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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

POURYA KHADEMI, et al.,)
)
 Plaintiffs,)
)
 v.)
)
SOUTH ORANGE COUNTY COMMUNITY)
COLLEGE DISTRICT,)
)
 Defendant.)
_____)

CASE NO.: CV 01-1932 ABC (Mcx)

ORDER RE: PLAINTIFFS' MOTION FOR
SUMMARY ADJUDICATION

In 1999, this Court enjoined the enforcement of certain sections of a policy regulating the time, place, and manner of speech and advocacy on campuses of Defendant South Orange County Community College District ("SOCCCD" or the "District"). Two and a half years later, the parties are again before the Court, in a challenge to the current speech and advocacy rules adopted by the District, Board Policy 8000 ("BP 8000"). Currently pending before the Court is Plaintiffs' Motion for Summary Adjudication. The Motion came on regularly for hearing on March 18, 2002. Upon consideration of the submissions of the parties, the case file, and the argument of counsel, the Motion is hereby GRANTED IN PART and DENIED IN PART.

1 I. FACTUAL AND PROCEDURAL BACKGROUND

2 In the previous case, Burbridge v. Sampson, No. CV 99-9482 ABC
3 (Mcx), plaintiffs Diep Burbridge, Scott Stephansky, and Dorothy Caruso
4 brought a challenge to Defendant's Board Policy 5406. On September
5 29, 1999, the Court enjoined the enforcement of certain sections of
6 that policy. See Burbridge v. Sampson, 74 F.Supp.2d 940 (C.D. Cal.
7 1999).¹ In the summer of 2000, Defendant adopted a new time, place,
8 and manner regulation, Board Policy 8000. Complaint ¶ 11, ll. 12-13;
9 see also Motion Ex. 1 (BP 8000). On February 28, 2001, Plaintiffs
10 brought the current action to enjoin enforcement of BP 8000.
11 Plaintiffs are Burbridge, a plaintiff in the earlier action, and James
12 Irvine and Pourya Khademi. All three plaintiffs are students at one
13 or both of the two campuses, Irvine Valley College and Saddleback
14 College, that make up the SOCCCD. See Motion Decl. of Diep Burbridge
15 ("Burbridge Decl."); Motion Decl. of James Irvine ("Irvine Decl.");
16 Motion Decl. of Pourya Khademi ("Khademi Decl."). Plaintiffs allege
17 that BP 8000 violates the First and Fourteenth Amendments of the
18 United States Constitution; Article 1, sections 2 and 3 of the
19 California Constitution; and California Education Code § 66301.
20 Complaint ¶¶ 15-27. They seek declaratory and injunctive relief.
21 Complaint Prayer for Relief ¶¶ 1-7.

22 On February 11, 2002, Plaintiffs filed a Motion for Summary
23 Adjudication with regard to certain sections of BP 8000, noticed for
24

25
26 ¹The parties appeared before the Court in two other lawsuits
27 challenging BP 5406. The first, Burbridge v. Mathur, CV 98-5274 ABC
28 (Mcx), was resolved when Defendant amended the policy. The third,
Stephansky v. Sampson, CV 99-12815 ABC (Mcx), was brought after
Defendant amended BP 5406 in response to this Court's injunction in
Burbridge v. Sampson. See Complaint ¶¶ 11-12.

1 hearing on March 11, 2002. Defendant filed an Opposition on February
2 26, 2002. Plaintiffs filed a Reply on March 4, 2002. On March 6,
3 2002, the Court continued the hearing to its present setting, March
4 18, 2002.

6 II. LEGAL STANDARD

7 The party moving for summary judgment or summary adjudication has
8 the initial burden of establishing that there is "no genuine issue as
9 to any material fact and that [it] is entitled to a judgment as a
10 matter of law." Fed. R. Civ. Pro. 56(c); see British Airways Bd. v.
11 Boeing Co., 585 F.2d 946, 951 (9th Cir. 1978); Fremont Indemnity Co.
12 v. California Nat'l Physician's Insurance Co., 954 F. Supp. 1399, 1402
13 (C.D. Cal. 1997).

14 If the moving party has the burden of proof at trial (e.g., a
15 plaintiff on a claim for relief, or a defendant on an affirmative
16 defense), the moving party must make a "showing sufficient for the
17 court to hold that no reasonable trier of fact could find other than
18 for the moving party." Calderone v. United States, 799 F.2d 254, 259
19 (6th Cir. 1986) (quoting from Schwarzer, Summary Judgment Under the
20 Federal Rules: Defining Genuine Issues of Material Fact, 99 F.R.D.
21 465, 487-88 (1984)). Thus, if the moving party has the burden of
22 proof at trial, that party "must establish beyond peradventure **all** of
23 the essential elements of the claim or defense to warrant judgment in
24 [its] favor." Fontenot v. Upjohn Co., 780 F.2d 1190, 1194 (5th Cir.
25 1986) (emphasis in original); see Calderone, 799 F.2d at 259.

26 If the opponent has the burden of proof at trial, the moving
27 party has no burden to negate the opponent's claim. Celotex Corp. v.
28 Catrett, 477 U.S. 317, 323 (1986). The moving party does not have the

1 burden to produce any evidence showing the absence of a genuine issue
2 of material fact. Id. at 325. "Instead, . . . the burden on the
3 moving party may be discharged by 'showing'--that is, pointing out to
4 the district court--that there is an absence of evidence to support
5 the nonmoving party's case." Id. (citations omitted).

6 Once the moving party satisfies this initial burden, "an adverse
7 party may not rest upon the mere allegations or denials of the adverse
8 party's pleadings . . . [T]he adverse party's response . . . **must set**
9 **forth specific facts** showing that there is a genuine issue for trial."
10 Fed. R. Civ. P. 56(e) (emphasis added). A "genuine issue" of material
11 fact exists only when the nonmoving party makes a sufficient showing
12 to establish the essential elements to that party's case, and on which
13 that party would bear the burden of proof at trial. Celotex, 477 U.S.
14 at 322-23. "The mere existence of a scintilla of evidence in support
15 of the plaintiff's position will be insufficient; there must be
16 evidence on which a reasonable jury could reasonably find for
17 plaintiff." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252
18 (1986). The evidence of the nonmovant is to be believed, and all
19 justifiable inferences are to be drawn in favor of the nonmovant. Id.
20 at 248. However, the court must view the evidence presented "through
21 the prism of the substantive evidentiary burden." Id. at 252.

22 23 **III. DISCUSSION**

24 **A. Whether Plaintiffs Have Standing**

25 As a threshold matter, the Court must examine whether Plaintiffs
26 having standing to raise their challenges to BP 8000. Article III
27 standing contains three elements: (1) "an injury in fact"; (2) "a
28 causal connection between the injury and the conduct complained of";

1 and (3) likelihood that the injury will be "'redressed by a favorable
2 decision.'" Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61
3 (1992).

4 The first element of the standing inquiry - the injury in fact -
5 is "an invasion of a legally protected interest which is (a) concrete
6 and particularized . . . and (b) 'actual or imminent, not conjectural'
7 or 'hypothetical.'" Id. at 560 (citations omitted). A plaintiff must
8 show that "'he has sustained or is immediately in danger of sustaining
9 some direct injury as the result of the challenged official conduct.'" 4805 Convoy, Inc. v. City of San Diego, 183 F.3d 1108, 1111-12 (9th
10 Cir. 1999) (quoting City of Los Angeles v. Lyons, 461 U.S. 95, 101-02
11 (1983)). "Thus, a 'plaintiff generally must assert his own legal
12 rights and interests, and cannot rest his claim to relief on the legal
13 rights or interests of third parties.'" Id. at 1112 (quoting
14 Secretary of State of Maryland v. Joseph H. Munson Co., Inc., 467 U.S.
15 947, 955 (1984) ("Munson")).

17 When a case concerns a challenge that a statute or ordinance is,
18 on its face, unconstitutional, particularly in the First Amendment
19 context, the type of facial challenge at issue affects the standing
20 analysis. While the plaintiff must still demonstrate an injury in
21 fact, plaintiff may assert not just his own constitutional rights, he
22 may also assert the constitutional rights of others. Id.

23 A statute may be facially unconstitutional if (1) "'it is
24 unconstitutional in every conceivable application'" or (2) "'it seeks
25 to prohibit such a broad range of protected conduct that it is
26 unconstitutionally overbroad.'" Foti v. City of Menlo Park, 146 F.3d
27 629, 635 (9th Cir. 1998) (quoting Members of City Council v. Taxpayers

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1 for Vincent, 466 U.S. 789, 796 (1984)).² The first type of facial
2 challenge involves a plaintiff who argues that the statute "could
3 never be applied in a valid manner because it is unconstitutionally
4 vague or it impermissibly restricts a protected activity." Id. In
5 such a case, courts apply the general rule that a plaintiff has
6 standing only to vindicate his own constitutional rights, rights that
7 have been, or are in imminent danger of, being invaded by the
8 government's implementation or enforcement of that statute. See id.;
9 cf. FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 220-21, 237 (1990)
10 ("There can be little question that the motel owners have 'a live
11 controversy' against enforcement of [a] statute" that regulates adult
12 motels and other "sexually oriented businesses").

13 However, an exception to the traditional standing rule applies in
14 the First Amendment context when a plaintiff raises the second type of
15 facial challenge. Foti, 146 F.3d at 635. In this type of challenge,
16 "the plaintiff argues that the statute is written so broadly that it
17 may inhibit the constitutionally protected speech of third parties."
18 Id.; accord Munson, 467 U.S. at 956-57. In such a case, the general
19 limitation on standing is relaxed because there exists "a danger of
20 chilling free speech" in society as a whole. Munson, 467 U.S. at 956-
21 57. Thus, so long as the plaintiff himself satisfies the injury in
22 fact requirement, he has standing to argue that a law is facially
23 overbroad as it relates to the expressive activities of others,
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25
26 ²"A successful challenge to the facial constitutionality of a law
27 invalidates the law itself." Foti, 146 F.3d at 635; accord Village of
28 Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 495
n. 5 (1982) ("A 'facial' challenge . . . means a claim that the law is
'invalid in toto - and therefore incapable of any valid application'")
(quoting Steffel v. Thompson, 415 U.S. 452, 474 (1974)).

1 whether or not he also challenges the law's overbreadth as it relates
2 to his own expressive activities. See id. (a for-profit professional
3 fundraiser who contracts with charitable organizations has standing to
4 challenge a statute that prohibits charitable organizations from
5 paying or agreeing to pay as expenses more than 25 percent of the
6 amount raised in connection with any fundraising activity); see also
7 S.O.C., Inc. v. County of Clark, 152 F.3d 1136, 1142-43 (plaintiff,
8 whose First Amendment activities are directly impacted by the new
9 ordinance, has standing to challenge the impact of the overbroad
10 ordinance on behalf of itself and others not before the court),
11 amended on other grounds, 160 F.3d 541 (9th Cir. 1998). The "prior
12 restraint" cases, where one who is subject to the law alleges that a
13 licensing statute vests unbridled discretion in the decision-maker
14 over whether to permit or deny the expressive activity, fall into this
15 category. See Broadrick v. Oklahoma, 413 U.S. 601, 611-12 (1973)
16 (discussing cases where a plaintiff has standing to bring facial
17 overbreadth challenges, including prior restraint and unreasonable
18 time, place and manner claims, "not because his own rights have been
19 violated, but because of a judicial prediction or assumption that the
20 statute's very existence may cause others not before the court to
21 refrain from constitutionally protected speech or expression"); see
22 also Freedman v. Maryland, 380 U.S. 51, 56 (1965) ("In the area of
23 freedom of expression it is well established that one has standing to
24 challenge a statute on the ground that it delegates overly broad
25 licensing discretion to an administrative office, whether or not his
26 conduct could be proscribed by a properly drawn statute, and whether
27 or not he applied for a license"); City of Lakewood v. Plain Dealer
28 Publishing Co., 486 U.S. 750, 755-56 (1988) (same).

1 Here, both types of facial challenges are at issue. Plaintiffs
2 first contend that BP 8000 is an impermissible time, place, and manner
3 restriction that is "unconstitutional in every conceivable
4 application." Foti, 146 F.3d at 635. See Motion at 4-14. With
5 regard to this challenge, Plaintiffs may have standing only with
6 regard to themselves. Plaintiffs also contend that, for six reasons
7 discussed below, BP 8000 is unconstitutionally overbroad. See Motion
8 at 14-20. With regard to this challenge, Plaintiffs may also have
9 standing to assert the interests of third parties.

10 It is undisputed that BP 8000 regulates the on-campus and some
11 off-campus speech and expressive activities of students of the two
12 SOCCCD colleges. In order to post or distribute written materials, or
13 engage in speech and advocacy on school grounds, Plaintiffs must
14 comply with the requirements and restrictions of BP 8000. Plaintiffs
15 allege that they have been engaged in numerous expressive activities
16 on the SOCCCD campuses. See Burbridge Decl. ¶ 2; Khademi Decl. ¶ 3.
17 They also allege that their various postings and banners have been
18 removed and that they are subject to various restrictions and
19 procedures under BP 8000 that limit and have chilled their expressive
20 activities. See Burbridge Decl. ¶¶ 3, 6-8; Khademi Decl. ¶¶ 4-5;
21 Irvine Decl. ¶¶ 3-4. BP 8000, as written, could possibly prevent
22 Plaintiffs from engaging in certain constitutionally protected
23 activities, restrict their manner of expression, and/or expose them to
24 disciplinary action for engaging in certain protected activities. A
25 favorable decision by this Court, enjoining the enforcement of part or
26 all of BP 8000, will likely redress Plaintiffs' injuries. Under the
27 facts as alleged, Plaintiffs have demonstrated that they are
28 immediately in danger of sustaining some direct injury as a result of

1 the implementation of the provisions of BP 8000 directed at student
2 activity. Accordingly, the Court is satisfied that Plaintiffs have
3 standing to challenge those provisions.

4 Plaintiffs also assert that they have standing to challenge the
5 provisions of BP 8000 addressed to members of the public and those who
6 seek to use SOCCCD facilities under the Civic Center Act, Cal. Educ.
7 Code § 82537. Plaintiffs have not alleged that they personally have
8 been or could be affected by these provisions of BP 8000.
9 Accordingly, they do not have standing to bring a facial challenge to
10 those sections as being impermissible time, place, or manner
11 restrictions.

12 The question is whether the exception to the bar to third party
13 standing in overbreadth cases should apply. “[S]ome nexus is . . .
14 required, even in first amendment cases, between the vice of the
15 statute and the conduct of the litigant.” Lawrence Tribe, American
16 Constitutional Law § 12-32 at 1036 (2nd ed. 1988). Here, there is no
17 such nexus between the activities of these student Plaintiffs and the
18 provisions applicable to members of the public and Civic Center Act
19 users. In a proper overbreadth case, “the plaintiff argues that the
20 statute is written so broadly that it may inhibit the constitutionally
21 protected speech of third parties, even if his own speech may
22 [constitutionally] be prohibited” by the ordinance. Foti, 146 F.3d at
23 635. In this case, in contrast, the general public and Civic Center
24 Access Act provisions of BP 8000 will **never** prohibit or punish **any**
25 expression by these Plaintiffs, regardless of whether or not that
26 expression is constitutionally protected. Plaintiffs have not shown
27 that they have sought or will seek to use the District’s facilities as
28 members of the public or under the Civic Center Access Act. “The

1 overbreadth exception to the prudential limits on standing . . . 'does
2 not affect the rigid constitutional requirement that plaintiffs must
3 demonstrate an injury in fact'” Young v. City of Simi Valley,
4 216 F.3d 807, 815 (9th Cir. 2000) (quoting 4805 Convoy, Inc. v. City
5 of San Diego, 183 F.3d 1108, 1112 (9th Cir. 1999)). Plaintiffs have
6 not met the injury in fact requirement with respect to the provisions
7 of BP 8000 applicable to the general public and Civic Center Act
8 users. Accordingly, the Court finds that Plaintiffs do not have
9 standing to challenge these sections. See Cole v. Oroville Union High
10 Sch. Dist., 228 F.3d 1092, 1099 (9th Cir. 2000) (“[A] litigant cannot
11 sustain an overbreadth . . . claim if he no longer has a personal
12 interest in the outcome which itself satisfies the case or controversy
13 requirement.”).

14 **B. Whether the Motion is Properly Presented**

15 Defendant contends that Plaintiffs’ Motion is improperly
16 presented because: (1) Plaintiffs’ Separate Statement of Material
17 Facts Not in Dispute (“Separate Statement”) identifies no issues; (2)
18 there is no number system in the Separate Statement; (3) Plaintiffs
19 have violated Federal Rule of Civil Procedure 56(d); and (4)
20 Plaintiffs have violated Local Rule 7.14. These arguments are all
21 meritless.

22 Although Plaintiffs’ Separate Statement should more properly have
23 been captioned the “Statement of Uncontroverted Facts and Conclusions
24 of Law,” it complies with the requirements of Local Rule 56-1.³
25 Because Plaintiffs have brought a **facial** challenge to BP 8000, there

27 ³Local Rule 56-1 is the current version of Local Rule 7.14.
28 Defendant is admonished to cite to the current Local Rules, which have
been in effect for more than five months, since October 1, 2001.

1 are inherently no factual issues to be identified. But if there were,
2 Local Rule 56-2 puts the burden on Defendant, as the opposing party,
3 to identify the issues in dispute. Plaintiffs have no such
4 obligation. Additionally, there is no requirement that Plaintiffs
5 number each paragraph in their Separate Statement.⁴ Compare Local
6 Rule 56-1 with Local Rule 52-3 (requiring that Proposed Findings of
7 Fact and Conclusions of Law be in separately numbered paragraphs).
8 Finally, it is not clear how Plaintiffs could have violated Rule
9 56(d), which sets forth the **Court's** duties in ruling on a motion for
10 partial summary judgment.

11 **C. Whether Plaintiffs Have Challenged Section 76120**

12 BP 8000 is purportedly based on California Education Code § 76120
13 ("section 76120"). See Motion Ex. 1 at § II.A. Section 76120
14 provides that entities such as Defendant shall adopt regulations
15 protecting students' free speech rights on campus:

16
17 The governing board of a community college district shall
18 adopt rules and regulations relating to the exercise of free
19 expression by students upon the premises of each community
college maintained by the district, which shall include
reasonable provisions for the time, place, and manner of
conducting such activities.

20 Such rules and regulations shall not prohibit the right of
21 students to exercise free expression including, but not
22 limited to, the use of bulletin boards, the distribution of
printed materials or petitions, and the wearing of buttons,
badges, or other insignia

23 However, section 76120 also provides an exception to its guarantee of
24 freedom of expression on campuses:

25 [T]hat expression which is obscene, libelous or slanderous
26 according to current legal standards, or which so incites

27 ⁴The Court notes, however, that Plaintiffs have submitted a
28 Corrected Separate Statement of Material Facts Not in Dispute with
each paragraph numbered.

1 students as to create a clear and present danger of the
2 commission of unlawful acts on community college premises,
3 or the violation of lawful community college regulations, or
the substantial disruption of the orderly operation of the
community college, shall be prohibited.

4 Defendant contends that Plaintiffs are challenging the
5 constitutionality of section 76120 and, therefore, that the California
6 Attorney General must be named as a defendant in this action. The
7 Court concludes that Plaintiffs are merely challenging Defendant's
8 interpretation and application of section 76120, not the statute
9 itself.

10 The Court acknowledges that the prohibitions on expression
11 contained in section 76120, particularly the prohibition on expression
12 that merely violates college regulations, are troublesome. However,
13 "it is a cardinal principle" of statutory interpretation that when a
14 statute raises "a serious doubt" as to its constitutionality, "this
15 Court will first ascertain whether a construction of the statute is
16 fairly possible by which the question may be avoided." Crowell v.
17 Benson, 285 U.S. 22, 62 (1932); see also United States v. X-Citement
18 Video, Inc., 513 U.S. 64, 78 (1994); United States v. Jin Fuey Moy,
19 241 U.S. 394, 401 (1916). Accordingly, the Court will construe
20 section 76120 as prohibiting only that expression which falls outside
21 the bounds of protection of the First Amendment. See, e.g., Tinker v.
22 Des Moines Indep. Community Sch. Dist., 393 U.S. 503, 513 (1969)
23 ("[C]onduct by the student, in class or out of it, which for any
24 reason . . . materially disrupts classwork or involves substantial
25 disorder or invasion of the rights of others is, of course, not
26 immunized by the constitutional guarantee of freedom of speech."),
27 cited in Grayned v. Rockford, 408 U.S. 104, 118 (1972); Giebel v.
28 Sylvester, 244 F.3d 1182, 1187 (9th Cir. 2001) ("narrow categories of

1 speech, such as obscenity, are wholly outside the First Amendment").

2 **D. Whether BP 8000 Violates the Supremacy Clause**

3 Plaintiffs first contend that the following provision of BP 8000
4 violates the Supremacy Clause⁵ of the United States Constitution:
5 "Expression by students which may otherwise fall within the First
6 Amendment IS NOT PROTECTED IF IT VIOLATES . . . Section 76120."
7 Motion Ex. 1 at § II.A.2 (emphasis in original). Clearly, this
8 language suggests that the prohibitions contained in section 76120
9 will be elevated above the guarantees of the United States
10 Constitution. But this Court is obligated, as noted above, to read
11 section 76120 as consistent with the free speech guarantees of the
12 First Amendment. Accordingly, in this facial challenge to BP 8000,
13 the Court finds that there is no expression protected by the First
14 Amendment that would violate section 76120. The Court does not rule
15 out the possibility, however, that students could rely on the
16 Supremacy Clause in a subsequent as-applied challenge to BP 8000 if
17 Defendant were to punish or prohibit protected expression as violative
18 of BP 8000 and section 76120.

19 **E. Whether State or Federal Constitutional Law Applies**

20 Before reaching Plaintiffs' challenges to BP 8000, the Court must
21 address the role of state law in this case. Here, Plaintiffs
22 challenge the validity of BP 8000 on the basis of both the United
23 States Constitution and the California Constitution. The Ninth
24 Circuit follows the doctrine that federal courts "should avoid
25 adjudication of federal constitutional claims when alternative state

26
27 ⁵"This Constitution . . . shall be the Supreme Law of the Land;
28 and the Judges in every State shall be bound thereby, any Thing in the
U.S. Const. art. VI, § 2.

1 grounds are available." Vernon v. City of Los Angeles, 27 F.3d 1385,
2 1391-92 (9th Cir. 1994). "Where the state constitutional provisions
3 offer more expansive protection than the federal constitution, [the
4 Court] must address the state constitutional claims in order to avoid
5 unnecessary consideration of the federal constitutional claims." Id.
6 at 1392. Thus, "[i]f the California Constitution provides
7 'independent support' for [Plaintiff's] claims, then 'there is no need
8 for decision of the federal [constitutional] issue.'" Carreras v.
9 City of Anaheim, 768 F.2d 1039, 1042-43 (9th Cir. 1985)(quoting City
10 of Mesquite v. Aladdin's Castle, Inc., 455 U.S. 283, 294-95 (1982))
11 (applying California law).

12 The California Constitution provides, in pertinent part: "Every
13 person may freely speak, write and publish his or her sentiments on
14 all subjects, being responsible for the abuse of this right. A law
15 may not restrain or abridge liberty of speech or press." Cal. Const.
16 art. I, § 2; compare U.S. Const. amend. 1 ("Congress shall make no law
17 . . . abridging the freedom of speech, or of the press; or the right
18 of the people peaceably to assemble, and to petition the Government
19 for a redress of grievances."). "The California Constitution, and
20 California cases construing it, accords greater protection to the
21 expression of free speech than does the United States Constitution."
22 Gonzalez v. Superior Court (City of Santa Paula), 180 Cal.App.3d 1116,
23 1122 (1986) (citing Robins v. Pruneyard Shopping Center, 23 Cal. 3d
24 899, 903, 907-10 (1979), among others). The state constitutional
25 provisions are more protective and inclusive of the rights to free
26 speech and press than the federal counterpart. Id. at 1123.

27 While the free speech provisions differ, California courts draw
28 upon both state and federal law for their state constitutional

1 analyses. See U.C. Nuclear Weapons Labs Conversion Project v.
2 Lawrence Livermore Lab., 154 Cal.App.3d 1157, 1163 (1984); Gonzalez,
3 180 Cal. App. 3d at 1123 (federal law provides guidance). "Federal
4 principles are relevant but not conclusive so long as federal rights
5 are protected." Robins, 23 Cal.3d at 909. "[W]here state law affords
6 greater protection to expression of free speech than federal law,
7 state law prevails." Gonzales, 180 Cal.App.3d at 1122. These
8 principles will guide the Court in its analysis of Plaintiffs'
9 constitutional challenges. Although Plaintiffs have, in their Motion,
10 presented their state and federal constitutional challenges
11 separately, the Court will, for the most part, treat them together.

12 **F. Whether BP 8000 is an Impermissible Prior Restraint**

13 "A prior restraint exists when the enjoyment of protected
14 expression is contingent upon the approval of government officials."
15 Baby Tam & Co., Inc. v. City of Las Vegas, 154 F.3d 1097, 1100 (9th
16 Cir. 1998) (citing Near v. State of Minn. ex rel Olson, 283 U.S. 697,
17 713 (1931)). "Although prior restraints are not unconstitutional per
18 se, the Supreme Court has repeatedly stated that '[a]ny system of
19 prior restraint' bears a 'heavy presumption against its constitutional
20 validity.'" Id. (quoting FW/PBS, Inc. v. City of Dallas, 493 U.S. 215,
21 225 (1990)). To pass constitutional muster a prior restraint must,
22 inter alia, require that a decision "'be made within a brief,
23 specified and reasonably prompt period of time,'" Burbridge, 74
24 F.Supp. at 953 (quoting Baby Tam, 154 F.3d at 1100-01), and allow for
25 prompt judicial review, id. (citing Baby Tam, 154 F.3d at 1101-02).

26 Plaintiffs contend generally that BP 8000 is an impermissible
27 prior restraint. See Motion at 21-22. The Court disagrees, but finds
28 that four individual provisions are unconstitutional. Section V.B.2

1 provides that "[u]se of any portion of the GROUNDS must be reserved.
2 The decision whether to allow use of the GROUNDS lies solely within
3 the discretion of the President."⁶ Motion Ex. 1 at § V.B.2. Section
4 V.B.4(a)(1) provides that on the campus of Irvine Valley College,
5 "[n]o amplification of any type shall be permitted within Quad A or B
6 or the Grounds without approval of the President." Id. at §
7 V.B.4(a)(1). Section V.C provides that "[a]ny portion of interior
8 SOCCCD property must be reserved. The decision to allow use of the
9 interior of any SOCCCD property lies solely under the discretion of
10 the President." Id. at § V.C.2. Lastly, interior amplification must
11 be authorized by the President. Id. at § V.C.3.

12 These sections are prior restraints because they condition
13 expression in certain areas of the District's campuses upon approval
14 of the administration. Accordingly, they are subject to strict
15 scrutiny. In particular, they "may not delegate overly broad
16 licensing discretion to a government official." Forsyth County v.
17 Nationalist Movement, 505 U.S. 123, 130 (1992). The four sections
18 identified here delegate completely unfettered discretion to the
19 campus presidents to permit or prohibit expression. When a permit
20 scheme is "completely discretionary, there is a danger that protected
21 speech will be suppressed impermissibly because of the government
22 official's . . . distaste for the content of the speech." Young v.
23 City of Simi Valley, 216 F.3d 807, 819 (9th Cir. 2000) (citing FW/PBS,
24 493 U.S. at 226). Because these provisions provide the presidents
25 with absolutely no standards to guide their decisions, they are

27
28 ⁶The grounds are defined as outdoor areas on the campuses not covered by section V.A of BP 8000. See Motion Ex. 1 at V.B.1.

1 unconstitutional and must be stricken.⁷

2
3 **G. Whether BP 8000 is a Permissible Time, Place, and Manner**
4 **Restriction**

5 There is no doubt that the fora at issue - the facilities and
6 areas which the college has made generally available for use by
7 students and the community at large - have been opened to the public.
8 See Motion Ex. 1 at § I.A.3 ("The SOCCCD is committed to assuring that
9 all persons may exercise their respective constitutional rights
10 protected under the First Amendment of the Federal Constitution[], and
11 similar provisions within the California Constitution throughout the
12 facilities under its jurisdiction"); see also Widmar v.
13 Vincent, 454 U.S. 263, 267-69 (1981) (treating university facilities
14 as designated public fora where the university had opened its
15 facilities for use by student groups); Burbridge, 74 F.Supp.2d at 947-
16 48. Once the state elects to open a forum to the public for
17 expressive activities, the state may establish and enforce
18 "reasonable, time, place and manner regulations" as long as they (1)
19 are content-neutral, (2) are narrowly tailored to serve a significant

20 ⁷The Court briefly explains why three other provisions are not
21 prior restraints. None of them give "public officials the power to
22 deny use of a forum in advance of actual expression." Ward v. Rock
23 Against Racism, 491 U.S. 781, 795 n.5 (1989) (quoting Southeastern
24 Promotions, Ltd. v. Conrad, 420 U.S. 546, 553 (1975)). First, BP 8000
25 provides for optional reservation systems for the prime areas on each
26 campus. See Motion Ex. 1 at § V.A.7. Because students are not
27 required to reserve, their expression is not conditioned upon approval
28 by the District administration. Similarly, BP 8000 requires a
reservation for the use of its amplification system in these prime
areas. See id. at § V.A.9. But students may bring their own
amplifications systems. See id. at § V.A.10(f). Accordingly,
amplified speech is not conditioned upon the approval of the
District's administrators. Finally, all postings by students must
contain certain required information and may contain certain other
information. See id. at § VIII.B.4. Students need not, however, seek
approval before posting their written material. See id. at § VIII.A.

1 governmental interest, and (3) leave open ample alternative channels
2 of communication. Gonzales, 180 Cal.App.3d at 1125 (concerning both
3 state and federal constitutions but quoting United States v. Grace,
4 461 U.S. 171, 177 (1983)); accord Robins, 23 Cal.3d at 909 ("property
5 owners as well as government may regulate speech as to time, place and
6 manner").

7 1. Content-Based Provisions

8 Any policy regulating protected speech and advocacy activities in
9 a public (or designated public) forum, "which is 'based upon the
10 content of speech[,] requires strict scrutiny." U.C. Nuclear Weapons
11 Labs, 154 Cal.App.3d at 1170 (concerning both state and federal
12 constitutions but quoting Consolidated Edison Co. v. Public Serv.
13 Comm'n, 447 U.S. 530, 535-36 (1980)). "'For the State to enforce a
14 content-based exclusion it must show that its regulation is necessary
15 to serve a compelling state interest and that it is narrowly drawn to
16 achieve that end.'" Foti, 146 F.3d at 635 (quoting Perry Educ. Ass'n
17 v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983) (citation
18 omitted)). Content-based provisions must also use the least
19 restrictive means to further the articulated interest. See id. at 636
20 (citing Sable Communications of Cal. v. FCC, 492 U.S. 115, 126
21 (1989)).

22 "'As a general rule, laws that by their terms distinguish favored
23 speech from disfavored speech on the basis of the ideas or views
24 expressed are content based.'" See Foti, 146 F.3d at 636 (quoting
25 Turner Broad. Sys. v. FCC, 512 U.S. 622, 643 (1994)); see also S.O.C.,
26 152 F.3d at 1145 ("A speech restriction is content-neutral if it is
27 'justified without reference to the content of the regulated
28 speech.'") (quoting Clark v. Comm'y for Creative Non-Violence, 468

1 U.S. 288, 293 (1984)). BP 8000 purports to be content-neutral, but,
2 in the same sentence, acknowledges that it is not. See Motion Ex. 1
3 at § IV.C ("The policy is content-neutral **with the exception of ED**
4 **76120, and to the extent that it seeks to preclude certain types of**
5 **speech designated herein below.**") (emphasis added). BP 8000 is
6 content-based in any section wherein it distinguishes between
7 protected and unprotected (or violative of Section 76120) expression.
8 Plaintiffs identify fourteen sections and subsections as being
9 content-based: Sections II.A.3, II.A.4, II.B, III, VII, VIII.B.7,
10 VIII.B.8, IX.E, XII, XIII.G.2, XIII.I.2, XIII.L.1(h), XIII.M, and
11 XV.F.⁸ For the reasons noted above, Plaintiffs do not have standing
12 to challenge any provisions in §§ XIII and XV. With regard to the
13 remaining nine sections, the Court agrees that all but one are
14 content-based.⁹

15 a. *Provisions Based on Section 76120*

16 Section III provides for administrative review of complaints that
17 student speech has violated section 76120. In particular, section
18 III.E requires the President of each campus to initially respond to
19 complaints that student expression has violated section 76120, while
20 sections III.H and III.I establish the procedures for the institution
21

22 ⁸The Court notes that several other provisions of BP 8000 not
23 identified by Plaintiffs also distinguish between protected and
24 unprotected expression. Because they are not explicitly challenged,
25 the Court does not determine, at this time, if they are permissible.
Defendant should not construe the Court's nonaction in this regard as
a judgment that those provisions are constitutional.

26 ⁹Section II merely describes section 76120 and California
27 defamation law. With the exception of section II.A.3, which the
28 Court addresses with regard to Plaintiffs' overbreadth claim, below,
section II does not independently call for any content-based
determination to be made by District administrators.

1 of administrative proceedings in response to such a complaint:

2 H. Administrative Proceedings

3 The President may institute administrative proceedings
4 against the student if the President determines that
5 the provisions of Section 76120 are violated. The
6 President and/or Chancellor each have sole discretion
7 to institute administrative proceedings.

8 I. The President and/or Chancellor shall consult with
9 legal counsel and receive a written legal opinion that
10 there is a reasonable basis that Section 76120 has been
11 violated . . . before the President may institute
12 administrative proceedings.

13 Motion Ex. 1 at §§ III.H-I. Similarly, section VII establishes the
14 procedures by which the administration may independently institute
15 administrative proceedings:

16 A. The President of each campus reserves the right to
17 institute administrative proceedings against each
18 student who violates the provisions of this policy
19 including the provisions of Section 76120.

20 B. Disciplinary proceedings shall **not** be based on content
21 of any statement with the following exceptions [sic]:

22 1. Violation of Education Code 76120

23 C. All rights and remedies with regard to administrative
24 review set forth in other Policies which govern student
25 actions are incorporated herein by reference.

26 Motion Ex. 1 at § VII (emphasis in original).

27 Sections VIII and IX apply to postings and distribution of
28 writings on the District's campuses. Section VIII.B.7 gives the
29 District "the absolute right to review writings [sic] after it is
30 posted to determine if it complies with Education Code Section 76120."

31 Motion Ex. 1 at § VIII.B.7. Section VIII.B.8 allows the District to
32 order the removal of any writing that violates section 76120, Motion
33 Ex. 1 at § VIII.B.8(a)(2), and gives the President the discretion,
34 after consulting with legal counsel, to institute disciplinary
35 proceedings based on a single violation of section 76120, id. at §

1 VIII.B.8(c). Section IX.E.1 allows the President to order any person
2 distributing material violative of section 76120 to stop distributing
3 the writing. Motion Ex. 1 at § IX.E.1.

4 All these sections require District administrators to examine the
5 content of expression to determine if it violates section 76120 and
6 then allow or require administrators to take punitive, disciplinary
7 action based on that content. Accordingly, the Court determines that
8 the sections are content-based. Cf. Mardi Gras of San Luis Obispo v.
9 City of San Luis Obispo, No. CV 02-323, - F.Supp.2d - , 2002 WL
10 389457, *7 (C.D. Cal. Feb. 11, 2002) (finding that a city ordinance
11 was content-based because it required "a City official [to] make a
12 determination whether an activity proposed by an applicant is
13 protected by the First Amendment"). Because the regulations are
14 content-based, "Defendant[] must demonstrate that [the provisions] are
15 necessary to further a compelling interest and that they are narrowly
16 drawn to achieve that end." Burbridge, 74 F.Supp.2d at 950 (citing
17 Foti, 146 F.3d at 635). Defendant contends that BP 8000 "strikes a
18 very reasonable balance between its rights and **duties** imposed by
19 Section 76120 . . . and the First Amendment." Opp'n at 10:9-10
20 (emphasis in original). The Court interprets this statement to mean
21 that Defendant is asserting a compelling state interest in complying
22 with section 76120.

23 The state has a compelling interest in the enforcement of its
24 **criminal** laws. See, e.g., Branzburg v. Hayes, 408 U.S. 665, 700-01
25 (1972). But the District has no compelling interest in enforcing
26 state **civil** law if doing so impinges on First Amendment rights.
27 See Bessard v. Cal. Comm'y Colleges, 867 F.Supp. 1454, 1464 (E.D. Cal.
28 1994). Although the Court has not construed section 76120 as

1 prohibiting any protected expression, the District's enforcement of
2 that code section infringes on students' First Amendment rights in
3 that it requires District administrators to examine the content of the
4 students' expression.

5 Defendant must proffer compelling reasons to justify each
6 prohibition in section 76120 and adopted by BP 8000. The Court can
7 conceive of a number of legitimate state interests, such as protecting
8 student health and safety and preventing disruption of the learning
9 environment, that might be served by prohibiting the kinds of speech
10 proscribed by section 76120. Cf. Orin v. Barclay, 272 F.3d 1207,
11 1214-15 (9th Cir. 2001) (upholding content-neutral restrictions as
12 narrowly tailored to a community college's pedagogical purpose). But
13 Defendant has not identified any such interests beyond those
14 identified in the policy itself. See Motion Ex. 1 at § I.A.4 ("This
15 policy is designed to encourage . . . students who want to attend
16 class, and need to study in a peaceful and quiet setting, to do so
17 without interference or disruption."). More importantly, Defendant
18 has not demonstrated that these interests are compelling (as opposed
19 to merely significant) and has not demonstrated that the content-based
20 restrictions are narrowly tailored to these ends. Cf. S.O.C., 152
21 F.3d at 1146 ("These substantial interests, however, may not be
22 compelling Because Clark County assumed throughout these
23 proceedings that Ordinance Section 16.12 is content-neutral, it has
24 not offered any reason why its interests in aesthetics and traffic
25 safety are compelling."); see also Healy v. James, 408 U.S. 169, 184
26 (1972) ("While a college has a legitimate interest in preventing
27 disruption on campus . . . , a 'heavy burden' rests on the college to
28 demonstrate the appropriateness of that action."), quoted in Widmar v.

1 Vincent, 454 U.S. 263, 270 n.7 (1981).

2 The burden is on Defendant, not the Court, to justify the
3 content-based sections of BP 8000. See Williams v. Eastside
4 Lumberyard & Supply Co., No. 99 CV 4237 JPG, 2001 WL 1801234, *7 (S.D.
5 Ill. March 23, 2001) ("A judge is the impartial umpire of legal
6 battles, not a [party's] attorney. He is neither required to hunt
7 down arguments [the parties] keep camouflaged, nor required to address
8 perfunctory and undeveloped arguments [T]o the extent that
9 [Defendant] failed to develop any additional argument[s] or provide
10 any legal support for them, [it] has waived them.") (citing cases
11 including United States v. Dunkel, 927 F.2d 955, 956 (7th Cir. 1991)
12 ("Judges are not like pigs, hunting for truffles buried in briefs.")).

13 Nevertheless, the Court finds that the District has a compelling
14 state interest in preventing "the commission of unlawful acts on
15 community college premises" and "the substantial disruption of the
16 orderly operation of the community college." Cal. Educ. Code § 76120.
17 See, e.g., Tinker, 393 U.S. at 513; Stockton v. City of Freeport, 147
18 F.Supp.2d 642, 647 (S.D. Tex. 2001) (school has "dramatically
19 compelling interests in maintaining a safe place of learning"); Pi
20 Lambda Phi Fraternity, Inc. v. Univ. of Pittsburgh, 58 F.Supp.2d 619,
21 625 (W.D. Pa. 1999) (university has "a compelling interest in
22 maintaining a safe educational environment"). But the Court cannot
23 find that the District has a compelling interest in preventing the
24 other types of expression that are prohibited by section 76120. Even
25 if section 76120 prohibits only expression outside the protection of
26 the First Amendment, Defendant must proffer a compelling state
27 interest that justifies the examination of the content of expression
28 to root out that prohibited expression. Given the interest of the

1 faculty and student body in intellectual freedom, the Court cannot
2 find that the District has a compelling interest in, for example,
3 prohibiting obscenity that justifies these content-based provisions.
4 See, e.g., Keyishian v. Bd. of Regents of the Univ. of the State of
5 New York, 385 U.S. 589, 603 (1967) ("Our Nation is deeply committed to
6 safeguarding academic freedom [T]he First Amendment . . . does
7 not tolerate laws that cast a pall of orthodoxy over the classroom.").

8 Because the Court does not find a compelling interest justifying
9 the examination of the content of student expression to root out all
10 speech prohibited by section 76120, the blanket enforcement of section
11 76120 is not narrowly tailored to those interests that the Court finds
12 are compelling. Cf. Tinker, 393 U.S. at 508 ("undifferentiated fear
13 or apprehension of disturbance is not enough to overcome the right to
14 freedom of expression"). Accordingly, the blanket imposition of the
15 terms of section 76120 must be stricken.

16 *b. Ban on Certain Advertising Materials*

17 Additionally, Plaintiffs contest BP 8000 § XII, which bans
18 certain types of materials from the District's campuses:¹⁰

- 19 A. All commercial material which advertises the following
20 items are [sic] banned from any SOCCCD property:
- 21 1. Alcoholic beverages, including wine, liquor, and
22 beer of any type (exception non-alcoholic beer);
 - 23 2. Tobacco products of any kind, including
24 cigarettes, cigars, and chewing tobacco;
 - 25 3. Guns or firearms of any kind;
 - 26 4. Illegal substances as identified by the Federal
27 Government, and/or by the State of California;
 - 28 5. Explosive materials of any kind.

¹⁰Plaintiffs do not have standing to contest section XII.C.

1 B. All material which is defamatory and/or which contains
2 obscene language as defined by Education Code Section
76120 is prohibited.

3 Motion Ex. 1 at § XII.A, B. Section XII.B is unconstitutionally
4 content-based for the same reasons as the other provisions regarding
5 section 76120 discussed above. This provision, too, must be stricken
6 from the policy. Section XII.A is also content-based, as it singles
7 out certain kinds of commercial advertising based on its content.¹¹
8 Defendant has offered no state interest in defense of the advertising
9 ban. See Opp'n at 11 n.7 ("It is submitted that an educational
10 facility can ban tobacco and alcohol ads.").¹²

11 Commercial speech does not fall outside the purview of the First
12 Amendment. See Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 121
13 S.Ct. 2404, 2421 (2001) (citing Virginia Bd. of Pharmacy v. Virginia
14 Citizens Consumer Council, 425 U.S. 748, 762 (1976)). The Court is to
15 apply "a framework for analyzing regulations of commercial speech that
16 is 'substantially' similar to the test for time, place, and manner
17 restrictions." Id. (quoting Bd. of Trustees of State Univ. of N.Y. v.
18 Fox, 492 U.S. 469, 477 (1989)). The test, established in Central
19 Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y., 477 U.S. 557
20 (1980), contains four elements:

21
22 ¹¹The Court can only assume that section XII.A is an attempt to
23 avoid the problems the District faced with its prior policy, which
24 prohibited **all** commercial advertising. See Burbridge, 74 F.Supp.2d at
25 949-50. But the current policy is no less content-based. See id. at
26 950 (finding content-based provisions of the former policy that
distinguished between advertising for "the occasional/incidental sale
of personal property" and other commercial advertising).

27 ¹²Because Plaintiffs have brought a time, place, and manner
28 challenge to these provisions, not an overbreadth challenge, the
discussion of ripeness in Board of Trustees of the State Univ. of N.Y.
v. Fox, 492 U.S. 469, 481-86 (1989), is not relevant.

1 "At the outset, [the Court] must determine whether the
2 expression is protected by the First Amendment. For
3 commercial speech to come within that provision, it at least
4 must concern lawful activity and not be misleading. Next,
5 we ask whether the asserted governmental interest is
substantial. If both inquiries yield positive answers, we
must determine whether the regulation directly advances the
governmental interest asserted, and whether it is not more
extensive than is necessary to serve that interest."

6 Lorillard, 121 S.Ct. at 2421 (quoting Central Hudson, 477 U.S. at
7 566). In Burbridge, the Court found that a ban on commercial
8 advertising was not narrowly tailored to either of Defendant's two
9 proffered interests. See 74 F.Supp.2d at 949-50. Given the state's
10 interest in enforcing its **criminal** laws, discussed supra, and the
11 theory that "product advertising stimulates demand for products,"
12 Lorillard, 121 S.Ct. at 2423, the Court finds that the ban on
13 advertising of "[i]llegal substances as identified by the Federal
14 Government, and/or by the State of California," Motion Ex. 1 at §
15 XII.A.4, is permissible. The other provisions, however, are not
16 supported by any state interest, are unconstitutionally content-based,
17 and must be stricken.¹³

18
19 ¹³Even if Defendant had identified a relevant state interest, "a
20 complete ban on the communication of truthful information . . . to
21 adult customers," Lorillard, 121 S.Ct. at 2425, would not be the least
22 restrictive means necessary to advance that interest. In the Fall
23 2001 semester, 1,083 of the District's 33,706 students (3 percent)
24 were under 18 years of age, while an additional 9,685 students (29
25 percent) were between 18 and 21 years of age. South Orange County
26 Community College District, The Almanac,
27 <http://www.socccd.cc.ca.us/ref/almanac/demographics/diststudcharf.htm>
28 (last updated 9/24/01). Sixty-eight percent of the District's
students are legally of age to buy alcohol, tobacco, and firearm
products. Therefore, section XII completely bans advertising of
lawful production information to an adult population.

Both because section XII bans advertising directed at an adult
population and because the reasoning of the decision has been called
into question by Lorillard, Defendant's reliance on Eller Media Co. v.
City of Oakland, No. C 98-02237 WHA, 2000 WL 33376585 (N.D. Cal. Dec.

(continued...)

1 *c. Denial of Reservations*

2 Section V.A.7[(d)]¹⁴ provides that an application to reserve a
3 prime area on campus may only be denied:

4 (i) if there is a preexisting reservation, (ii) such
5 conditions as may be applicable to the lawn areas, (iii)
6 and/or there is an unreasonable risk of harm or an activity
7 that will create an unreasonable risk of harm (set forth in
Section XIII), or [(iv)] there is a clear violation of ED
76120.

8 Motion Ex. 1 at § V.A.7[(d)]. The first two bases for denial
9 (preexisting reservations and lawn maintenance) are content-neutral
10 and will be discussed below. The third and fourth bases are content-
11 based, as they require the administrator to examine the content of the
12 proposed expression to determine if it will create an unreasonable
13 risk of harm or violates section 76120. An unreasonable risk of harm
14 is defined as including “[c]ertain types of music concerts where in
15 the discretion of the President an unreasonable risk of harm is
16 foreseeable.” Motion Ex. 1 at § XIII.L.1(h).

17 The provision that allows administrators to rely on section 76120
18 to deny a reservation must be stricken for the same reasons that the
19 other section 76120 provisions in BP 8000 are impermissible. As a
20 general matter, also for reasons discussed above, the District has a
21 compelling state interest in prohibiting expression that will create
22 an unreasonable risk of harm. However, the Court agrees that the
23 prohibition on “[c]ertain types of music concerts” is

24
25 ¹³(...continued)
26 7, 2000), is misplaced.

27 ¹⁴Section V.A.7 actually contains two subsections labeled “c.”
28 For ease of reference, the Court refers to the second subsection as
“(d).”

1 unconstitutional. As the Court has held, this optional reservation
2 system is not a true prior restraint. Nevertheless, the Court
3 concludes that, having chosen to give students the option of reserving
4 space, the District, in establishing a system for denying those
5 reservations, must adopt the same types of procedural protections and
6 guidance that characterize valid prior restraints. The provision as
7 written gives the campus presidents unbridled discretion in choosing
8 which music concerts to prohibit. Accordingly, this basis for denying
9 a reservation must be stricken.

10 The other activities barred by section XIII.L.1 are not
11 expressive. The Court assumes they are permissible grounds for
12 prohibiting student activity. But section XIII.L.1 also gives the
13 campus presidents unlimited discretion to identify other types of
14 expressive activities that create an unreasonable risk of harm. This
15 unbridled discretion is impermissible and must be stricken.

16 2. Content-Neutral Provisions¹⁵

17 Plaintiffs also identify a number of content-neutral provisions
18 that, they contend, are not narrowly tailored to significant state
19 interests and do not leave open adequate alternative avenues for
20 communication. The failure to satisfy any one of the three prongs of
21 a time, place, and manner regulation is constitutionally fatal. Perry
22 Educ. Ass'n v. Perry Local Educator's Ass'n, 460 U.S. 37, 45 (1983).
23 The Court addresses only those content-neutral provisions identified
24 by Plaintiffs that do not suffer from constitutional flaws discussed

25
26
27 ¹⁵The provisions discussed in this section of the Court's Order
28 are the only ones to which the Supreme Court's recent decision in
Thomas v. Chicago Park Dist., 122 S.Ct. 775 (2002), are relevant.

1 elsewhere in this Order.¹⁶

2 a. *Exception for the SOCCCD and its Contractors*

3 BP 8000 excepts the District and "all persons or groups who enter
4 into contracts with SOCCCD" from "the provisions pertaining to
5 banners, posters, and/or distribution of material" Motion Ex.
6 1 at § I.B.1, 2; see also id. at § X.D (excepting contractors from the
7 restrictions on banners). The Court agrees with Plaintiffs that these
8 two provisions are unconstitutional to the extent that they exempt
9 contractors from the requirements of BP 8000. "Granting waivers to
10 favored speakers . . . would of course be unconstitutional" Thomas v. Chicago Park Dist., 122 S.Ct. 775, 781 (2002).¹⁷

12 Accordingly, sections I.B.2 and X.D must be stricken from BP 8000.

13 Defendant asserts that it "has the right to exempt itself from
14 the scope of the Policy since it is the enforcing entity." Opp'n at
15 19:22-23. See Motion Ex. 1 at § I.B.1 ("The restrictions set forth in
16 this policy including those with regard to amplification, posting,
17 and/or distribution of material, including banners, are **NOT** applicable
18 to SOCCCD.") (emphasis in original). Defendant cites no legal
19 authority in support of this proposition. On the other hand,
20 Plaintiffs have provided no contrary authority. The Court will

23 ¹⁶Plaintiffs do not appear to challenge the limits on the hours
24 that amplification may be used on campus. See Motion Ex. 1 at §
25 V.A.10(a)-(b). Accordingly, the Court does not rule on the
26 constitutionality of these provisions. However, the Court notes its
concern that these provisions do not meet the requirement of leaving
open adequate alternative avenues for communication.

27 ¹⁷The Thomas Court rejected a facial challenge on this ground
28 because "a pattern of unlawful favoritism" had not been shown. 122
S.Ct. at 781. In this case however, the blanket waiver for favored
groups is explicit and a facial challenge is appropriate.

1 reserve ruling on this provision at this time.¹⁸

2 **b. Lawn Maintenance**

3 Section V.A.6 excludes use of the lawn areas on the campuses in
4 the following cases:

- 5 1) In the event of substantial rainfall, the President may
6 limit or restrict access on the lawn until such time as
7 it is relatively safe to utilize the lawn area;
- 8 2) During watering periods;
- 9 3) During maintenance by the gardeners;
- 10 4) During times when the area may contain pesticides,
11 and/or fertilizer;
- 12 5) A reasonable period as may be determined by the
13 President related to the care, feeding, and/or
14 maintenance of the grass area.

15 Motion Ex. 1 at § V.A.6. Plaintiffs contend that this section is not
16 narrowly tailored to any significant interest because the last section
17 gives the campus presidents discretion to prohibit speech with which
18 they disagree. See Motion at 7:24-8:5.

19 Defendant asserts that "care and maintenance of the lawn area is
20 essential." Opp'n at 14:8. Although Defendant has not presented a
21 terribly helpful formulation, the Court agrees that the District has a
22 substantial interest in the upkeep of its property. Cf. Community for
23 Creative Non-Violence, 468 U.S. at 296 (recognizing the government's
24 "substantial interest in maintaining the parks . . . in an attractive
25 and intact condition"). The Court also finds that the provision is
26 narrowly tailored in that it "'promotes a substantial government

27 ¹⁸The Ninth Circuit has not ruled on this question but has stated
28 that it is "troubled by [a] wholesale exemption for government
speech." Foti, 146 F.3d at 637. Defendant should not, therefore,
construe the lack of ruling on this question as a judgment that this
provision is constitutional.

1 interest that would be achieved less effectively absent the
2 regulation.'" Rock Against Racism, 491 U.S. at 799 (quoting United
3 States v. Albertini, 472 U.S. 675, 689 (1985)). Obviously, Defendant
4 would be less able to maintain its lawns if it were not permitted to
5 bar people from trampling on it during sensitive periods.

6 The discretion delegated to the campus presidents to set aside
7 time for lawn maintenance does not defeat this provision. Initially,
8 because this is not a prior restraint, it is not even clear to the
9 Court that Plaintiffs' discretion argument applies. Cf. Rock Against
10 Racism, 491 U.S. at 793-95. Additionally, the discretion is not
11 unfettered. The presidents may only set aside reasonable times for
12 lawn maintenance. If the campus presidents were setting aside more
13 time than was reasonable or prohibiting student expression during
14 times not required for lawn maintenance, Defendant would almost
15 certainly be subject to an as-applied challenge. See id. at 794-95
16 ("While these standards are undoubtedly flexible, and the officials
17 implementing them will exercise considerable discretion, perfect
18 clarity and precise guidance have never been required even of
19 regulations that restrict expressive activity The guideline is
20 not vulnerable to respondent's facial challenge.").

21 Lastly, the Court finds that the prohibitions on lawn use leave
22 ample alternative avenues for communication. Plaintiffs never argue
23 that these restrictions on lawn use do not leave open adequate other
24 areas for communication. Rather, they contend that under BP 8000 in
25 its entirety, there are not indoor venues available during evening
26 hours and inclement weather and there is no way to reach visitors to
27 campus during contractor events in the parking lots. See Motion at
28 13-14. The Court finds that during the limited periods when the lawn

1 areas are not available, many other areas on campus are available for
2 expression; and most of the time, the lawns themselves are available.
3 For these reasons, the Court finds that the prohibitions on lawn use
4 are reasonable time, place, and manner restrictions.

5 *c. Denial of Reservations*

6 The campus presidents may deny reservations for the prime areas
7 on campus when there is a preexisting reservation or because of
8 maintenance of the lawn areas. See Motion Ex. 1 at § V.A.7[(d)](i)-
9 (ii). For the reasons discussed above, the provision allowing denial
10 based on lawn maintenance is permissible. The Court also finds that
11 the provision allowing denial because there is a preexisting
12 reservation is a reasonable time, place, and manner restriction.
13 See Thomas, 122 S.Ct. at 777 n.1 (approving ordinance that allowed a
14 permit application to be denied because another permit application for
15 the same time and place had been approved or because it conflicted
16 with a previously planned program for the same time and place);
17 Grayned v. City of Rockford, 408 U.S. 104, 115 (1972) (“[T]wo parades
18 cannot march on the same street simultaneously, and government may
19 allow only one.”) (citing Cox v. New Hampshire, 312 U.S. 569, 576
20 (1941)).

21 *d. Charging for Costs of Litter Clean-up*

22 Lastly, Plaintiffs challenge the provision that allows the
23 District to charge the distributor of a writing for costs incurred in
24 cleaning up resulting litter. See Motion Ex. 1 at § IX.D. Plaintiffs
25 contend that this provision “vest[s] unbridled discretion to charge
26 costs of ‘clean-up’ for ‘litter’ by recipients based on content.”
27 Motion at 9:22-23.

28 As observed above, it is not even clear whether Plaintiffs’

1 unbridled discretion argument applies to this provision. See Rock
2 Against Racism, 491 U.S. at 793-95. The Court will uphold this
3 provision for the same reasons that the restrictions on lawn
4 maintenance are permissible.

5 **H. Whether BP 8000 is Unconstitutionally Overbroad**

6 Plaintiffs contend that BP 8000 is overbroad on a number of
7 grounds. Because Plaintiffs do not have standing to bring the
8 following challenges, the Court does not address the arguments that BP
9 8000 is overbroad because it extends section 76120 to non-student
10 speech both on- and off-campus, Motion at 16:18-20, 17:2-4; because it
11 imposes the restrictions of Section 76120 to Civic Center Act users,
12 Motion at 17:7-13; because it restricts access under the Civic Center
13 Act to non-profit organizations and groups, Motion at 17:16-18:6;
14 because it prohibits the public from distributing leaflets in certain
15 areas, Motion at 18:10-12; and because it limits anonymous speech by
16 non-students, Motion at 19:24-20:21. The Court now turns to
17 Plaintiffs' remaining arguments.

18 A regulation is unconstitutionally overbroad if it "'does not aim
19 specifically at evils within the allowable area of [government]
20 control, but . . . sweeps within its ambit other activities that
21 constitute an exercise' of protected expressive or associational
22 rights." Tribe, supra, § 12-27 at 1022 (quoting Thornhill v. Alabama,
23 310 U.S. 88, 97 (1940)) (alteration in original). "A plausible
24 challenge to a law as void for overbreadth can be made only when (1)
25 the protected activity is a significant part of the law's target, and
26 (2) there exists no satisfactory way of severing the law's
27 constitutional from its unconstitutional applications so as to excise
28 the latter clearly in a single step from the law's reach." Id.

1 (emphasis omitted).

2 1. Definitions of Defamation

3 Plaintiffs first contend that BP 8000 defines defamation too
4 broadly, see Motion Ex. 1 at § II.B, "and implies to someone reading
5 the policy . . . that speech outside these limits is not protected and
6 would, in fact, be barred by Education Code § 76120." Motion at
7 15:11-13. Plaintiffs argue that the defamation definition is
8 overbroad because "a potential speaker . . . might refrain from
9 speaking from fear his or her speech would not be protected." Id. at
10 16:5-7.

11 BP 8000 advises that it is providing information about California
12 defamation law "as a public service" and that "California defamation
13 law exists separate and apart from this policy" Motion Ex. 1
14 at § II.B.1. BP 8000 does not explicitly state whether the
15 definitions provided in the section on California defamation law are
16 intended to be exhaustive. The Court agrees with Plaintiffs that the
17 definitions provided are incomplete (e.g., the section does not
18 discuss the category of "limited public figures"). Nevertheless, the
19 Court finds that the provision is not unconstitutionally overbroad.
20 Given the Court's obligation to construe the statute to avoid
21 unconstitutionality, the Court finds that the provision simply
22 provides information by way of example and does not suggest that it is
23 a complete treatise on defamation law.

24 "Application of the overbreadth doctrine . . . has been employed
25 by the Court sparingly and only as a last resort. Facial overbreadth
26 has not been invoked when a limiting construction has been or could be
27 placed on the challenged statute." Broadrick, 413 U.S. at 613. In
28 this case, the Court does not interpret BP 8000's descriptions of

1 California defamation law as actually prohibiting any protected
2 expression. "Although such laws, if too broadly worded may deter
3 protected speech to some unknown extent, there comes a point where
4 that effect - at best a prediction - cannot, with confidence, justify
5 invalidating a statute on its face" Id. at 615. In this
6 case, the Court cannot say with confidence that BP 8000 would, for
7 example, deter a student from criticizing a limited public figure.
8 The Court finds that Plaintiffs' attack on the definitions of
9 defamation is better suited to an as-applied challenge should a
10 student actually be punished for protected speech. Cf. id. at 615-16
11 ("[W]hatever overbreadth may exist should be cured through case-by-
12 case analysis of the fact situations to which its sanctions,
13 assertedly, may not be applied.").¹⁹

14 2. Prohibition on Protected First Amendment Speech

15 Next, Plaintiffs contend that BP 8000 is overbroad in that it
16 prohibits otherwise protected speech that violates section 76120. The
17 Court rejects this argument for the same reasons it rejected
18 Plaintiffs' Supremacy Clause challenge, supra.

19 3. Extension of Section 76120 to Off-Campus Speech

20 Thirdly, Plaintiffs argue that BP 8000 is overbroad in that it
21 extends the prohibitions of section 76120 to students' off-campus
22 speech. See Motion at 16:18-20; 17:5-6. However, Plaintiffs have
23 pointed to no authority that would prohibit the District from applying
24 otherwise permissible time, place, and manner restrictions on its own
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28 ¹⁹Despite the Court's holding in this regard, Defendant is urged
to clarify or delete these provisions.

1 students' speech to off-campus facilities **used by the District.**²⁰ The
2 District's interest in, for example, preventing conduct that
3 "materially disrupts classwork or involves substantial disorder or
4 invasion of the rights of others," Tinker, 393 U.S. at 513, would
5 apply to off-campus facilities as well as on-campus. Therefore, to
6 the extent that the District can, consistent with this Order, enforce
7 section 76120, it may be applied to off-campus facilities used for
8 SOCCCD programs.

9
10 4. Ban on Leaflets on Windshields, in Parking Lots, and Inside Buildings

11 Lastly, Plaintiffs object to the sections of BP 8000 that
12 prohibit students from distributing writings "inside all buildings
13 including classrooms" and in "parking lots" as overbroad.²¹ Motion
14 Ex. 1 at §§ IX.C.1, 2; see also id. at § VIII.B.3(a)(3) (no posting on
15 windshields). The Court agrees. These sections ban **all** writings,
16 whether or not they violate section 76120 (and thus fall outside the
17 scope of protection of the First Amendment) and whether or not the
18 school has any legitimate interest in banning their distribution.

19
20 ²⁰BP 8000 only covers off-campus facilities "used for SOCCCD
21 programs." Motion Ex. 1 at § II.A.3. The Court notes that a
22 different result would likely be reached if BP 8000 purported to
23 regulate off-campus student speech in venues unconnected to the
24 District at all (or, in an as-applied challenge, if the District were
25 punishing expression by students in their non-academic lives).

26 ²¹Defendant contends, without much analysis, that the building
27 interiors and parking lots are not public fora. Opp'n at 24:16-17.
28 The Court disagrees and finds that they are, at least, designated
public fora. The District has opened them to the public to some
extent. See Motion Ex. 1 at § V.B (describing requirements for
student use of the grounds, including the parking lots); id. at § V.C
(describing requirements for student use of building interiors). Even
if the terms of BP 8000 did not open these areas to the public, the
fact that outside contractors are allowed to use them would lead the
Court to the same conclusion.

1 Like Plaintiffs, the Court conceives of a broad array of protected
2 expression barred by these provisions, ranging from class notes to the
3 campus newspaper to campaign materials. These sections are patently
4 overbroad. Cf. Krantz v. City of Fort Smith, 160 F.3d 1214 (8th Cir.
5 1998) (striking down as overbroad a city ordinance that prohibited the
6 placement of **all** leaflets on parked cars).²² The language is clear
7 and precise - all distribution of writings is barred; the Court cannot
8 narrow the provisions in a way to avoid the constitutional problem.

9 The Court must apply the time, place, and manner test discussed
10 above to these provisions. See id. at 1219. It is clear, because
11 they are not limited to those writings violative of section 76120,
12 that the provisions are content-neutral. However, the Court finds as
13 a matter of law that the provisions are not narrowly tailored to a
14 significant governmental interest. In fact, because the provisions
15 are so sweeping, Defendant will be unable to show that they are
16 narrowly tailored to anything. In particular, Defendant has not shown
17 that the provisions are narrowly tailored to the District's interest
18 in protecting students from being "cornered and deluged by persons who
19 seek to advertise or convert followers for any cause or seek
20 contributions" Opp'n at 22:23-24. Even if that were a
21 significant government interest, the provisions encompass writings

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25 ²²Defendant's effort to distinguish Krantz is unavailing.
26 Because the SOCCCD building interiors and parking lots are public
27 fora, it is irrelevant that Krantz involved public parking lots. It
28 is also irrelevant that the plaintiffs in Krantz were distributing
religious material. Like the sections of BP 8000 at issue here, the
ordinance in Krantz barred distribution of **all** leaflets. See Krantz,
160 F.3d at 1216 ("any commercial or non-commercial handbill").

1 that go far beyond advertising and soliciting.²³ Nor do the
2 provisions go very far in preventing advertising and soliciting, which
3 can happen in the absence of the distribution of written material.
4 Likewise, the provisions are not narrowly tailored to the prevention
5 of litter. First, these sections bar the distribution of a wide range
6 of writings, such as class notes, unlikely to result in litter.
7 Additionally, the District could punish those who create litter,
8 rather than barring the distribution of all writings. Cf. Krantz, 160
9 F.3d at 1219 (citing Schneider v. New Jersey, 308 U.S. 147, 163
10 (1939)). Because BP 8000 §§ IX.C.1 and IX.C.2 are not narrowly
11 tailored to a significant government interest, they are
12 unconstitutionally overbroad. The Court need not reach the question
13 of whether the District has left open ample areas for distribution of
14 writings.

15 **I. Whether BP 8000 Violates California Education Code § 66301**

16 Lastly, Plaintiffs contend that BP 8000 violates California
17 Education Code § 66301 ("section 66301"), which prohibits:

18 mak[ing] or enforc[ing] any rule subjecting any student to
19 disciplinary sanctions solely on the basis of conduct that
20 is speech or other communication that when engaged in
21 outside a campus of those institutions, is protected from
22 governmental restriction by the First Amendment to the
23 United States Constitution or Section 2 of Article 1 of the
24 California Constitution.

22 Because the Court has construed both section 76120 and BP 8000 as
23 prohibiting only speech that is unprotected by the First Amendment,
24 supra, BP 8000 does not violate section 66301.

25 //

26
27 ²³These provisions are thus distinguishable from Los Angeles
28 Alliance for Survival v. City of Los Angeles, 22 Cal.4th 352 (2000),
upon which Defendant relies. The ordinance at issue in Los Angeles
Alliance for Survival specifically prohibited solicitation.

1 **J. Whether the Unconstitutional Provisions of BP 8000 are Severable**

2 Defendant asks that the Court sever any unconstitutional
3 provisions of BP 8000 from the rest of the policy. Opp'n at 25:21-23.
4 Severability of a state regulation is a matter of state law. Leavitt
5 v. Jane L., 518 U.S. 137, 138 (1996). Under California law, three
6 criteria exist for severability: "the invalid provision must be
7 grammatically, functionally, and volitionally separable." Legislature
8 of the State of Cal. v. Eu, 54 Cal.3d 492, 535 (1991) [hereinafter
9 Legislature of Cal.]. That is, the provisions must be "grammatically
10 severed without affecting the operation of the remaining" provision.
11 Id. Second, severance must "not affect the function or operation of
12 the remaining provisions." Id. And, finally, the Court must find
13 that the drafters of BP 8000 "would have adopted the remaining
14 provisions had they foreseen the success of [Plaintiffs'] challenge."
15 Id. "Severance of particular provisions is permissible despite the
16 absence of a formal severance clause." Id. at 534-35.

17 The Court finds that several of the sections found to be
18 impermissible meet all the requirements for severance. Section
19 V.A.7[(d)]([iv]), section XIII.L.1(h), and the words "without
20 limitation" in section XIII.L.1 may be severed without affecting,
21 grammatically or functionally, the rest of the scheme for denying
22 students reservations for the prime areas on campus. The Court also
23 finds that the District would have adopted the scheme even in the
24 absence of these provisions. Additionally, sections XII.A.1-3, 5 and
25 XII.B can be severed grammatically and functionally. The ban on
26 advertising of illegal materials, section XII.A.4 remains functional.
27 The Court finds that the District would have adopted the ban on
28 advertising illegal materials even in the absence of the ban on other

1 commercial advertising. The bans on postings and distribution of
2 writings inside buildings, in parking lots, and on windshields,
3 sections IX.C.1, IX.C.2, and VIII.B.3(a)(3), are similarly severable
4 without affecting the rest of the regulations governing postings and
5 writings. The Court finds that the District would have adopted the
6 rest of the regulations in the absence of these particular provisions.

7 Next, the Court finds that several other provisions, while
8 grammatically severable, leave such a void in the policy that they are
9 not functionally and volitionally severable. The blanket exceptions
10 for activities of District contractors, sections I.B.2 and X.D, are
11 grammatically severable. But without them, it is entirely unclear
12 what rules, if any, apply to the actions of the contractors who
13 utilize District property. Because of this void, the Court cannot
14 find that the policy is functional or that the District would have
15 adopted it.

16 The impermissible prior restraints regarding use of the grounds
17 and interiors on the District's campuses are similarly troublesome.
18 The following sentences are grammatically severable: "The decision
19 whether to allow use of the GROUNDS lies solely within the discretion
20 of the President," Motion Ex. 1 at § V.B.2; "No amplification of any
21 type shall be permitted within Quad A or B or the Grounds without
22 approval by the President," id. at § V.B.4(a)(1); "The use of such
23 [interior] areas lies solely within the discretion of each College
24 President and/or Chancellor . . .," id. at § V.C.1; "The decision to
25 allow use of the interior of any SOCCCD property lies solely under the
26 discretion of the President," id. at § V.C.2; and "Amplification may
27 only be permitted within such areas as may be authorized by the
28 President such as the gym, auditoriums, and large meeting halls,"

1 id. at § V.C.3(a). These sections are not functionally severable as
2 it is entirely unclear how the reservation system for the grounds and
3 interior of buildings would work in their absence. The Court could
4 alternatively sever all provisions relating to the grounds and
5 interior of buildings. But this would leave a greater void, as it
6 would be unclear what access students have to those areas at all.
7 Because of these voids, the Court also finds that the provisions are
8 not volitionally severable.

9 Lastly, the Court must address the remaining content-based
10 provisions purporting to implement section 76120 that the Court has
11 not to be severable. Although many of these provisions are
12 grammatically severable, they are not functionally or volitionally
13 severable. Implementing section 76120 appears to be the District's
14 primary purpose in enacting BP 8000. Severing these sections would
15 leave the District without any scheme to administer BP 8000.
16 Accordingly, the Court cannot find that the policy is functional in
17 their absence or that the District would have adopted the policy at
18 all.

19 With the exception of section XIII.L.1(h), the ban on music
20 concerts likely to create an unreasonable risk of harm, and the
21 unlimited discretion allowed the campus presidents in that same
22 section, the Court has not addressed the provisions of BP 8000
23 applicable to the general public and Civic Center Act users. Section
24 XIII.L.1(h) and the words "without limitation" in section XII.L.1 are
25 severed from those provisions. The rest remain in effect.

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1 **IV. CONCLUSION**

2 For the foregoing reasons, the Court finds that a number of
3 provisions in Board Policy 8000 violate Plaintiffs' First Amendment
4 rights. Because many of the unconstitutional provisions are not
5 functionally or volitionally severable from the rest of the policy,
6 all provisions in BP 8000 applicable to students must be struck down
7 in their entirety. With the exception of section XIII.L.1(h) and the
8 words "without limitation" in section XIII.L.1, which are struck and
9 severed, the provisions applicable to the general public and Civic
10 Center Act users remain in effect. Plaintiffs' Motion for Summary
11 Adjudication is hereby GRANTED IN PART and DENIED IN PART.

12
13 **DATED:** _____

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15 _____
16 **AUDREY B. COLLINS**
17 **UNITED STATES DISTRICT JUDGE**
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