

United States District Court
Northern District of California

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

KIARA ROBLES,

Plaintiff,

v.

IN THE NAME OF HUMANITY, WE
REFUSE TO ACCEPT A FASCIST
AMERICA, et al.,

Defendants.

Case No. 17-cv-04864-CW

ORDER GRANTING THE REGENTS'
MOTION TO DISMISS; GRANTING
BERKELEY'S MOTION TO DISMISS;
AND GRANTING IN PART
MIRABDAL'S MOTION TO DISMISS
OR STRIKE PURSUANT TO ANTI-
SLAPP STATUTE

(Dkt. Nos. 11, 16, 43)

Plaintiff Kiara Robles filed this suit against Defendants In
the Name of Humanity, We REFUSE to Accept a Fascist America
(ANTIFA), The Regents of the University of California (Regents),
University of California Police Department (UCPD), the City of
Berkeley (Berkeley), Ian Dabney Miller, Raha Mirabdal, and DOES
1-20. Docket No. 15. On October 2, 2017, Berkeley moved to
dismiss the complaint. Docket No. 11. On October 4, 2017, the
Regents also moved to dismiss the complaint. Docket No. 16. On
February 8, 2018, Mirabdal moved to dismiss the complaint or to

1 strike it pursuant to the anti-SLAPP statute. Docket No. 43.
2 The Court found these motions to dismiss suitable for disposition
3 on the papers. Having reviewed the papers and the record, the
4 Court GRANTS Berkeley's motion to dismiss, GRANTS the Regents'
5 motion to dismiss, and GRANTS IN PART Mirabdal's motion to
6 dismiss or strike.

7 BACKGROUND

8 I. Factual Background

9 Unless otherwise noted, the factual background is taken from
10 the complaint, which is assumed to be true for purposes of
11 Defendants' motions to dismiss or strike.

12 Robles is a resident of Oakland, California. Complaint at
13 3. On February 1, 2017, she planned to attend a speech by Milo
14 Yiannopoulos, a conservative gay media personality and political
15 commentator, which was hosted at the University of California
16 Berkeley (UC Berkeley) by a registered student organization. Id.
17 3-4, ¶ 44. The Regents controls, administers, and manages UC
18 Berkeley. Id. ¶ 6. Robles and others arrived at UC Berkeley's
19 Sproul Plaza to hear Yiannopoulos speak. Id. at 3.

20 Around 1,500 protestors associated with ANTIFA also gathered
21 at Sproul Plaza. Id. According to Robles, ANTIFA is "a radical
22 American, left wing, anti-Trump, non-profit organization that
23 organizes demonstrations to achieve its political agenda." Id.
24 at 4. ANTIFA protestors soon "erupted into violence." Id. at 3.
25 ANTIFA orchestrated the violence in order to disrupt the
26 Yiannopoulos event. Id. ¶ 48. While Robles was being
27 interviewed by news station KGO-TV about her thoughts related to
28 the event, protestors surrounded her "combatively" and yelled

1 that she was a "fascist." Id. ¶ 49. Robles was attacked by both
2 masked and unmasked assailants with pepper spray and bear mace.
3 Id. at 3, ¶¶ 50-51.

4 At the time of the attack, there were "no campus police
5 close enough to Robles to protect her from her assaulter." Id.
6 ¶ 52. Robles alleges that "nearly 100 campus police and SWAT
7 members waited in the Student Union building, within eyesight of
8 the violence happening outside, watching the protestors become
9 more belligerent and dangerous." Id. (emphasis omitted). Robles
10 alleges that officers from UCPD and the City of Berkeley Police
11 Department (BPD) could see the attacks, yet they did not act to
12 protect any of the victims. Id. ¶ 54.

13 Soon after, Robles and others were again attacked by
14 protestors. Miller, an ANTIFA protestor, "struck" Robles "in the
15 face and body with flagpoles" until she "was forced to escape by
16 jumping over a metal barrier." Id. ¶ 55. Mirabdal, another
17 ANTIFA protestor, and several unknown assailants "surrounded" her
18 "combatively," and Mirabdal "shined a flashlight aggressively" in
19 Robles' face, "blinding" her and "placing her in fear and
20 apprehension of harm." Id. ¶ 64. Again, neither the UCPD or BPD
21 assisted Robles or apprehended her attackers. Id. ¶ 66.

22 II. Procedural Background

23 On June 5, 2017, Robles filed a related suit, Robles I,
24 against nearly all of the Defendants in the present suit -- the
25 Regents, UCPD, BPD, ANTIFA, Miller and Mirabdal -- as well as
26 several others -- Janet Napolitano, President of the University
27 of California; Monica Lozano, Chair of the Regents; Nicholas
28 Dirks, Chancellor of UC Berkeley; the Coalition to Defend

1 Affirmative Action, Integration, & Immigrant Rights, and Fight
2 for Equality by Any Means Necessary; Jesse Arreguin, mayor of
3 Berkeley; Margo Bennett, Chief of the UCPD; Andrew Greenwood,
4 Chief of the BPD; John Burton, California Democratic Party
5 Chairman; Nancy Pelosi, Minority Leader of the House of
6 Representatives; George Soros, an individual; and DOES 1-20.
7 Robles I, Case No. 17-3235, Docket No. 1. Id. In her Robles I
8 complaint, she asserted claims for: (1) violation of First
9 Amendment rights under 42 U.S.C. § 1983; (2) violation of Equal
10 Protection rights under 42 U.S.C. § 1983; (3) negligence;
11 (4) gross negligence; (5) premises liability; (6) negligent
12 infliction of emotional distress; (7) intentional infliction of
13 emotional distress; (8) assault; (9) battery; and (10) violation
14 of Bane Act, California Civil Code section 52.1. Id. On July
15 13, 2017, BPD, Arreguin, and Greenwood moved to dismiss the
16 complaint. Id., Docket No. 46. On July 17, 2017, the Regents,
17 Bennett, Dirks, Lozano, and Napolitano also moved to dismiss the
18 complaint. Id., Docket No. 51. One day later, Soros moved to
19 dismiss the complaint. Id., Docket No. 52. Before the motions
20 could be decided, Robles requested that the undersigned
21 voluntarily recuse from the case. Id., Docket No. 50. This
22 request was denied on July 25, 2017. Id., Docket No. 56. On
23 that same day, Robles voluntarily dismissed the case. Id.,
24 Docket No. 57.

25 Less than a month later, on August 22, 2017, Robles filed
26 the instant suit, Robles II, against the Regents, Berkeley, UCPD,
27 ANTIFA, Miller, and Mirabdal. Docket No. 1. Robles II involves
28 the same set of facts as Robles I and nearly the same set of

1 asserted claims, adding only one additional claim for a violation
2 of the Ralph Act, California Civil Code section 51.7. Id.
3 Berkeley filed a motion to relate the two cases, which the Court
4 granted. Robles I, Case No. 17-3235, Docket Nos. 58, 59.
5 Berkeley, the Regents, and Mirabdal have moved to dismiss or
6 strike the complaint. Docket Nos. 11, 16, 43. On October 24,
7 2017, Miller filed an answer to the complaint. Docket No. 26.
8 The UCPD and ANTIFA have not filed an answer or motion to
9 dismiss.¹

10 LEGAL STANDARD

11 A complaint must contain a "short and plain statement of the
12 claim showing that the pleader is entitled to relief." Fed. R.
13 Civ. P. 8(a). The plaintiff must proffer "enough facts to state
14 a claim to relief that is plausible on its face." Ashcroft v.
15 Iqbal, 556 U.S. 662, 678 (2009) (quoting Bell Atl. Corp. v.
16 Twombly, 550 U.S. 544, 570 (2007)). On a motion under Rule
17 12(b)(6) for failure to state a claim, dismissal is appropriate
18 only when the complaint does not give the defendant fair notice
19 of a legally cognizable claim and the grounds on which it rests.
20 Twombly, 550 U.S. at 555. A claim is facially plausible "when
21 the plaintiff pleads factual content that allows the court to
22 draw the reasonable inference that the defendant is liable for
23 the misconduct alleged." Iqbal, 556 U.S. at 678.

24 In considering whether the complaint is sufficient to state
25

26 ¹ As Robles has not filed proof of service for these
27 entities, the Court cannot determine whether these parties have
28 been served within the ninety-day time limit of Federal Rule of
Civil Procedure 4(m). Robles shall file proof of service within
fourteen days of this order.

1 a claim, the court will take all material allegations as true and
2 construe them in the light most favorable to the plaintiff.
3 Metzler Inv. GMBH v. Corinthian Colleges, Inc., 540 F.3d 1049,
4 1061 (9th Cir. 2008). The court's review is limited to the face
5 of the complaint, materials incorporated into the complaint by
6 reference, and facts of which the court may take judicial notice.
7 Id. at 1061. However, the court need not accept legal
8 conclusions, including threadbare "recitals of the elements of a
9 cause of action, supported by mere conclusory statements."
10 Iqbal, 556 U.S. at 678 (citing Twombly, 550 U.S. at 555).

11 When granting a motion to dismiss, the court is generally
12 required to grant the plaintiff leave to amend, even if no
13 request to amend the pleading was made, unless amendment would be
14 futile. Cook, Perkiss & Liehe, Inc. v. N. Cal. Collection Serv.
15 Inc., 911 F.2d 242, 246-47 (9th Cir. 1990). In determining
16 whether amendment would be futile, the court examines whether the
17 complaint could be amended to cure the defect requiring dismissal
18 "without contradicting any of the allegations of [the] original
19 complaint." Reddy v. Litton Indus., Inc., 912 F.2d 291, 296 (9th
20 Cir. 1990).

21 DISCUSSION

22 I. The Regents' Motion to Dismiss

23 Robles asserts nine claims against the Regents: violation of
24 her First Amendment rights based on the Regents' alleged
25 withholding of police protection; violation of equal protection
26 based on her sexual orientation and political viewpoint;
27 negligence; gross negligence; premises liability; negligent
28 infliction of emotional distress; intentional infliction of

1 emotional distress; violation of California's Bane Act; and a
2 claim for injunctive relief. The Regents contend that all of
3 these claims should be dismissed.

4 A. Eleventh Amendment

5 The Regents first asserts that Robles' First Amendment and
6 equal protection claims are barred by the Eleventh Amendment.
7 Robles brings both of these claims pursuant to 42 U.S.C. § 1983,
8 which creates a federal right of action against "[e]very person"
9 who, under color of law, deprives a person of federal
10 constitutional rights. See 42 U.S.C. § 1983; Will v. Michigan
11 Dep't of State Police, 491 U.S. 58, 68 (1989). It is well-
12 established that states and governmental entities considered
13 "arms of the State" are immune from suits brought in federal
14 court under the Eleventh Amendment and are not "persons" subject
15 to suit under § 1983. Will, 491 U.S. at 70-71; Pennhurst State
16 Sch. & Hosp. v. Halderman, 465 U.S. 89, 100, 104 (1984). The
17 Ninth Circuit has ruled on multiple occasions that the "Regents,
18 a corporation created by the California constitution, is an arm
19 of the state for Eleventh Amendment purposes, and therefore is
20 not a 'person' within the meaning of section 1983." Armstrong v.
21 Meyers, 964 F.2d 948, 949-50 (9th Cir. 1992). See also BV Eng'g
22 v. Univ. of California, Los Angeles, 858 F.2d 1394, 1395 (9th
23 Cir. 1988) (quoting Jackson v. Hayakawa, 682 F.2d 1344, 1360 (9th
24 Cir. 1982)) (holding that the Regents is "considered to be an
25 instrumentalit[y] of the state, and therefore enjoy[s] the same
26 immunity as the state of California.") (internal quotation marks
27 and citations omitted). Thus, Robles' § 1983 claims against the
28 Regents cannot be sustained.

1 The Eleventh Amendment also bars Robles' state law claims
2 against the Regents. The Eleventh Amendment bars state law
3 claims which are brought into federal court under pendent
4 jurisdiction. Pennhurst State Sch. & Hosp., 465 U.S. at 121.
5 This is because pendent jurisdiction, a judge-made doctrine of
6 discretion based on considerations of efficiency, cannot override
7 the Eleventh Amendment, a "constitutional limitation on the
8 authority of the federal judiciary to adjudicate suits against
9 the State." Id. at 121-23. Accordingly, Robles' state law
10 claims against the Regents are also barred.

11 Robles argues that the Regents is not entitled to immunity
12 under the Eleventh Amendment in this case because it was not
13 functioning as an arm of the state. Relying on the Ninth
14 Circuit's decision in Doe v. Lawrence Livermore Nat. Lab., 65
15 F.3d 771, 775 (9th Cir. 1995), which was reversed by the Supreme
16 Court in Regents of the Univ. of California v. Doe, 519 U.S. 425
17 (1997), Robles argues that the Regents "is an enormous entity
18 which functions in various capacities and which is not entitled
19 to Eleventh Amendment immunity for all of its functions." Opp.
20 at 6. Robles contends that the Regents' intentional withholding
21 of police protection during the event had nothing to do with any
22 official functions, but rather the Regents' own personally held
23 beliefs.

24 Robles' argument is misguided. Even assuming that it was
25 not overruled by the Supreme Court in Regents, the holding in Doe
26 cited by Robles merely notes that there are exceptions to
27 immunity for certain types of actions. Doe, 65 F.3d at 775. For
28 example, the Doe court cited cases where immunity did not apply

1 to the Regents because "Congress has abrogated [its] immunity
2 from suit in federal court for violation of patent law" and it
3 "waived its Eleventh Amendment immunity by signing a government
4 contract that contemplated possible suits against it in federal
5 court and by entering into a federally regulated area." Id.
6 Robles fails to explain why an exception applies to this
7 situation. Indeed, as discussed above, controlling Ninth Circuit
8 precedent holds that the Regents "is an arm of the state for
9 Eleventh Amendment purposes," "is not a 'person' within the
10 meaning of section 1983," and therefore is immune to § 1983
11 claims. See Armstrong, 964 F.2d at 949-50. Robles does not
12 provide any reason to depart from this precedent. Her argument
13 is about the Regents' intent in allegedly withholding police
14 protection, but the Regent's intent is not relevant to the
15 analysis.

16 Accordingly, the Eleventh Amendment bars all of Robles'
17 claims against the Regents, which are dismissed from the case.
18 The Court therefore need not discuss the Regents' other grounds
19 for dismissal.

20 In a footnote, Robles seeks leave to amend her claims "to
21 add the individual decision and policy makers responsible for
22 ordering the stand-down to UCPD during the Mr. Yiannopoulos
23 event." Opp. at 6 n.14. The Regents argues that amendment would
24 be futile because Robles already named several individual
25 defendants in Robles I, alleging no facts showing that these
26 individuals acted in their personal capacities, and then did not
27 name the individual defendants at all in Robles II. Because it
28 is not clear that amendment would be futile, Robles' request for

1 leave to amend her claims against the Regents is granted. Robles
2 may attempt to avoid Eleventh Amendment immunity by alleging
3 these claims against individual actors in their personal
4 capacities.

5 II. Berkeley's Motion to Dismiss

6 Berkeley moves to dismiss Robles' claims based on the
7 following grounds: (1) with respect to the first and second
8 claims, failure to state a claim for Monell liability; (2) with
9 respect to the sixth, seventh, and tenth claims, failure to
10 exhaust administrative remedies; and (3) with respect to the
11 twelfth claim, failure to state a claim for injunctive relief.

12 A. Monell liability

13 Robles brought her first and second claims against Berkeley
14 pursuant to 42 U.S.C. § 1983, alleging that Berkeley violated her
15 First and Fourteenth Amendment rights by willfully withholding
16 police protection at the Yiannopoulos event.

17 Berkeley contends that Robles' § 1983 claims are not tenable
18 because she does not allege that they were carried out according
19 to a municipal policy or custom. It is well-established that "a
20 local government may not be sued under § 1983 for an injury
21 inflicted solely by its employees or agents." Monell v. Dep't of
22 Soc. Servs. of City of New York, 436 U.S. 658, 694 (1978).

23 Instead, a municipality only faces liability under § 1983 when
24 the "execution of a government's policy or custom, whether made
25 by its lawmakers or by those whose edicts or acts may fairly be
26 said to represent official policy, inflicts the injury." Id.
27 Robles alleges that Berkeley police officers, at the direction of
28 the Regents, chose to withhold their aid to the attendees of the

1 event due to the officers' animus against those who do not
2 subscribe to their "ultra-leftist, radical philosophies." Opp.
3 at 3-4 (quoting Complaint ¶¶ 25, 27-42). Robles gives two
4 alternative reasons for the Berkeley police officers' actions:
5 they either followed the direction of the Regents or had personal
6 animus against the event participants. Neither shows that
7 Berkeley implemented a custom or policy that caused Robles'
8 constitutional injury. Nor does Robles allege that Berkeley was
9 deliberately indifferent to the fact that training or supervision
10 was required to prevent constitutional violations. Bd. of Cty.
11 Comm'rs of Bryan Cty., Okl. v. Brown, 520 U.S. 397, 407 (1997).
12 Accordingly, Robles' first and second claims must be dismissed.

13 B. Government Tort Claims Act

14 Berkeley contends that Robles did not present her state law
15 claims to the city prior to filing them in federal court, and
16 thus did not administratively exhaust her claims. Under the
17 California Tort Claims Act, "a plaintiff must timely file a claim
18 for money or damages with the public entity" before bringing suit
19 against that entity." California v. Superior Court of Kings
20 County (Bodde), 32 Cal. 4th 1234, 1237 (2004) (citing Cal. Gov.
21 Code § 900 et seq.). "The failure to do so bars the plaintiff
22 from bringing suit against that entity." Id. Moreover, because
23 this is not only a procedural requirement, but "a condition
24 precedent to plaintiff's maintaining an action against
25 defendant," the plaintiff must plead compliance with this
26 condition precedent in her complaint. Id. at 1240.

27 Robles does not contest that she did not comply with the
28 California Tort Claims Act. Instead, she argues that she was not

1 required to do so because it would have been futile. "A
2 plaintiff need not pursue administrative remedies where the
3 agency's decision is certain to be adverse." Howard v. Cty. of
4 San Diego, 184 Cal. App. 4th 1422, 1430 (2010). According to
5 Robles, it would have been futile to seek administrative relief
6 because a "favorable decision would force BPD to admit that they
7 willfully ignored their sworn duties and withheld their services
8 based on political and other biases." Opp. at 5. This is
9 insufficient to establish application of the futility exception,
10 which requires a plaintiff to show "that the agency has declared
11 what its ruling will be on a particular case." Howard, 184 Cal.
12 App. 4th at 1430 (internal quotation marks and brackets omitted).
13 Robles does not allege that Berkeley ever declared that it would
14 reject her claims. Berkeley's actions giving rise to Robles'
15 claims cannot also serve as Berkeley's rejection of those same
16 claims. Thus, the futility exception does not apply here and
17 Robles' state law claims against Berkeley must be dismissed.

18 C. Injunctive Relief Claim

19 Berkeley correctly contends that Robles' twelfth claim, for
20 injunctive relief, is improper because injunctive relief is a
21 remedy, not a cause of action. Ajetunmobi v. Clarion Mortg.
22 Capital, Inc., 595 F. App'x 680, 684 (9th Cir. 2014).
23 Accordingly, it must be dismissed.

24 In sum, all of Robles' claims against Berkeley must be
25 dismissed. The Court grants Robles leave to amend her first and
26 second claims to attempt to state a claim for Monell liability.
27 Because Robles concedes that she did not present her claims to
28 the city pursuant to the California Tort Claims Act, and the

1 Court has already found that it would not have been futile to do
2 so, amendment of her sixth, seventh, and tenth claims would
3 appear to be futile. Thus, the Court will not grant leave to
4 amend these claims.² The Court also will not grant leave to amend
5 the twelfth claim for injunctive relief because amendment would
6 be futile.

7 III. Mirabdal's Motion to Dismiss or Strike

8 A. Motion to Dismiss

9 Mirabdal asserts that the complaint fails sufficiently to
10 plead the assault, battery, and Bane Act claims asserted against
11 her. The only factual allegations in the complaint that directly
12 refer to Mirabdal are as follows:

13 62. Mirabdal was also present at the Milo Yiannopoulos
14 event.

15 63. Mirabdal is a member of the radical American, left
16 wing, anti-Trump, non-profit organization funded by
17 George Soros, ANTIFA, and carried out the assault on
18 Plaintiff Robles at the direction of ANTIFA and in
19 concert with each and every Defendant.

20 64. After Mirabdal and several unknown assailants
21 surrounded Plaintiff Robles combatively, Mirabdal
22 shined a flashlight aggressively in Plaintiff Robles'
23 face, blinding Plaintiff Robles and placing her in fear
24 and apprehension of harm.

25 65. Mirabdal further beat peaceful Milo Yiannopoulos
26 supporters with a wooden sign post during the UC
27 Berkeley riot.

28 In short, Robles alleges only that Mirabdal "surrounded" her
"combatively" and "shined a flashlight aggressively" in her face,
"blinding" her and "placing her in fear and apprehension of

² Robles may, however, seek leave to amend if she can allege new facts showing compliance with the California Tort Claims Act. Cf. California, 32 Cal. 4th at 1243-44 (discussing mechanisms to present a late claim).

1 harm."

2 1. Battery

3 In California, the elements of battery are: "(1) defendant
4 touched plaintiff, or caused plaintiff to be touched, with the
5 intent to harm or offend plaintiff; (2) plaintiff did not consent
6 to the touching; (3) plaintiff was harmed or offended by
7 defendant's conduct; and (4) a reasonable person in plaintiff's
8 position would have been offended by the touching." Lawrence v.
9 City & Cty. of San Francisco, 258 F. Supp. 3d 977, 998 (N.D. Cal.
10 2017) (quoting So v. Shin, 212 Cal. App. 4th 652, 669 (2013)).

11 Mirabdal contends that the complaint fails to state a claim
12 for battery because it does not allege that Mirabdal actually
13 touched Robles. Robles responds that a defendant need not
14 directly touch the plaintiff; rather, "any forcible contact
15 brought about by an object or substance thrown or launched or set
16 in motion by a defendant" could satisfy the touch requirement.
17 Inter-Ins. Exch. of Auto. Club of S. Cal. v. Lopez, 238 Cal. App.
18 2d 441, 445 (1965). Robles' theory of liability is that Mirabdal
19 caused the flashlight's beam to "touch" Robles.

20 Robles' theory appears to raise an issue of first
21 impression: whether shining a light beam at someone constitutes
22 touching sufficient to satisfy the first element of battery under
23 California law. Courts have held that tobacco smoke, as
24 "particulate matter," has the physical properties capable of
25 making contact. See, e.g., Leichtman v. WLW Jacor
26 Communications, 92 Ohio App. 3d 232, 235 (1994). Mirabdal
27 argues, however, that light, unlike smoke, is intangible. She
28 further argues that tort law "has long distinguished between

1 tangible and intangible invasions and has deemed invasions by
2 light to be the latter." In re WorldCom, Inc., 546 F.3d 211, 219
3 (2d Cir. 2008). Thus, "it is not trespass to project light,
4 noise or vibrations" -- i.e., intangible invasions -- "across or
5 onto the land of another." Id.

6 The Court does not find Mirabdal's distinction between light
7 and smoke to be persuasive. The Supreme Court has stated in the
8 context of criminal battery that common-law battery may be
9 accomplished by using an intangible substance, such as light.
10 See United States v. Castleman, 134 S. Ct. 1405, 1414-15 (2014)
11 ("'[A] battery may be committed by administering a poison or by
12 infecting with a disease, or even by resort to some intangible
13 substance,' such as a laser beam.").

14 A Virginia Court of Appeals case considering a similar issue
15 is instructive. In Adams v. Virginia, the court considered
16 whether shining a laser at someone constitutes touching for the
17 purpose of the crime of battery. 33 Va. App. 463, 469 (2000).
18 There, the court noted:

19 Because substances such as light or sound become
20 elusive when considered in terms of battery, contact by
21 means of such substances must be examined further in
22 determining whether a touching has occurred. Such a
23 test is necessary due to the intangible nature of those
24 substances and the need to limit application of such a
25 principle (touching by intangible substances) to
26 reasonable cases. Because the underlying concerns of
27 battery law are breach of the peace and sacredness of
28 the person, the dignity of the victim is implicated and
the reasonableness and offensiveness of the contact
must be considered. Otherwise, criminal convictions
could result from the routine and insignificant
exposure to concentrated energy that inevitably results
from living in populated society.

27 Id. at 469-70. Accordingly, the court held that "for purposes of
28 determining whether a battery has occurred, contact by an

1 intangible substance such as light must be considered in terms of
2 its effect on the victim" and "to prove a touching, the evidence
3 must prove that the substance made objectively offensive or
4 forcible contact with the victim's person resulting in some
5 manifestation of a physical consequence or corporeal hurt." Id.
6 at 470.

7 The same reasoning applies to the tort of battery, which
8 should be limited to reasonable cases. Thus, because the contact
9 here was effected by an intangible substance, light, the Court
10 will closely scrutinize whether the substance "made objectively
11 offensive or forcible contact with the victim's person resulting
12 in some manifestation of a physical consequence or corporeal
13 hurt," which goes to the third and fourth elements of battery.
14 See id. It is conceivable that an intangible substance could
15 cause "some manifestation of physical consequence or corporeal
16 hurt"; for example, a high-intensity laser directed at a person's
17 eye could cause lasting physical harm to the eye. Where an
18 intangible substance causes no physical harm, however, it is
19 unlikely to be offensive in a reasonably objective way.

20 Here, Robles alleges that Mirabdal shined a flashlight beam
21 at her, "blinding" her. Complaint ¶ 64. If Robles was "blinded"
22 such that she suffered serious, permanent physical eye injury,
23 then that would undoubtedly constitute physical harm, as Robles
24 suggests. Opp at 4. However, this allegation appears to be
25 figurative rather than literal. As a result, Robles has not
26 plead that she was harmed by the contact. Accordingly, Robles'
27 battery claim must be dismissed with leave to amend.
28

2. Assault

1 In California, a claim for assault requires a plaintiff to
2 show: "(1) defendant acted with intent to cause harmful or
3 offensive contact, or threatened to touch plaintiff in a harmful
4 or offensive manner; (2) plaintiff reasonably believed she was
5 about to be touched in a harmful or offensive manner or it
6 reasonably appeared to plaintiff that defendant was about to
7 carry out the threat; (3) plaintiff did not consent to
8 defendant's conduct; (4) plaintiff was harmed; and
9 (5) defendant's conduct was a substantial factor in causing
10 plaintiff's harm." Lawrence, 258 F. Supp. 3d at 998 (quoting So,
11 212 Cal. App. 4th at 668-69).

12 Mirabdal contends that the complaint does not allege that
13 she intentionally threatened to touch Robles in a harmful or
14 offensive manner, nor does it allege that Robles reasonably
15 believed she was about to be touched in a harmful or offensive
16 manner or that it reasonably appeared to her that Robles was
17 about to carry out the threat. Robles responds that the
18 complaint alleges Mirabdal aggressively shined a flashlight in
19 her eyes and that Mirabdal, along with others, "surrounded" her
20 "combatively."³ These allegations do not, however, show that
21 Mirabdal committed a "demonstration of an unlawful intent by one
22 person to inflict immediate injury on the person of another
23 then present." Plotnik v. Meihaus, 208 Cal. App. 4th 1590, 1603-
24 04 (2012). In Plotnik, defendants approached the plaintiff
25

26
27 ³ Robles' allegation that Mirabdal beat other individuals
28 with a wooden sign post is inapposite because Robles does not
contend that Mirabdal did so in a way that threatened Robles.

1 "aggressively" and threatened to beat and kill him. Id. at 1604.
2 The court held that, while the defendants' "actions and words
3 were aggressive and threatening," they did not commit an act that
4 "could or was intended to inflict immediate injury on Plotnik."
5 Id. (internal punctuation and brackets omitted). The defendants
6 did not display a weapon, take a swing at him, or otherwise
7 attempt to touch him. Id.

8 The same is true here. Robles's allegations do not
9 establish that Mirabdal committed an act that could or was
10 intended to inflict immediate injury on Robles. Mirabdal's
11 alleged acts surrounding Robles "combatively" and shining a
12 flashlight in her face were not intended to inflict immediate
13 injury on Robles. Nor were those acts threats to do so.
14 Moreover, as discussed above, Robles has not established that
15 shining a flashlight at her constitutes harmful contact or
16 contact that is offensive in an objectively reasonable way. It
17 follows that Mirabdal's acts leading up to shining the flashlight
18 at Robles cannot constitute an act with intent to cause harmful
19 or offensive contact, or a threat to touch Robles in a harmful or
20 offensive manner. Thus, this claim must be dismissed with leave
21 to amend.

22 3. Bane Act

23 The Bane Act authorizes a civil action for damages,
24 injunctive relief, and other appropriate equitable relief against
25 a person who "interferes by threat, intimidation, or coercion, or
26 attempts to interfere by threat, intimidation, or coercion, with
27 the exercise or enjoyment by any individual or individuals of
28 rights secured by the Constitution or laws of the United States,

1 or of the rights secured by the Constitution or laws of this
2 state." Cal. Civ. Code § 52.1(a) and (b). The Bane Act "was
3 intended to address only egregious interferences with
4 constitutional rights, not just any tort." Shoyoye v. Cty. of
5 Los Angeles, 203 Cal. App. 4th 947, 959 (2012). "The act of
6 interference with a constitutional right must itself be
7 deliberate or spiteful." Id.

8 Robles alleges that Mirabdal's acts of surrounding her and
9 thus preventing her escape and shining a flashlight at her
10 interfered with her right to assemble peacefully. Mirabdal
11 challenges that the allegations involving herself do not rise to
12 the level of "threat, intimidation, or coercion" sufficient to
13 state a claim under the Bane Act. But Mirabdal cites no case
14 supporting her argument. Mirabdal's motion to dismiss this claim
15 must be denied.

16 B. Motion to Strike

17 The California anti-SLAPP statute provides for a "special
18 motion to strike" for a "cause of action against a person arising
19 from any act of that person in furtherance of the person's right
20 of petition or free speech," "unless the court determines that
21 the plaintiff has established that there is a probability that
22 the plaintiff will prevail on the claim." Cal. Code Civ. Proc.
23 § 425.16. The anti-SLAPP statute applies in federal court. U.S.
24 ex rel. Newsham v. Lockheed Missiles & Space Co., 190 F.3d 963,
25 973 (9th Cir. 1999).

26 To resolve an anti-SLAPP motion, the court engages in a two-
27 step process. "First, the court decides whether the defendant
28 has made a threshold showing that the challenged cause of action

1 is one arising from protected activity." Jarrow Formulas, Inc.
2 v. LaMarche, 31 Cal. 4th 728, 733 (2003). The defendant has the
3 burden to show that her acts were "taken in furtherance of [her]
4 right of petition or free speech under the United States or
5 California Constitution in connection with a public issue." Id.
6 "If the court finds such a showing has been made, it then
7 determines whether the plaintiff has demonstrated a probability
8 of prevailing on the claim." Id.

9 Mirabdal asserts that she was engaging in a protected
10 activity, protesting against Yiannopoulos. Section 425.16(e) of
11 the anti-SLAPP statute provides for four types of protected
12 activity. Mirabdal's alleged conduct, shining a flashlight at
13 Robles or surrounding her combatively, was not a written or oral
14 statement, and so it does not qualify under subsections one
15 through three, leaving only the possibility of subsection four.
16 § 425.16(e). Mirabdal does not explain how shining a flashlight
17 at Robles or surrounding her combatively constitutes "conduct in
18 furtherance of the exercise of the constitutional right of
19 petition or the constitutional right of free speech in connection
20 with a public issue or an issue of public interest." Cal. Code
21 Civ. Proc. § 425.16(e). As a result, she has not satisfied her
22 burden of showing that she engaged in a protected activity and
23 her motion must be denied.

24 CONCLUSION

25 The Court GRANTS Berkeley's motion to dismiss (Docket No.
26 11), GRANTS the Regents' motion to dismiss (Docket No. 16), and
27 GRANTS IN PART Mirabdal's motion to dismiss or strike (Docket No.
28 43). Robles may file an amended complaint as permitted by this

1 order within twenty-one days.

2 Robles shall file proof of service within fourteen days of
3 this order.

4 IT IS SO ORDERED.

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6 Dated: June 4, 2018



CLAUDIA WILKEN
United States District Judge

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