viewpoint-discriminatory desires of hecklers. The District Court granted UCLA's motion to dismiss Appellants'

heckler's veto claim, however, based on a conceptual error. Without any analysis, the Court determined that by giving the potential cancellation mob what it wanted, UCLA engaged merely in content-based (but not viewpoint-based) discrimination against speech. And, according to the District Court, this mattered because the room in which Appellants' pro-Israel speech was to occur was a "limited public forum," where UCLA was free to impose its restrictions based on a highly forgiving "reasonableness" standard.

This was a fundamental category error. Shout down mobs do not seek to drive speech out of the marketplace of ideas because of its *general topic* or underlying *subject matter* (which is what the term "content" means when not referring to viewpoint); they seek to drive out speech because of the *particular viewpoint being expressed within a given content category*. When government gives effect to the mob's wishes, it therefore engages in viewpoint discrimination. And, importantly, viewpoint discrimination is subject to exactly the same standard—strict scrutiny—no matter what kind of forum is at issue. UCLA has not even attempted to argue that it satisfied strict scrutiny. Appellants' heckler's veto claim should therefore be reinstated.

Second, at the pleading stage, UCLA should *not* be taken at its word. To the contrary, the alleged facts strongly suggest that UCLA's decision makers are ideologically biased against Appellants' speech and shut it down on that basis. If

ever there were a group of university administrators whose conduct signaled antipathy to Israel, Defendants are surely in it. One need only glance at the record: UCLA has turned a blind eye to attacks against "fucking Jews," has tolerated "Jew exclusion zones," has funded an "activist in residence" who explicitly calls for the elimination of Israel, etc. Indeed, this was not even the first time that Defendants acquiesced to a campus shout down mob silencing pro-Israel views. The District Court erred in dismissing this alternative theory of liability based on an uncharitable and legally flawed reading of the complaint.

This Court should reverse the District Court and reinstate both claims.

ARGUMENT

I. Standard of Review

This Court reviews a grant of a motion to dismiss for failure to state a claim de novo. *See Mudpie, Inc. v. Travelers Cas. Ins. Co. of Am.*, 15 F.4th 885, 889 (9th Cir. 2021). On a motion to dismiss under Rule 12(b)(6), courts accept all factual allegations in the plaintiff's complaint as true, and draw all reasonable inferences in favor of the plaintiff. *See Ass'n for Los Angeles Deputy Sheriffs v. Cnty. of Los Angeles*, 648 F.3d 986, 991 (9th Cir. 2011).

Dismissal is proper only if it appears beyond doubt that the plaintiff can prove no set of facts that would entitle her to relief. *Id*. To survive a motion to dismiss for failure to state a claim, the complaint need merely "allege sufficient

factual matter to state a claim to relief that is plausible on its face." *OSU Student All. v. Ray*, 699 F.3d 1053, 1061 (9th Cir. 2012) (cleaned up); *see also, e.g.*, *Florence v. Seggos*, No. 21-834, 2022 WL 2046078, at *2 (2nd Cir. June 2, 2022) (District Court committed error when it drew an inference in favor of a defendant); *Kennedy v. Central City Concern*, No. 3:15–cv–01378–SB, 2016 WL 1047890, *3 (D. Or. Feb. 18, 2016) (courts may not make inferences in favor of a defendant, even from judicially noticed facts or documents); *Cortez Prods., Inc. v. Monterey Peninsula Artists, Inc.*, No. 03 C 4630, 2004 WL 609375 (N.D. Ill. Mar. 22, 2004) (courts may not make inferences in favor of a defendant, even reasonable ones, at the motion to dismiss stage).

II. The District Court erred by dismissing Appellees' heckler's veto theory

Appellants' first theory is that by ratifying the viewpoint discriminatory desires of a mob of hecklers without first attempting to address potential disruption at its source, UCLA discriminated against Appellants' pro-Israel views. This type of viewpoint discrimination claim does not require that government decision-makers personally disagree with the suppressed point of view. What matters is that they give effect to the wishes of the mob, which is decidedly viewpoint-motivated.

A. The character of Appellants' First Amendment claim – government ratification of a "heckler's veto" is viewpoint-based

1. A government official's ideological bias against speech is not necessary to show viewpoint discrimination

Viewpoint discrimination occurs when speech is driven out of the marketplace of ideas because of a desire to silence particular views. *Santa Monica Nativity Scenes Cmt. v. City of Santa Monica*, 784 F.3d 1286, 1294 (9th Cir. 2015). That is, viewpoint discrimination occurs when speech is burdened because of "hostility . . . towards the underlying message expressed." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 386 (1992). The animus often stems from a government official who seeks to prevent others from being influenced by the disfavored idea. *See, e.g.*, *Matal v. Tam*, 582 U.S. 218, 250 (2017) (Kennedy, concurring) ("viewpoint discrimination occurs when the government intends to suppress a speaker's beliefs"); *see also, e.g.*, *Delano Farms Co. v. California Table Grape Comm'n*, 586 F.3d 1219, 1225 (9th Cir. 2009) ("[G]overnment . . . may not privilege one . . . viewpoint over another and it may not prevent individuals from expressing their opinions, just because it disagrees with them.").

But "viewpoint discrimination need not take that form in every instance." *Tam*, 582 U.S. at 250. In many cases, the attitudes of government officials are irrelevant. Instead, the viewpoint-discriminatory motivation is supplied by third parties. So, for example, it would "never be tolerated [for a] city official [to

consult polling data to] determin[e] who should be allowed to conduct a parade or protest demonstration." *Amidon v. Student Ass'n of State Univ. of New York*, 399 F. Supp. 2d 136, 150 (N.D.N.Y. 2005), *aff'd* 508 F.3d 94 (2d Cir. 2007). This is because the polling data would be "[]viewpoint based information," on the popularity or unpopularity of particular ideas. *Id.*, 399 F. Supp. 2d at 150. Similarly, to deny a trademark registration on the ground that third parties may be offended amounts to viewpoint discrimination, no matter the individual government agent's views of the matter. *Tam*, 582 U.S. at 250 ("Respondent's application was denied not because the Government thought his object was to demean or offend but because the Government thought his trademark would have that effect on at least some Asian–Americans [but t]he Government may not insulate a law from charges of viewpoint discrimination by tying censorship to the reaction of the speaker's audience.").

Similarly, the Supreme Court has held that a public university's use of student body referenda to determine whether to "defund[]" particular student advocacy groups would threaten "viewpoint neutrality . . . [and] the constitutional protection the program requires." *Bd. of Regents of Univ. of Wisc. Sys. v. Southworth*, 529 U.S. 217, 235 (2000). As the Second Circuit echoed, "[v]iewpoint discrimination arises because the vote reflects an aggregation of the student body's agreement with or valuation of the message a[student group]

wishes to convey." *Amidon v. Student Ass'n of State Univ. of N.Y. at Albany*, 508 F.3d 94, 101-02 (2d Cir. 2007). "The whole theory of viewpoint neutrality is that minority views are treated with the same respect as are majority views." *Southworth*, 529 U.S. at 235.

A limitation on speech that is driven by a local majority's disapproval of the particular ideas being expressed is therefore viewpoint-based, even if a government administrator carrying out the program may personally be neutral, or may have some non-viewpoint-related goal in mind (such as avoiding the unpopularity and potential blowback that would come with rejecting the majority's desires). The same goes if a local majority—or even just a vocal minority—makes its wishes known through means that are less peaceful than responding to a poll, such as causing a disturbance or threatening violence in response to speech—*i.e.*, a heckler's veto.

Consistent with this, the Supreme Court has repeatedly characterized restrictions based on actual or anticipated hostility by third parties to a speaker's message as viewpoint based. *See, e.g.*, *Tam*, 582 U.S. at 250; *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 395-96 (1993) (rejecting possible hecklers' threats of "public unrest and even violence," as "difficult to defend as a reason to deny the presentation of a religious point of view"); *Forsyth Co., Ga. v. Nationalist Movement*, 505 U.S. 123, 134 (1992). And it is no answer

to say that government officials were purportedly motivated by security concerns rather than viewpoint-related animus. Where the "proffered justification for [limiting the plaintiff's speech] is directly related to the reactions of [the hostile audience,]" the animus of the crowd is what matters, not a police officer's neutral desire to maintain public safety. *Ovadal v. City of Madison, Wisc.*, 416 F.3d 531, 537 (7th Cir. 2005). Even if "[t]he motive is innocent, . . . the discriminatory effect [is] too great to be permitted." *Chicago Acorn v. Metro. Pier & Exposition Auth.*, 150 F.3d 695, 701 (7th Cir 1998). Put another way, the "chain of causation" runs from the speaker's viewpoint to his exclusion from the marketplace of ideas. *R.A.V.*, 505 U.S. at 394 n.7 (rejecting argument that burdening speech based on an anticipated "violent response" is justified by government's interest in addressing "secondary effects" such as public safety).

The District Court here appears to have misunderstood this fundamental principle. According to the District Court, in order for a limitation on speech to count as viewpoint-based, it must have been motivated by the personal disagreement of the responsible government official. 1-ER-012 ("To succeed on a viewpoint discrimination claim, plaintiffs must allege that the government intended to suppress expressions merely because public officials oppose the speaker's view."); 1-ER-016 (opining that Plaintiff's purported "fail[ure] to adequately allege that Defendants moved the Spencer event . . . because *they opposed the*

speaker's pro-Israel views" necessarily doomed their viewpoint discrimination claim (emphasis added)). Respectfully, that is just a misunderstanding of the First Amendment. As noted above, a government official's personal disagreement with a point of view may be sufficient, but it is not necessary, to show viewpoint discrimination. This Court should reverse the District Court's error.

2. Giving effect to a one-sided heckler's veto presents grave First Amendment concerns

Having misunderstood the nature of viewpoint discrimination to require ideological bias on the part of the government, the District Court then mischaracterized Appellants' heckler's veto claim as raising a "content [but not viewpoint] discrimination" claim. 1-ER-015. This too was error.

First, the District Court did not identify any "content" of Robert Spencer's speech (other than its viewpoint) that could plausibly have given rise to UCLA's restriction. It is well-settled in First Amendment law that the "content" of speech has two distinct meanings: First, it can refer to the "subject matter" or general topic being discussed. *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 829 (1995). Second, it also includes "particular views taken by speakers on a subject." *Id.* In order to find that the "content" of the speech (but not the viewpoint) was the basis for UCLA's action, the District Court was therefore required to find that the "subject matter" of the speech somehow triggered UCLA's decision to silence Robert Spencer.

But this makes little sense. Under the ordinary meaning of the words, the "subject matter" of Robert Spencer's speech was the conflict between Israel and Hamas. But UCLA does not argue, nor could it, that he was silenced merely because he planned to say something (anything) about this topic. Had Mr. Spencer planned to echo campus orthodoxy that Israel was the villain in the conflict or that it was engaging in a "genocide" rather than pursuing legitimate military objectives after being brutally attacked on October 7, 2023, his speech would have gone off without a hitch. It is only because Mr. Spencer sought to express a *specific point of view within the general topic* that he was excluded from the marketplace of ideas.

More generally, to say that when government gives effect to the wishes of a shout down mob, it acts on the basis of content-as-subject-matter and not content-as-viewpoint is tantamount to saying that there is a subject matter category consisting of views with which shout down mobs disagree. But there is no such subject matter category. This is just a way of describing the phenomenon that within most subjects, there are points of view that are *controversial* or that might inspire anger and counter-protests. But, of course, to say that an idea is controversial is simply to say that "some take issue with its viewpoint." *Child Evangelism Fellowship of N.J. Inc. v. Stafford Twp. Sch. Dist.*, 386 F.3d 514, 527 (3d Cir. 2004). And limitations based on the controversial nature of speech are just

another kind of viewpoint-based (not merely content-based) discrimination. *See e.g.*, *United Food & Com'cl Workers Union, Local 1099 v. SW. Ohio Reg'l Trans. Auth.*, 163 F.3d 341, 361 (6th Cir. 1998) ("[A]ny prohibition against 'controversial' advertisements unquestionably allows for viewpoint discrimination. A controversy arises where there exists a 'disputation concerning a matter of opinion.'" (citation omitted)). There is no getting around it: government action that is triggered by the fact that a viewpoint is controversial or inspires anger or blowback from the audience is viewpoint-based and cannot be converted into merely content- but not viewpoint-based suppression of ideas, merely by saying it is so.

The District Court did not provide any analysis to support its contrary conclusion that when UCLA acceded to a potential anti-Israel shout down mob, it engaged in mere content-based restrictions on free speech. Instead, it simply adopted a general remark, repeated in various cases, that "[a] heckler's veto is an impermissible content-based speech restriction." 1-ER-015 (quoting *United States v. Rundo*, 990 F.3d 709, 719 (9th Cir. 2021)); *id*. (citing *Meinecke v. City of Seattle*, 99 F.4th 514, 522 (9th Cir. 2024) & *Seattle Mideast Awareness Campaign v. King Co.* 781 F.3d 489, 502 (9th Cir. 2015)). This is not what those cases mean.

While it is true that courts sometimes refer to government ratification of a heckler's veto as "content-based," *see, e.g.*, *Meinecke*, 99 F.4th at 522; *Rosenbaum*

v. City & Cty. of San Francisco, 484 F.3d 1142, 1158 (9th Cir. 2007); *Ovadal*, 416 F.3d at 537, it does not follow that heckler's vetoes are therefore not viewpoint-based. The categories are not mutually exclusive. To the contrary, discrimination on the basis of viewpoint is "but a subset or particular instance of the more general phenomenon of content discrimination." *Rosenberger*, 515 U.S. at 830-31. Therefore, describing government conduct as content discrimination does not answer the question of whether it is also viewpoint discrimination.[2]

And, when courts have taken the time to drill down on the issue, they rightly identify the heckler's veto doctrine as viewpoint based. For example, just last month this Court reaffirmed that, in the university context, allowing the "adverse reactions of students" to drown out unpopular speech amounts to an "impermissible heckler's veto" targeting "dissenting *viewpoints*." *Reges v. Cauce*, No. 24-3518, 2025 WL 3685613, at *14, -- F.4th --- (9th Cir. Dec. 19, 2025) (emphasis added).

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[2] The somewhat loose language used by those courts that describe a heckler's veto as "content-based" is explained by the fact that, in the context of traditional and designated public fora, all content-based restrictions on speech are held to the strictest standards. *See, e.g.*, *Youth 71Five Ministries v. Williams*, 160 F.4th 964, 986 (9th Cir. 2025). Accordingly, courts deciding heckler's veto cases in traditional and designated public fora have "no reason to differentiate between the terms, as the same standard applie[s] to both." *New Century Found. v. Robertson*, 400 F. Supp. 3d 684, 701 (M.D. Tenn. 2019).

Other decisions are in uniform agreement. *See, e.g.*, *Defending Ed. v. Olentangy Local Sch. Dist. Bd. of Ed.*, 158 F.4th 732, 748-49 (6th Cir. 2025) ("If schools enforced this type of 'heckler's veto' (barring speech because of an audience's reaction), they would commit the odious viewpoint discrimination that cuts to the First Amendment's core." (cleaned up)); *U. of MD Students for Justice in Palestine v. Bd. of Regents of the U. System of MD*, 2024 WL 4361863 at *10 (D. Md. Oct. 1, 2024) (university speech restriction "motivated by a concern . . . that violence might ensue" was "neither viewpoint-neutral, nor content-neutral"); *Meinecke*, 99 F.4th at 524 (holding that when the government gives in to a heckler's veto it is "simply *choosing sides* in the debate." (emphasis added)); *New Century Found. v. Robertson*, 400 F. Supp. 3d 684, 701 (M.D. Tenn. 2019) (imposing heightened security fees on a speaker due to anticipated hostile audience reactions is based "not merely on the content of the speech (is it political speech?) but on the viewpoint (what position does the group espouse and will it generate hostility?")); *Bible Believers v. Wayne Co., Mich.*, 805 F.3d 228, 248 (6th Cir. 2015) ("Viewpoint discrimination is censorship in its purest form . . . the heckler's veto is precisely that type of odious viewpoint discrimination."); *Santa Monica Nativity Scenes Cmt.*, 784 F.3d at 1294 (heckler's veto is when government burdens "a *particular message* because of the audience's reaction to it" (cleaned up, emphasis added)); *Rock for Life-UMBC v. Hrabowski*, 411 Fed. App'x 541,

552 (4th Cir. 2010) ("[S]afety concerns arising from a prediction of how listeners might react to speech cannot be effectively de-coupled from speech content."); *Rosenbaum*, 484 F.3d at 1159 (characterizing plaintiffs' "'heckler's veto' claim [as a] *viewpoint discrimination* [claim]" (emphasis added)); *Lewis v. Wilson*, 253 F.3d 1077, 1080-81 (8th Cir. 2001) (rejecting application for "ARYAN-1" license plate out of concern for potential road rage reaction amounted to unconstitutional regulation based on the "message of racial superiority that the plate would carry in the minds of some who read it."); *Cent. Fl. Nuclear Freeze Campaign v. Walsh*, 774 F.2d 1515, 1525 (11th Cir. 1985) (burdening speech based on potential for hostile counter activity violates that "principle of equality of expression . . . [which means that "all *points of view* [must be afforded] an equal opportunity to be heard." (emphasis added)); *Forsyth Co.*, 505 U.S. at 134 (holding that "[l]isteners' reaction to speech is not a content-neutral basis for regulation," and explaining that the "hostility . . . based on content . . . [involves] express[ing] *views* unpopular with [hecklers]." (emphasis added)); *see also New Century Found.*, 400 F. Supp. 3d at 701 (citing *Bible Believers* for the proposition that "a heckler's veto is never viewpoint neutral.").

The principle that when government ratifies a heckler's veto it engages in viewpoint-based discrimination holds true in all cases, regardless of the type of forum at issue. *See, e.g.*, *Rock for Life-UMBC*, 411 Fed. App'x at 552-53

(applying strict scrutiny to heckler's veto claim arising in limited public forum on college campus); *Robb v. Hungerbeeler*, 370 F.3d 735, 742-44 (8th Cir. 2004) (in a "nonpublic forum" case, holding that the "State . . . may not censor . . . speech because of the potential responses of its recipients. The first amendment knows no heckler's veto," and rejecting government attempt to re-characterize its "viewpoint-based discrimination" as government speech) (quotation marks, citation omitted); *Lewis*, 253 F.3d at 1080-81 (putative nonpublic forum); *Chicago Acorn*, 150 F.3d at 701 (nonpublic forum); *cf. Reges,* 2025 WL 3685613, at *14, -- F.4th ---- (government employment context). Indeed, as a matter of logic, it would make no sense to say that the character of a speech restriction (subject-matter-based, viewpoint-based, viewpoint-neutral, time/place/manner, etc…) might change depending on the type of forum. Forum analysis simply recognizes that when government acts in its proprietary capacity, it has a relatively free hand to impose certain speech restrictions, *see, e.g.*, *Lamb's Chapel*, 508 U.S. at 390; *Perry Ed. Ass'n v. Perry Local Eds Ass'n*, 460 U.S. 37, 46 (1982) ("The State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated." (citations, quotation marks omitted))—the nature of those speech restrictions does not change depending on the forum, the only thing that changes is the level of justification required to support certain types of governmental actions, *Lambs Chapel*, 508 U.S. at 392 (for

public property characterized as a "nonpublic forum" limitations on "subject matter and speaker identity" are subject to forgiving "reasonable[ness]" review).

In the face of this overwhelming, firmly-established authority, the District Court erroneously focused on *dicta* in *Seattle Mideast Awareness Campaign v. King Co.*, 781 F.3d 489 (9th Cir. 2015) ("*SeaMAC*"), suggesting that, under the unique circumstances of that case, when the government shuts down speech out of a concern that it will trigger a violent audience reaction, it has merely engaged in content-as-subject-matter discrimination, which is subject to a deferential standard of review in the limited public forum context. 1-ER-015.

SeaMAC, however, arose under very specific and unusual circumstances, and is easily distinguishable. There, a public transit agency was presented with applications to run two sets of highly inflammatory advertisements on the sides of public buses: one set of advertisements was proffered by anti-Israel activists and asserted that Israel engaged in war crimes and the other was proffered by anti-Palestinian activists asserting that Palestinians engaged in war crimes. 781 F.3d at 495. Both sets of proposed ads resulted in threats of disorder and violence targeting the bus system. *Id*. at 493-96; *see also id.* at 495 (noting that "public transit systems were 'targets of choice' for terrorists"). In response, the government "simultaneously rejected all pending ads on the Israeli-Palestinian conflict." *Id*. at 502; *see also id.* ("[T]he County Executive . . . rejected all the ads

at the same time because [SeaMAC's ads and] the counter-ads were at least as likely to elicit a [disruptive or violent] response" . . . "given the threat . . . posed to the transit system, the County could not safely run ads on either side of the Israeli-Palestinian conflict.") (cleaned up).

Unlike the present case (and the vast majority of heckler's veto cases), *SeaMAC* did not involve the government effectuating a local majority's desires to drive a specific viewpoint out of the marketplace of ideas. Instead, *SeaMAC* involved two competing and diametrically opposed sets of hecklers both threatening violence in response to the expression of opposing viewpoints on the same topic. In other words, the government excluded "all speech on [the] particular subject—whatever the viewpoint expressed." *Id*. But, as the court explicitly acknowledged, that is just standard-issue content-as-*subject-matter* discrimination. *Id*. Given that the transit agency in *SeaMAC* excluded speech from a limited public forum at the level of subject matter topic, as opposed to views within a topic, its conduct was content-based and subject only to "reasonableness" review. *Id*. at 499.

Against this background, the court's statement that "[t]he 'heckler's veto' . . . is a form of content discrimination," *id*. at 502, means no more than what has already been said. Yes, under the unique circumstances of *SeaMAC*, responding at the same time to two sets of diametrically opposed hecklers by excluding an entire

topic of discussion fits the pattern of content-as-subject-matter discrimination. But *SeaMAC* is inapposite when only some views are driven from a forum based on audience hostility.[3]

Further, any suggestion by the *SeaMAC* court that in cases like the present one when only some sides in a debate threaten violence in response to speech and the government responds by excluding only one offending viewpoint, the proper characterization of the government's conduct is content-as-subject-matter-based, and not content-as-viewpoint-based was *dicta,* and does not control this matter. *See, e.g.*, *S. Union Co. v. United States*, 567 U.S. 343, 352 n.5 (2012) ("In any event, our statement in [a previous case] was unnecessary to the judgment and is not binding."); *In re Miller*, 152 F.3d 927 (9th Cir. 1998) (defining "*dicta* as [judicial statements] not necessary for the decision.").[4]

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[3] The court further confused matters by pronouncing (also in *dicta*) that "heckler's veto concerns [can be] relevan[t] in a limited public forum [if they represent] mere pretext for suppressing expression because public officials oppose the speaker's point of view." *SeaMAC*, 781 F.3d at 502. But if a public official suppresses speech out of personal disagreement with a point of view, that is just straightforward ideological bias discrimination, not a "heckler's veto." The whole point of the heckler's veto doctrine is to capture cases where government agents harbor no animus to a point of view, but allow it to be excluded based on the hostility of a violent mob without sufficiently protecting a peaceful speaker.

[4] For the reasons stated in the main text, the *dicta* in *SeaMAC* does not bind this Court to hold that a heckler's veto is a content- but not viewpoint-based limitation on speech in anything but the (very rare) circumstance presented in *SeaMAC* where all sides of a contentious issue are heckled and all sides are

B. A "forum analysis" is irrelevant where, as here, viewpoint discrimination has been alleged--all instances of viewpoint discrimination are subject to strict scrutiny

As shown above, Appellants' heckler's veto claim is properly characterized as a viewpoint-discrimination claim. UCLA does not contest that viewpoint based limitations on speech are subject to strict scrutiny, even in a limited public forum. Nor could it. The cases are unanimous. *See, e.g.*, *Amidon*, 508 F.3d at 105-05; *N.E. Penn. Freethought Society v. Co. of Lackawanna Transit Sys.*, 938 F.3d 424, 432 (3d Cir. 2019) ("[N]o matter what kind of property is at issue, viewpoint discrimination is out of bounds."); *Child Evangelism Fellowship of S.C. v. Anderson Sch. Dist. Five*, 470 F.3d 1062, 1067 (4th Cir. 2006) ("The ban on viewpoint discrimination is a constant. Beyond this, speakers' rights depend upon how widely the government has opened its property and its purposes in doing so.").

Accordingly, whether the meeting room reserved for the Robert Spencer lecture was a "designated public forum" or a "limited public forum" is simply irrelevant. As the Third Circuit put it, "conduct[ing] a forum analysis before determining whether [government action] discriminated on the basis of viewpoint

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simultaneously barred from speaking. In the alternative, if the Court deems itself bound to follow the *SeaMAC dicta* here, Appellants respectfully request that the Court re-convene *en banc* to overrule *SeaMAC* to the extent it mis-characterized the nature of a one-sided heckler's veto and to hold, consistent with Supreme Court precedent and the overwhelming consensus of other opinions, that such hecklers' vetoes are viewpoint-based.

. . . put[s] the cart before the horse[because] viewpoint discrimination is impermissible in any forum." *N.E. Penn Freethought Soc'y*, 938 F.3d at 436; *see also, e.g.*, *id.* (where viewpoint discrimination has been alleged, "[c]ourts need not tackle the forum-selection question") (quotation marks, citation omitted); *St. Michael's Media, Inc. v. Mayor & City Council of Baltimore*, No. ELH-21-2337, 2023 WL 2743361, at *16 (D. Md. Mar. 31, 2023) (where a plaintiff "sufficiently alleges viewpoint-based discrimination, . . . a forum analysis [is] unnecessary"); *Lewis*, 253 F.3d at 1079.

C. UCLA's response to left-wing and anti-Israel hecklers fails strict scrutiny

Under the strict scrutiny standard, UCLA's treatment of Robert Spencer would be constitutional only if it (1) advanced a compelling governmental interest; and (2) did so using narrowly tailored means. *Meinecke*, 99 F.4th at 524. At the motion to dismiss stage, UCLA has not even attempted to argue that it met this standard. The Court should, accordingly, reverse the dismissal of Appellants' heckler's veto claim on this basis alone. *Christ's Bride Ministries, Inc. v. Se. Pennsylvania Transp. Auth.*, 148 F.3d 242, 255 (3d Cir. 1998) ("SEPTA has not argued that its actions survive strict scrutiny. Accordingly, we conclude that CBM's First Amendment rights were violated when SEPTA removed CBM's ads.").

And even if this Court were to reach the question, it is clear at this stage that UCLA's conduct failed strict scrutiny. While public safety can surely be a compelling governmental interest in some contexts, *see, e.g. Meinecke*, 99 F.4th at 524-25; *Saltz v. City of Frederick, MD*, 538 F. Supp. 3d 510, 546 (D. Md. 2021), the government is not permitted to speculate that peaceful speech will inspire genuine violence in response. At the time that UCLA shut down the Robert Spencer lecture based on un-articulated "security concerns," there were no counter-protestors on the scene. 3-ER-226 ¶ 110. Indeed, UCLA put up such a weak defense of Robert Spencer's right to speak, that the hecklers did not even have to show up before the university shut him down.

A public officer's decision to cater to the mob is that much worse when based on speculations of future violence. *San Diego Minutemen v. Cal. Bus. Transp. & Hous. Agency's Dept. of Transp.*, 570 F. Supp. 2d 1229, 1251-52 (S.D. Cal. 2008) (speculation that highway-side signs might inspire drivers' adverse reaction unreasonable); *Glasson v. City of Louisville*, 518 F.2d 899, 902-03 (6th Cir. 1975), *overruled on other grounds by Bible Believers*, 805 F.3d at 251-52; *see also Tinker v. Des Moines Indep. Comm. Sch. Dist.*, 393 U.S. 503, 508 (1969) (an "undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression."). In a case closely on point, the court in *Rock for Life-UMBC v. Hrabowski*, therefore deemed it unreasonable for a university to

order controversial campus speakers to relocate "before [they] even set up" because the police had "no opportunity to make an assessment of how [potential hecklers] actually reacted to the plaintiffs' speech [which meant] defendants could not have been certain that any real threat of violence existed" or that they were unable to provide security in the original location. 411 Fed. App'x at 553.

Nor was UCLA's response narrowly tailored to achieve the interest of violence prevention. Courts have long recognized that where a peaceful speaker is threatened with potential violence by those who disagree, governmental authorities have an affirmative duty to protect the speaker by addressing the hecklers' conduct. *Jones v. Bd. of Regents of U. of Ariz.*, 436 F.2d 618, 621 (9th Cir. 1970) (University police have affirmative "obligation of affording [a peaceful, but unpopular speaker] . . . protection" against hecklers who tore signs/sandwich boards from his body); *see also Bible Believers*, 805 F.3d at 251; *Ovadal*, 416 F.3d at 537; *Dunlap v. City of Chicago*, 435 F. Supp. 1295, 1301 (N.D. Ill. 1977); *Glasson*, 518 F.2d at 906-07; *Hague v. Comm. For Indus. Org.*, 307 U.S. 496, 516 (1939); *see also Feiner v. New York*, 340 U.S. 315, 326 (1951) (Black, J. dissenting) ("The police of course have power to prevent breaches of the peace. But if, in the name of preserving order, they ever can interfere with a lawful public speaker, they first must make all reasonable efforts to protect him."); *Hedges v. Wauconda Cmty. Unit Sch. Dist. No. 118*, 9 F.3d 1295, 1299 (7th Cir. 1993) ("The

police must permit the speech and control the crowd; there is no heckler's veto."). As this court recently reiterated in *Meinecke*, in the heckler's veto context, "[c]urtailing speech based on the listeners' reaction is rarely—if ever—the least restrictive means to achieve the government's interest in safety. If speech provokes wrongful acts on the part of hecklers, the government must deal with those wrongful acts directly; it may not avoid doing so by suppressing the speech." 99 F.4th at 525.

And, while the government's duty is not unlimited, *see, e.g.*, *Bible Believers*, 805 F.3d at 253 (officers are not required to "go down with the speaker"), it "bears the burden of showing that the remedy it has adopted does not 'burden substantially more speech than is necessary to further the government's legitimate interests." *Turner Broadcasting Sys. Inc. v. F.C.C.*, 512 U.S. 622, 665 (1994) (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989)).

At the very least, to carry its burden, UCLA would need to "prove[] with evidence that [it] tried less restrictive means to serve the claimed interests," before burdening Robert Spencer's speech. *Saltz*, 538 F. Supp 3d at 547; *see also Meinecke*, 99 F.4th at 525 ("Put differently, if a less restrictive alternative would serve the Government's purpose, the Government must use that alternative.") (cleaned up).

In its motion to dismiss, UCLA suggested that the First Amendment was not implicated at all when it acted against Mr. Spencer, because it demanded only that he "move the event" to an out-of-the-way location, rather than "cancel it." 2-ER-122. In *Meinecke*, the Ninth Circuit squarely rejected the same argument. 99 F.4th at 524 (city could not avoid scrutiny on the ground that it "merely sought to relocate [the plaintiff's] speech rather than ban it . . . by mov[ing him] to a safer location." (cleaned up)) *see also Reges*, 2025 WL 3685613, at *13, -- F.4th ---- ("It is basic First Amendment law that in the absence of a neutral restriction, like one based on time, place, or manner, the government may not escape First Amendment scrutiny by limiting a speaker to certain places or modes of expression."); *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 556 (1975) ("One is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." (cleaned up)).

And, as noted above and as alleged in the complaint, being required to move to the outer reaches of campus was more than simply inconvenient. It would have frustrated Mr. Spencer's ability to reach and interact with an audience, made it impossible to film the lecture for later distribution, and would have sent a strong symbolic message of official disapproval of the pro-Israel point of view. *See, e.g. Lone Star Sec. & Video, Inc. v. City of Los Angeles*, 989 F. Supp. 2d 981, 992

(C.D. Cal. 2013) (location particularly important when it is "part of the expressive message").

Moreover, as in *Meinecke*, "there were several less speech-restrictive alternatives [other than re-locating Mr. Spencer] to achieve public safety." 99 F.4th at 525. Even assuming that a shout down mob had materialized, UCLA's "officers could have required the protestors to . . . step back . . . They could have called for more officers . . . They could have erected a free speech barricade . . . They could have warned the protestors that any sort of physical altercation would result in the perpetrators' arrests. And they could have arrested . . . individuals who ultimately [engaged in criminal conduct, if any]." 99 F.4th at 525. UCLA didn't do any of this before moving Robert Spencer to the outer-campus satellite location. Under *Meinecke* and other precedent, it clearly failed the strict scrutiny test.

UCLA's reaction here also failed strict scrutiny for a different reason: moving Mr. Spencer to the out-of-the-way location would not have appreciably advanced UCLA's asserted interested in preventing disruptive counter-protests in any event. Signs re-directing intending audience members to the new location would have been just as easily followed by the mob, and Plaintiffs adequately alleged that the computer science lecture hall had no physical features to improve security. Narrow tailoring requires not only that the least speech restrictive means

be used to advance legitimate ends, but that the means *actually advance* those ends. *Baker v. City of Fort Worth*, 506 F. Supp. 3d 413, 424 (N.D. Tex. 2020) ("To be narrowly tailored, the regulations cannot 'provide only ineffective or remote support' of the asserted compelling interest." (quoting *Greater New Orleans Broad. Ass'n, Inc. v. United States*, 527 U.S. 173, 188 (1999) (alteration in original)). Taking the allegations in the complaint as true, UCLA's silencing of Mr. Spencer did not even do that.

D. Even if UCLA's conduct were deemed content- but not viewpoint-based, it would still not pass constitutional muster

As explained above, Appellants' heckler's veto claim should be reinstated because it is properly characterized as a viewpoint discrimination claim and because UCLA's actions undoubtedly failed to satisfy strict scrutiny. But even if the claim were somehow to be construed to assert content- but not viewpoint-based discrimination in a limited public forum, it was still error to grant UCLA's motion to dismiss.

When government acting in a proprietary capacity imposes subject matter-based or speaker-identity-based limitations on the uses to which its facilities may be put, its choices are reviewed only to determine if they are "reasonable in light of the purpose which the forum at issue serves." *Perry Ed. Ass'n*, 460 U.S. at 49.

The forum here was a lecture hall at a major public university. Even conceding, for the purposes of this appeal only, that the room was a "limited public

forum," not all limited public fora are created equal. Some—like the advertising space on the sides of public buses at issue in *SeaMAC,* or the internal mail system used by a public school system at issue in *Perry Ed. Ass'n*, 460 U.S. at 37—are primarily devoted to operational or revenue-raising purposes for government agencies, and have little importance in our Constitutional and societal structure. Others—like lecture halls at public universities—have a heightened purpose that impacts society deeply and broadly. The "reasonableness" of a speech restriction in a limited public forum depends on the forum's purpose, which, in turn, depends greatly on the type of structure at issue (lecture hall, billboard, social media comments page, etc…) and the function of the institution in which the forum is embedded. *See DiLoreto v. Downey Unified Sch. Dist. Bd. of Educ.*, 196 F.3d 958, 968 (9th Cir. 1999) ("[E]ven though the actual forum in this case is the advertising space on the fence, the special nature and function of public secondary schools are relevant to evaluating the limits the school may impose on expressive activity.").

The lecture room here has a heightened purpose from a free speech perspective, both because it is a *lecture room* devoted to principles of open inquiry and public discussion, and, even more importantly, because it is *on the campus of a university*. As this court put it in *Reges*:

> The public university occupies a central place in the law of the First Amendment. The First Amendment protects the free exchange of ideas. The university is a primary generator and repository of ideas, a place in which unfettered academic debate and open discourse promotes the

> search for truth and prepares students for a discordant world lacking in orthodoxy. When we . . . destock the marketplace of ideas [we] imperil future generations who must be exposed to a range of ideas and readied for the disharmony of a democratic society.

2025 WL 3685613, at *6, -- F.4th ---- (citations omitted).

When a public university allows intolerant mobs to have their way on campus by easily driving out views that make activists uncomfortable, it "destocks" the marketplace of ideas. The potential long-term consequences of universities failing to face down cancellation mobs can hardly be overstated. If viewpoint diversity disappears from the university campus, nothing short of the "Nation's future" is at stake. *Id.* at *7 (quoting *Keyishian v. Bd. of Regents of the Univ. of State of N.Y.*, 385 U.S. 589, 603 (1967)). Future leaders must be exposed to a wide range of ideas at university, including especially ones that challenge presuppositions and that might upset or disturb, "otherwise our civilization will stagnate and die." *Reges*, 2025 WL 3685613, at *7, -- F.4th ---- (quoting *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957)).

Even worse, given that many members of shout down mobs are themselves students, a university's habitual acquiescence to cancellation efforts is a kind of pedagogy, teaching these students precisely the wrong lesson: that "by threatening violence against those with whom you disagree, you can enlist the power of the State to silence them." *Dariano v. Morgan Hill Unified Sch. Dist.*, 767 F.3d 764, 770-71 (9th Cir. 2014) (O'Scannlain, dissenting from denial of reh'g *en banc*); *see*

also id. (caving in to a heckler's veto creates "perverse incentive[s]" and guarantees more of the same); *N.E. Penn. Freethought Soc'y*, 938 F.3d at 438 ("signaling that the government will suppress unpopular speech if the public behaves badly" "invites a heckler's veto"). The long-term consequences of universities tolerating and encouraging an ethos of silencing disfavored speech are potentially dire. "Those who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard." *W. Virginia St. Bd. of Ed. v. Barnette*, 319 U.S. 624, 641 (1943); *see also Bible Believers*, 805 F.3d at 252-53 (ratifying a heckler's veto allows "the crowd [to] impose[], through violence, a tyrannical majoritarian rule").

Given all of this, Appellants respectfully submit that even if held only to a "reasonableness" standard (which it should not be), UCLA's response to left-wing and anti-Israel hecklers—which here consisted of effectively cancelling Robert Spencer's pro-Israel speech based on the mere possibility that a shout down mob might appear without any effort at all to address potential disruption at its source—was unreasonable.

E. The District Court erred in holding that Appellants' claim for damages was barred by qualified immunity

The District Court held that even if Appellants had stated a heckler's veto claim, to the extent they sought damages on the claim, it was barred by qualified

immunity.[5] This was error.

Caselaw going back at least fifty years firmly establishes that UCLA had a duty to take reasonable actions to protect Robert Spencer from potential hecklers before burdening his speech. *See, e.g. Jones*, 436 F.2d at 621; *see also, e.g. Bible Believers*, 805 F.3d at 251; *Ovadal*, 416 F.3d at 537; *Dunlap*, 435 F. Supp. at 1301; *Glasson*, 518 F.2d at 906-07; *Hague*, 307 U.S. at 516. Accordingly, no reasonable government official in Defendants' position could have been surprised to learn of his potential liability. *See, e.g.*, *Bible Believers*, 805 F.3d at 258 (denying qualified immunity in analogous circumstances because caselaw of decades long standing "alerted Defendants that removing a peaceful speaker, when the police have made no serious attempt to quell the lawless agitators, could subject them to liability").

Moreover, Defendants not only had a clearly established body of caselaw to draw on in order to understand their legal duties, here they were "specifically put on notice," *Bible Believers*, 805 F.3d at 258, on May 1, 2024, when YAF sent a letter to UCLA's Chief Campus Counsel citing relevant authority, including

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[5] The District Court's holding on qualified immunity does not apply to Appellants' claim for injunctive and declaratory relief on their heckler's veto cause of action. As Appellants have properly pleaded, UCLA's failure to protect Robert Spencer from left-wing and/or anti-Israel hecklers was not a one-off event, but is part of an unwritten and long-standing policy and practice that should be enjoined. 3-ER-246 ("In caving in to the wishes of anti-Israel and left-wing activists, Defendants acted pursuant to an unwritten, but firmly entrenched, policy and practice."); *see also, e.g.*, 3-ER-216 to 3-ER-271 ¶¶ 78-79.

Meinecke. 3-ER-223 ¶ 96, 3-ER-297 *et seq.* (Compl. Ex. B). Where, as here, a party specifically warns government actors against ratifying a heckler's veto, qualified immunity is particularly inappropriate. *Bible Believers*, 805 F.3d at 258.

The District Court excluded this entire body of caselaw from its qualified immunity analysis on the sole ground that many of the cases arose in the context of designated or traditional public fora. Based on its prior conceptual error designating heckler's veto claims to sound in content- but not viewpoint-based discrimination, the District Court asserted that because these cases "defin[ed] speaker's rights in traditional and designated for a that are not applicable in limited public fora, these cases could not put Defendants on notice of the constitutional violations Plaintiffs allege here." 1-ER-018. But, again, this argument is simply based on a mistaken understanding of the heckler's veto doctrine. As discussed at length above, when government gives effect to the desires of a shout down mob, it engages in viewpoint discrimination. The standard for viewpoint discrimination is identical in traditional, designated, and limited public fora. Accordingly, heckler's veto caselaw is just as relevant in one type of forum as any other. The District Court was wrong to invoke qualified immunity here.[6]

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[6] Moreover, qualified immunity in the First Amendment context is unsupported by 42 U.S.C. § 1983, *Oliver v. Arnold*, 19 F.4th 843, 852 (5th Cir. 2021) (Ho, J. concurring in denial of reh'g *en banc*), and should be rejected. Plaintiff recognizes the Court is bound by precedent to the contrary, but

III. The District Court erred in dismissing Appellants' alternative claim that Appellees' asserted security concerns were mere pretext

It is undisputed that viewpoint discrimination also occurs when government actors burden speech out of personal disagreement with a speaker's views. 2-ER-119. Appellants brought a secondary viewpoint-discrimination claim based on allegations that UCLA's true reason for silencing Robert Spencer's speech was disagreement with his pro-Israel and conservative views, and that its proffered "security" rationale was a mere pretext for ideologically-driven censorship. 2-ER-065 to 2-ER-066, 2-ER-086, 3-ER-190 ¶ 11, 3-ER-243 to 3-ER-245 ¶¶ 163-170. At the motion to dismiss stage, Appellants needed only to raise a "plausible" inference supporting their claim. The complaint here easily passes that threshold.

Contrary to controlling authority, however, the District Court treated the complaint with the opposite of charity: it demanded exacting precision with every allegation, and drew inferences *against* Appellants whenever possible. As just one example, the District Court credited UCLA's assertions that it had a "justifiable security reason for moving the [Robert Spencer] event." 1-ER-014. The Court based this conclusion on the fact that Appellants had, many weeks prior to the event, informed UCLA that Mr. Spencer's speech would likely result in a "shout down" effort by counter protestors (which, of course, everyone already knew), and

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respectfully raises the issue here to preserve it for possible Supreme Court review.

that, as the event date approached, anti-Israel activists threatened to shut down the event. *Id.*

But the Court did not reckon with the facts that UCLA knew about these potential issues for many weeks prior to the event, and that one of the main purposes of the pre-event planning process was to give UCLA time to marshal its security resources to address cancellation threats that, again, *everybody knew was coming*. To be sure, Appellants do not assert that there were absolutely no security issues to be concerned about. But the fact that UCLA knew about the concerns for weeks, repeatedly assured Appellants that the security situation was in hand, and only at the last minute, after it was too late for Appellants to re-direct intending audience members to a new outer-campus location, suddenly claimed to be unprepared, strongly undermines UCLA's purported security motivation. 3-ER-223 to 3-ER-229. Moreover, UCLA did not even wait to see whether a mob would even appear, or, if it did, whether it would be relatively small and manageable, before silencing Mr. Spencer. *Id.*

It is the easiest thing in the world to *say*, as UCLA did here, that it was motivated solely by security. But Appellants are not required to take UCLA at its word. And the facts alleged in the complaint are far more than enough to get past the pleading stage. Discovery will bear out that UCLA's decision makers were

motivated by ideological bias against pro-Israel speech. The role of a court at the pleading stage is not to short circuit the process. This Court should reverse.

A. The complaint plausibly alleged that UCLA treated anti-Israel speech favorably

It is true that, to YAF's knowledge, UCLA's top administrators have never explicitly stated that they back the anti-Israel side of the debate on the conflict between Israel and Hamas. But that is not required to show ideological bias. After all, "the government rarely flatly admits it is engaging in viewpoint discrimination." *Ridley v. Mass. Bay Transp. Auth.*, 390 F.3d 65, 86 (1st Cir. 2004), *partially abrogated on other grounds by Tam*, 137 S. Ct. 1744. Actions speak louder than words. Specifically, the complaint contains allegations substantiating that UCLA (and specifically Defendant Block) welcomed anti-Israel speech to an extreme degree, while treating pro-Israel speech to far different standards. To take just a few examples, under Defendant Block's watch and at his direction UCLA,

- Funded a virulently antisemitic left-wing "activist in residence," 3-ER-209 ¶ 60;
- Hosted numerous anti-Israel conferences and speakers, including ones that slandered Israeli soldiers as murderers of children "for sport," 3-ER-201 ¶ 42;
- Failed to respond to numerous instances of campus antisemitism, including intimidation against Jews and Israelis that was plainly unlawful, 3-ER-203 to 3-ER-214 ¶¶ 46-47, 51-55, 58-59, 71;

- Ordered the UCLA Police Department to "stand down" and not interfere with activists who were engaged in widespread violence and intimidation of Jewish and pro-Israel students, 3-ER-214 ¶ 71;
- Authorized UCLA security to *assist* the anti-Israel activists, 3-ER-214 ¶ 72.

The District Court shrugged off this entire history on the facile ground that Appellants supposedly failed to allege that "any of the identified prior events posed security concerns similar to anti-Israel activists' response to the Spencer event." 1-ER-015. But that is not true at all. Indeed, as the complaint alleges, many of the anti-Israel activities tolerated by UCLA posed security concerns *far worse* than any potential concerns arising from anti-Israel blowback to the Spencer event. *See, e.g.*, 3-ER-206 to 3-ER-212 ¶¶ 54 (chants of "slaughter the Jews"), 55 (swarms of activists chanting "death to Jews"), 58 (activists using "large knives to 'stab' and remove posters of Israeli hostages"), 66 (masked activists pushing and shoving ideological opponents).

It is true that security concerns arising from anti-Israel activities stemmed from the anti-Israel activists themselves, and not from pro-Israel counter protestors. But there is no reason (and the District Court did not attempt to provide one) that in assessing the sincerity of UCLA's "security concerns" with respect to the Robert Spencer event, only prior heckler's vetoes against anti-Israel speakers would be relevant data points. Security is security. The complaint alleges many instances in which UCLA downplayed or ignored serious security issues arising

from anti-Israel speech. The contrast with the way UCLA handled the *speculative* security concerns at the Rober Spencer event speaks for itself.

B. Silencing Robert Spencer was not the first time that UCLA turned on a pro-Israel speaker

As further indicia of ideological bias against pro-Israel speech, the complaint detailed prior events during which UCLA allowed anti-Israel hecklers to scuttle events with which they disagreed. The District Court acknowledged that Appellants "identifi[ed] two prior incidents where activists threatened speakers, and both were cancelled or relocated," 1-ER-015 (citing Compl. ¶¶ 79, 103, 110 (including allegations that anti-Israel activists shut down an in-person speech by the former Israeli Minister of Foreign Affairs)). But confusingly, the District Court did not draw the obvious inference from this fact that, especially when considered against the background of years' worth of tolerance of unlawful and harassing anti-Israel activism unchecked by the university, UCLA's decision makers harbor ideological bias against pro-Israel views.

The District Court instead opined that the fact that "only anti-Israel protestors have threatened events does not make Defendants' decision to cancel . . . the threatened events discriminatory." 1-ER-015. But, with respect and contrary to the District Court's reasoning, Appellants submit that, in context, a juror could easily infer ideological bias from the facts that only anti-Israel protestors have threatened events and that Defendants' have consistently acceded to those

protestors desires. The same anti-Israel protestors who threatened disturbances against the Israeli Foreign Minister's speech themselves engaged in disruptive, threatening and violent anti-Israel marches of their own. UCLA's response to those anti-Israel activists was consistent: play hands off and give them what they want. In one circumstance, what they wanted was to chant "slaughter the Jews" and threaten Jewish students, 3-ER-206 ¶ 54; in other circumstances, they wanted UCLA to put up no resistance when they shouted down pro-Israel speech on campus, 3-ER-224 to 3-ER-225 ¶ 103, 2-ER-073. UCLA's consistent catering to the anti-Israel activists does indeed raise an inference of ideological bias, which undermines their pretextual "security" rationale asserted at the last minute to derail the Robert Spencer speech.

C. UCLA's failure to articulate a plausible basis for refusing to provide security supports an inference of bad faith

As alleged in the complaint, at the time that UCLA ordered Robert Spencer to shut down or move his speech to a satellite location, there were no counter-protestors on the scene. 3-ER-226 ¶ 110. YAF representatives repeatedly asked UCLA's representatives for an explanation. At first, UCLA provided no response at all—indeed, UCLA refused to respond for *hours* after it issued its ultimatum. 3-ER-225 to 3-ER-2226 ¶¶ 107-109. UCLA bureaucrats even engaged in absurd theatrics: literally locking the lecture hall door against Appellants, and then pretending that they could not find anyone with the key to re-open the space. 3-

ER-226 ¶ 109. When UCLA finally did respond through Defendant Braziel, the only thing it said was that due to unspecified "security concerns," it had determined that it was unprepared to handle Mr. Spencer's event in the student union building. *Id.* Despite numerous requests for more information, UCLA said nothing more.

Months later, in support of its motion to dismiss the complaint, UCLA submitted a declaration drafted by its litigation counsel that suddenly set forth a purported explanation for UCLA's actions. 2-ER-178 to 2-ER-181. According to the declaration, despite having previously represented that security could be provided in the Student Union building, on day of the event, it changed course because the building was "a publicly accessible multistory, multiuse building" and contained a restaurant, study rooms, and other facilities. 2-ER-179 to 2-ER-180 ¶ 6.

Of course, on UCLA's motion to dismiss, it was not permissible for the District Court to consider the declaration for the truth of the matters asserted therein. The District Court appears to have appropriately ignored the declaration for that purpose. But the very fact that UCLA's litigation team suddenly came up with a detailed "explanation" for its purported inability to provide the security it had previously promised is evidence of pretext and ideological bias because the government's "post-hoc rationalization [can itself] be evidence of viewpoint

discrimination." *Am. Freedom Def. Initiative v. Washington Metro. Area Transit Auth., WMATA*, 901 F.3d 356, 366 (D.C. Cir. 2018) (citation and quotation marks omitted).

Even worse, the Braziel declaration raises more questions than it answers. That the Student Union was "multistory [and] multiuse," 2-ER-179 ¶ 6, was not breaking news; nor was the fact that Mr. Spencer's views, expressed under the banner of his "Jihad Watch" publication, were unpopular with anti-Israel activists, 3-ER-200 ¶ 39, 3-ER-217 to 3-ER-218 ¶¶ 80-81—yet UCLA previously determined that the venue *could* be secured. UCLA's decision to wait until the last minute to suddenly re-think its security assessment, apparently based on basic, obvious information about the building, after the location had been publicized, and after it was too late to inform intending audience members of a change, is highly suspect, and evidence of bad faith. The District Court did not mention UCLA's failure to provide a cogent explanation for its sudden reversal, 1-ER-005 to 1-ER-027, and this factor strongly supports inferences of pretext and ideological bias.

Taken together, the allegations in the complaint raise a plausible inference that UCLA's decision makers were motivated by ideological bias when they silenced Robert Spencer. In support of its contrary conclusion, the District Court relied solely on *Moss v. U.S. Secret Service*, 572 F.3d 962 (9th Cir. 2009) (*Moss I*) and *Moss v. U.S. Secret Service*, 711 F.3d 941 (9th Cir. 2013) (*Moss II*), *rev'd sub*

nom Wood v. Moss, 572 U.S. 744 (2014). But those cases are easily distinguishable. In the *Moss* cases, a group of anti-George W. Bush protestors claimed that members of the Secret Service engaged in viewpoint discrimination when they instructed the protestors to move from a location that was "within weapons range of the President." *Wood v. Moss*, 572 U.S. at 751. A different group of pro-George W. Bush demonstrators were in a location from which "weapons access to [the President's location]" was blocked by a "a large two-story building," and was not instructed to move. *Id.* Under these circumstances, the protestors' viewpoint discrimination claim based on the Secret Service officers' decision to move them, but not to move the pro-Bush demonstrators, failed. *Id*.

These cases have nothing to do with the instant matter. Just to take a few examples, there were no allegations that the Secret Service officers in *Moss* engaged in unexplained delays in the approval process for the plaintiffs' speech event. In contrast, here, Appellants properly alleged that UCLA dragged its feet for an extended period of time, causing the window for effective pre-event publicity to narrow almost to the point of extinction. Indeed, UCLA only approved the event at the last minute after being threatened with a lawsuit. Second, there were no allegations in *Moss* that government actors approved an event and promised security protection, only to suddenly reverse course at the last minute after it was too late to publicize changes to the event location. Third, there were no

allegations in *Moss* that the government engaged in flimsy *post hoc* rationalizations for a last minute change in plans based on obvious facts about the location of the event such as that it had multiple entrances, as there were here. Finally, in *Moss*, there were no allegations that, like here, the government had already allowed shout-down protestors to scuttle pro-Israel speech on campus a few months earlier. In short, the cases the District Court relied on provided no support for its holding.

Appellants have plausibly pleaded ideological-bias discrimination and the Court should reverse.

CONCLUSION

For the foregoing reasons, the Court should reverse the judgment of the District Court with respect to Appellants' First and Second Causes of Action, and should remand this matter for further proceedings.

Respectfully submitted this 14th day of January 2026.

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FORM 17. STATEMENT OF RELATED CASES PURSUANT TO CIRCUIT RULE 28-2.6

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9th Cir. Case Number(s) _____95-6934_____

The undersigned attorney or self-represented party states the following:

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Signature ____s/ James Kerwin_____ Date ____January 14, 2026_
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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FORM 8. CERTIFICATE OF COMPLIANCE FOR BRIEFS

9th Cir. Case Number(s): 25-6934

I am the attorney or self-represented party.

This brief contains 12,520 words, excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

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UNITED STATES COURT OF APPEALS
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