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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

NATHAN APODACA; and
STUDENTS FOR LIFE AT
CALIFORNIA STATE UNIVERSITY
- SAN MARCOS,

Plaintiffs,

v.

TIMOTHY P. WHITE, Chancellor of
California State University, in his
official and individual capacities;
KAREN S. HAYNES, President of
California State University-San Marcos,
in her official and individual capacities;
and ASSOCIATED STUDENTS, INC.
OF CALIFORNIA STATE
UNIVERSITY SAN MARCOS, a
California nonprofit corporation,

Defendants.

Case No. 3:17-cv-01014-L-AHG

ORDER:

**GRANTING IN PART AND
DENYING IN PART
DEFENDANTS’ MOTION FOR
SUMMARY JUDGMENT [Doc. 55]**

**DENYING AS MOOT
DEFENDANTS’ MOTION TO
SEVER AND STRIKE JURY
DEMAND [Doc. 56]**

**GRANTING IN PART AND
DENYING IN PART PLAINTIFFS’
MOTION FOR SUMMARY
JUDGMENT [Doc. 58]**

Pending before the Court in this action alleging violations of constitutional rights is a motion for summary judgment filed by Defendants Timothy P. White, Karen Haynes, and Associated Students, Inc. of California State University San Marcos (“ASI”) (collectively “Defendants”). Additionally, Defendant filed a conditional motion to sever jurisdictional issues and strike Plaintiffs Nathan Apodaca and Students for Life at California State University-San Marcos (“Students for Life”)

1 (“CSUSM”) (collectively “Plaintiffs”) jury demand as it relates to those issues if they
2 survive summary judgment. Plaintiffs filed a cross motion for summary judgment in
3 combination with its opposition to Defendants’ summary judgment motion. All
4 motions have been fully briefed. For the reasons which follow, the Defendants’
5 motion for summary judgment [doc. 55] is GRANTED IN PART and DENIED IN
6 PART, Defendants’ motion to sever and strike jury demand [doc. 56] is DENIED AS
7 MOOT, and Plaintiffs’ motion for summary judgment [doc. 58] is GRANTED IN
8 PART and DENIED IN PART.

9 **I. BACKGROUND**

10 CSUSM is a public university organized and existing under the laws of the
11 State of California, which receives funding from the State of California.

12 Plaintiff Nathan Apodaca¹ was a student at CSUSM and president of Students
13 for Life at CSUSM (“Students for Life”) from Fall 2016 until Fall 2017. Students for
14 Life was a recognized student organization (“RSO”) at CSUSM during the 2015-16,
15 2016-17, and 2017-18 academic years. Students for Life has three goals: “1. Make a
16 compelling case for the pro-life view on the issue of abortion 2. Connect, equip, and
17 train pro-life students to make that case. 3. To be a resource on campus for students
18 in the midst of a crisis pregnancy, and to help those in need of healing after an
19 abortion.” Doc. 58-4 at 386-87. To achieve its goals, Students for Life assembles
20 public outreach events, like on campus debates about abortion and host speakers.

21 Defendant Timothy P. White is the Chancellor of CSUSM and has been since
22 December 2012. Defendant Karen S. Haynes is the President of CSUSM and has
23 been since 2004. Defendant ASI is a nonprofit public benefit corporation. CSUSM
24 recognizes ASI as an official auxiliary organization with its primary activity being
25

26 ¹ Mr. Apodaca did not enroll in classes at CSUSM for the Spring or Fall 2018
27 semesters because he was notified that his Army National Guard unit would be
28 deployed in Spring 2018. Mr. Apodaca has since been deployed overseas on active
duty with the U.S. Army.

1 student body organization programs. Advocacy, one of ASI’s core values, demands
2 that ASI represent the student voice in the governance of the campus, community, and
3 state of California. ASI is exclusively funded by the ASI Student Fee (the “ASI fee”).
4 The ASI fee and any interest earned on ASI accounts are ASI’s only sources of
5 income, and the fee is held in trust for ASI’s use only. The ASI fee is a mandatory
6 fee that every undergraduate attending classes on campus pays as a condition of
7 enrollment.² By enrolling at CSUSM and paying the ASI fee, students become
8 members of ASI. Plaintiff Apodaca, like each Students for Life student member, paid
9 the ASI fee each semester he attended CSUSM.

10 Student body organization funds generated through mandatory fees, like the
11 ASI fee, may be expended, *inter alia*, for programs of cultural and educational
12 enrichment and community service. ASI created two ASI-fee-funded community
13 centers, the Gender Equity Center (“GEC”) and the LGBTQA Pride Center (“Pride
14 center”) (collectively “the Centers”). The purpose of the GEC is to provide a space
15 dedicated to gender equity in which students of all genders and diverse identities feel
16 safe, valued, and respected. The purpose of the Pride Center is to create, sustain, and
17 affirm an open, safe, and inclusive environment for lesbian, gay, bisexual,
18 transgender, queer questioning, intersex, and ally individuals and communities at
19 CSUSM. The Centers create their own programs and contribute funding to events put
20 on by other organizations.

21 Student body organization funds generated through mandatory fees, like the
22 ASI fee, also may be expended, *inter alia*, for assistance to RSOs. RSOs at CSUSM
23 may seek to access ASI fee funds for event funding from four entities: (1) the ASI
24 Leadership Fund (“ALF”), (2) the Centers, (3) the Campus Activities Board (“CAB”),
25 or (4) the ASI Board of Directors (“BOD”) directly. RSOs would receive ALF

26 _____
27 ² The ASI fee was \$50 per student per semester for the 2016-17 academic year. After
28 a student-approved referendum, the ASI fee was \$75 per student per semester for the
2017-18 academic year.

1 funding in the form of a reimbursement for approved allocations, while the other three
2 entities providing funding by cosponsoring events. The ALF funding application
3 includes guidelines and criteria to which RSOs must satisfy to be eligible to receive
4 ALF funding. Its funding eligibility guidelines prohibit ALF funding for honorariums
5 and speaker fees and requires budgets to be itemized. The Centers have neither listed
6 criterion from which to decide whether to fund an RSO event nor a written policy that
7 governs whether either Center can or will cosponsor an RSO's proposed activity.
8 Neither CAB nor BOD have an explicit written policy specifying its process for
9 granting cosponsorship.

10 On November 14, 2016, Plaintiffs emailed ASI seeking, *inter alia*, clarification
11 on how to request funding to cover an honorarium and travel expenses for a speaker
12 Students for Life invited to visit CSUSM and lecture about abortion (the "abortion
13 lecture") the following semester. On November 23, 2016, ASI responded and pointed
14 Plaintiffs to the Arts & Lectures department, who recently had led the efforts to bring
15 Dr. Cornel West to CSUSM to speak, but informed Plaintiffs that the call for funding
16 proposals for that school year had closed. Plaintiffs immediately responded to ASI
17 requesting whether ASI would cosponsor their event. On December 8, 2016, ASI
18 replied, "Due to our budget we are not able to offer any assistance." Doc. 58-10 at
19 10.

20 On or about February 2, 2017, Plaintiffs submitted an ALF funding application
21 requesting \$500 for "Event expenses/Logistics/Advertising" related to the abortion
22 lecture despite Apodaca's knowledge that honorariums and speaker fees were not
23 eligible expenses. On February 6, 2017, ASI denied Plaintiffs' application because
24 there was no itemized budget. When Apodaca inquired whether Plaintiffs could
25 resubmit to cover speaker travel expenses, ASI reminded him that ALF funds cannot
26 pay for speaker fees or travel expenses. Plaintiffs did not submit a revised application.
27 When Plaintiffs inquired whether the Centers can provide speaker funding, ASI
28 informed Plaintiffs that the Centers may be able to fund a speaker if the Centers

1 cosponsor the event. Although Apodaca was skeptical of the Centers' desire to
2 cosponsor the abortion lecture event, ASI encouraged Apodaca to inquire about the
3 opportunity as the Centers are a part of ASI.

4 On February 24, 2017, Plaintiffs emailed the assistant director of the Centers
5 to request the Centers cosponsor the abortion lecture as funding was needed to cover
6 the anticipated speaker's travel expenses. The Centers' assistant director forwarded
7 Plaintiffs' request to the director of the Centers to discuss how they should respond
8 to Plaintiffs' cosponsorship request. Subsequently, the Centers assistant director
9 replied to Plaintiffs' email and denied Plaintiffs' cosponsorship request. The Centers
10 claimed no additional funds could be committed after review of its remaining events
11 and informed Plaintiffs that its request did not provide enough notice as GEC had
12 moved to planning its events about 14 months out. The same day, Plaintiffs replied
13 to the email denying their request to ask what the Centers required to apply for
14 cosponsorship. Plaintiffs' reply was sent to the Centers' director and assistant director
15 and neither responded to Plaintiffs' email.

16 On May 17, 2017, Plaintiffs filed their original Complaint. On August 9, 2017,
17 Plaintiffs filed an amended complaint against the above-mentioned Defendants
18 alleging violations of the First Amendment right to freedom of speech based on
19 compelled speech and viewpoint discrimination and violations of the Fourteenth
20 Amendment's right to equal protection of the law. Subsequently, Defendants filed a
21 motion for summary judgment along with a motion to sever certain issues and strike
22 the jury demand. Plaintiffs opposed Defendants motion for summary judgment and
23 filed their own cross motion for summary judgment. Defendants' reply to its
24 summary judgment motion also served as the opposition to Plaintiffs' cross motion.
25 Later, Plaintiffs opposed Defendants' motion to sever and filed their reply to the cross
26 motion for summary judgment. Lastly, Defendants filed its reply to the motion to
27 sever. After review, the Court found the matters suitable for determination on the
28 papers and without oral argument pursuant to Civil Local Rule 7.1.d.1.

1 **II. LEGAL STANDARD**

2 Summary judgment is appropriate under Rule 56(c) where the moving party
3 demonstrates the absence of a genuine issue of material fact and entitlement to
4 judgment as a matter of law. *See* Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477
5 U.S. 317, 322 (1986). A fact is material when, under the governing substantive law,
6 it could affect the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S.
7 242, 248 (1986). A dispute about a material fact is genuine if “the evidence is such
8 that a reasonable jury could return a verdict for the nonmoving party.” *Anderson*, 477
9 U.S. at 248.

10 The party seeking summary judgment bears the initial burden of establishing
11 the absence of a genuine issue of material fact. *Celotex*, 477 U.S. at 323. The moving
12 party can satisfy this burden in two ways: (1) by presenting evidence that negates an
13 essential element of the nonmoving party’s case; or (2) by demonstrating that the
14 nonmoving party failed to make a showing sufficient to establish an element essential
15 to that party’s case on which that party will bear the burden of proof at trial. *Id.* at
16 322–23. “Disputes over irrelevant or unnecessary facts will not preclude a grant of
17 summary judgment.” *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass’n*, 809 F.2d
18 626, 630 (9th Cir. 1987).

19 “[T]he district court may limit its review to the documents submitted for the
20 purpose of summary judgment and those parts of the record specifically referenced
21 therein.” *Carmen v. San Francisco Unified Sch. Dist.*, 237 F.3d 1026, 1030 (9th Cir.
22 2001). Therefore, the court is not obligated “to scour the record in search of a genuine
23 issue of triable fact.” *Keenan v. Allan*, 91 F.3d 1275, 1279 (9th Cir. 1996) (*citing*
24 *Richards v. Combined Ins. Co. of Am.*, 55 F.3d 247, 251 (7th Cir. 1995). If the moving
25 party fails to discharge this initial burden, summary judgment must be denied and the
26 court need not consider the nonmoving party’s evidence. *Adickes v. S.H. Kress &*
27 *Co.*, 398 U.S. 144, 159–60 (1970).

28 If the moving party meets this initial burden, the nonmoving party cannot defeat

1 summary judgment merely by demonstrating “that there is some metaphysical doubt
2 as to the material facts.” *Matsushita Elect. Indus. Co., Ltd. v Zenith Radio Corp.*, 475
3 U.S. 574, 586 (1986). Rather, the nonmoving party must “go beyond the pleadings”
4 and by “the depositions, answers to interrogatories, and admissions on file,” designate
5 “specific facts showing that there is a genuine issue for trial.” *Celotex*, 477 U.S. at
6 324 (quoting Fed. R. Civ P. 56(e)).

7 When making this determination, the court must view all inferences drawn
8 from the underlying facts in the light most favorable to the nonmoving party. *See*
9 *Matsushita*, 475 U.S. at 587. “Credibility determinations, the weighing of evidence,
10 and the drawing of legitimate inferences from the facts are jury functions, not those
11 of a judge, [when] he [or she] is ruling on a motion for summary judgment.”
12 *Anderson*, 477 U.S. at 255.

13 **III. DISCUSSION**

14 **A. Standing**

15 The Supreme Court places the constitutional burden of establishing standing
16 on plaintiffs to demonstrate an injury in fact, causation, and likelihood that a favorable
17 decision will redress the injury. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61
18 (1992). Proof of an “injury in fact” requires plaintiffs to present “an invasion of a
19 legally protected interest” that is “concrete and particularized” and “actual or
20 imminent,” not “conjectural” or “hypothetical.” *Id.* at 560. Irrespective of an injury’s
21 magnitude, a plaintiff’s “injury in fact” is particularized once it affects plaintiff in a
22 “personal and individualized way.” *See Council of Ins. Agents & Brokers v. Molasky-*
23 *Arman*, 522 F.3d 925, 932 (9th Cir. 2008) (holding that “an identifiable trifle”
24 sufficiently establishes standing) (quoting *U.S. v. Students Challenging Regulatory*
25 *Agency Procedures (SCRAP)*, 412 U.S. 669, 689 (1973); *Id.* at 561).

26 In an as-applied First Amendment challenge, the plaintiff must pinpoint some
27 personal harm resulting from application of the challenged statute or regulation. *See*
28 *e.g., Foti v. City of Menlo Park*, 146 F.3d 629, 635 (9th Cir. 1998) (“An as-applied

1 challenge contends that the law is unconstitutional as applied to the litigant’s
2 particular speech activity, even though the law may be capable of valid application to
3 others.”). Distinctly, standing scrutiny focuses both on the plaintiffs and whether
4 harm to the them is sufficient to give plaintiffs the “requisite personal interest” in the
5 case. *See Jacobs v. Clark Cty. Sch. Dist.*, 526 F.3d 419, 425 (9th Cir. 2008). While,
6 on the merits, the First Amendment analysis focuses on the government’s or state’s
7 conduct, particularly the rationale for imposing the identified harm on the plaintiff.
8 *See, e.g., Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45-46
9 (1983). The differing analyses allow a court to hold that a party has standing to bring
10 an as-applied First Amendment yet find that the government’s conduct did not violate
11 the First Amendment. *See, e.g., Jacobs*, 526 F.3d at 426, 441-42 (finding standing
12 existed but holding that a school’s uniform policy did not violate the First
13 Amendment).

14 Facial constitutional challenges can manifest in one of two forms. A plaintiff
15 may argue that an ordinance “is unconstitutionally vague or . . . impermissibly
16 restricts a protected activity.” *Foti*, 146 F.3d at 635.; *see Nunez v. City of San Diego*,
17 114 F.3d 935, 949 (9th Cir. 1997) (“Plaintiffs may seek directly on their own behalf
18 the facial invalidation of overly broad statutes that create an unacceptable risk of the
19 suppression of ideas.” (internal quotation marks and citation omitted)). Alternatively,
20 “an individual whose own speech or expressive conduct may validly be prohibited or
21 sanctioned is permitted to challenge a statute on its face because it also threatens
22 others not before the court.” *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 503
23 (1985). The first type of facial challenge may be combined with the as-applied
24 challenge from which a plaintiff argues that the law is unconstitutional as applied to
25 plaintiff’s speech or expressive conduct. *See Foti*, 146 F.3d at 635; *see also NAACP*
26 *v. City of Richmond*, 743 F.2d 1346, 1352 (1985).

27 While Defendants assert that Plaintiffs’ First Amendment claim here fails in its
28 entirety because Plaintiffs lack standing, the Court finds that Plaintiffs clearly have

1 standing to set forth their First Amendment claim. As the Court will discuss below,
2 Plaintiffs challenge Defendants’ denial of funding, sourced from a mandatory student
3 fee Plaintiffs paid, for the abortion lecture Plaintiffs planned to host on grounds that
4 their viewpoint was discriminated against due to Defendants’ unbridled discretion in
5 funding decision making. Standing exists here in that Plaintiffs have “a First
6 Amendment interest in not being compelled to contribute to an organization whose
7 expressive activities conflict with their own personal beliefs.” *Bd. of Regents of Univ.*
8 *of Wis. Sys. v. Southworth*, 529 U.S. 217, 228 (2000). Despite Defendants’ contention
9 that Plaintiffs cannot meet their burden to demonstrate the denial
10 caused the alleged injury, the undisputed evidence shows Plaintiffs paid mandatory
11 student fees, which may have amounted to compelled speech, to ASI and expressive
12 activities by ASI conflicted with Plaintiffs’ personal beliefs. Additionally, the
13 undisputed evidence shows that Defendants’ denial of Plaintiffs’ funding request cut
14 short Plaintiffs’ fundraising efforts to bring a speaker to CSUSM for their proposed
15 abortion lecture program.

16 Defendants also contend Plaintiffs lack standing to bring a facial challenge to
17 the ALF funding process because Plaintiffs have not identified any viewpoint
18 discrimination and there is no risk of suppression of speech. However, “when a
19 [funding regulation] vests unbridled discretion in a government official over whether
20 to permit or deny [funds related to] expressive activity, one who is subject to the law
21 may challenge it facially without the necessity of first applying [] for, and being
22 denied, [funding].” *City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750755-56
23 (1988) (quote modified here) (citing *Freedman v. Maryland*, 380 U.S. 51, 56 (1965)
24 (“In the area of freedom of expression it is well established that one has standing to
25 challenge a statute on the ground that it delegates overly broad licensing discretion to
26 an administrative office . . . whether or not he applied for a license”)). In this case,
27 Plaintiffs applied for funding related in multiple ways and was denied by Defendant
28 ASI each time. Now, Plaintiffs’ challenge seeks to facially invalidate the broad

1 discretion given to Defendant ASI they claim creates an unacceptable risk of the
2 suppression of ideas. Defendants' contentions concerning ALF funding strike at the
3 merits of the case, not Plaintiffs' standing under the First Amendment. As such, this
4 contention does not rebut Plaintiffs' showing of the requisite personal interest to bring
5 their First Amendment challenge.

6 Defendants likewise attack Plaintiffs' Fourteenth Amendment Equal Protection
7 Clause on standing and ripeness grounds. However, Plaintiffs demonstrate an injury
8 in fact in that ASI funds the Centers in higher proportion in comparison to RSOs, the
9 Centers can use ASI funds in ways Plaintiffs are prohibited, and Defendants generally
10 favor the Centers' expressive activity over Plaintiffs' viewpoint. Plaintiffs personally
11 encountered ASI's prohibition placed on CSUSM RSOs' use of ASI funds for speaker
12 fees while the Centers can use the same funds to fund speaker expenses. The Centers'
13 decision not to cosponsor Plaintiffs' abortion lecture program also prevented
14 Plaintiffs from covering the desired speaker's travel expenses when groups with
15 different viewpoints than Plaintiff had programs funded and speaker expenses paid.

16 Accordingly, the Court finds that Plaintiffs exhibited standing to bring an as-
17 applied and facial challenge against Defendants' mandatory ASI fee, its attendant
18 uses, and whether Defendant ASI created a speech forum by distributing mandatory
19 ASI fees to fund expression on campus. Likewise, the Court finds the case ripe for
20 Plaintiffs to challenge whether Defendants treat RSO's speech unequally by favoring
21 the Centers' expressive activity through funding and other privileges.

22 **B. Whether Plaintiffs' First Amendment rights were violated by**
23 **Defendants' ASI fee collection and distribution policies.**

24 The Supreme Court has repeatedly upheld that "the First Amendment generally
25 precludes public universities from denying student organizations access to school-
26 sponsored forums because of the groups' viewpoints." *Christian Legal Soc. Chapter*
27 *of the Univ. of Cal., Hastings College of Law v. Martinez*, 561 U.S. 661, 667 (2010)
28 (see citing *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819 (1995);

1 *Widmar v. Vincent*, 454 U.S. 263 (1981); *Healy v. James*, 408 U.S. 169 (1972). The
2 Supreme Court cautions lower courts to resist “substitut[ing] their own notions of
3 sound educational policy for those of the school authorities which they review.” *Bd.*
4 *of Ed. Of Hendrick Hudson Central School Dist., Westchester Cty. v. Rowley*, 458
5 U.S. 176, 206 (1982). Schools enjoy “a significant measure of authority over the type
6 of officially recognized activities in which their students participate.” *Bd. of Ed. of*
7 *Westside Comm. Schools (Dist. 66) v. Mergens*, 496 U.S. 226, 240 (1990). It is pivotal
8 that colleges independently exercise the license to choose among pedagogical
9 approaches considering extracurricular programs are as integral to today’s
10 educational process as the classroom. *See Bd. of Ed. of Independent School Dist. No.*
11 *92 of Pottawatomie Cty. v. Earls*, 536 U.S. 822, 831 (2002). “A regulation that serves
12 purposes unrelated to the content of expression is deemed neutral, even if it has an
13 incidental effect on some speakers or messages but not others.” *Ward v. Rock Against*
14 *Racism*, 491 U.S. 781, 791 (1989).

15 Plaintiffs first contend that Defendants’ policies violate the First Amendment
16 by compelling students to subsidize private speech in a viewpoint discriminatory
17 system. Plaintiffs’ rely on *Janus v. American Fed. Of State, Cty., and Mun.*
18 *Employees, Council 31*, 138 S.Ct. 2448 (2018), to assert that Defendant
19 unconstitutionally compel Plaintiffs to fund ASI expression to which Plaintiffs object.
20 In *Janus*, a non-union Illinois state employee challenged the constitutionality of
21 mandatory non-union member agency fees (a percentage of the full union dues)
22 accompanying an Illinois law which deemed a union the exclusive representative of
23 all employees in a bargaining unit upon a majority vote. *Id.* at 2455-56. The union
24 annually set the agency fee and sent nonmembers a notice providing a basis and
25 breakdown of expenditures. *Id.* at 2456. The employee in *Janus* refused to join the
26 union because he opposed many of its views, even those concerning collective
27 bargaining. *Id.*

28 The *Janus* Court held that the extraction of labor union fees from

1 nonconsenting public-sector employees violates the First Amendment. *Id.* at 2463-
2 86. The Supreme Court reasoned that the compelling interest of “labor peace” could
3 readily be achieved ““through means significantly less restrictive of associational
4 freedom’ than the assessment of agency fees.” *Janus*, 138 S.Ct. at 2466 (citing *Harris*
5 *v. Quinn*, 134 S.Ct. 2618, 2639 (2014)). The Court further noted that “the First
6 Amendment does not permit the government to compel a person to pay for another
7 party’s speech just because the government thinks that the speech furthers the interests
8 of the person who does not want to pay.” *Id.* at 2467. Notably, the *Janus* court
9 chastised and overruled *Abood v. Detroit Bd. of Ed.*, 431 U.S. 209 (1977) as not well
10 reasoned. *Id.* at 2481. The *Janus* Court points out that *Abood* failed to: (1)
11 independently evaluate the strength of the government interests that purportedly
12 supported the challenged union fee provision; or (2) inquire as to how well that
13 provision promoted those interests; or (3) whether they could have been adequately
14 served without impinging so heavily on the free speech rights of nonmembers. *Id.* at
15 2479-80. The *Janus* Court concluded that *Abood* made a serious mistake of assuming
16 that promoting “labor peace” called for an imposition of mandatory union fees on
17 non-union members because it failed to consider whether those fees were necessary
18 to serve the asserted state interests. *Id.* at 2480. For this reason, *inter alia*, the
19 Supreme Court decreed that “States and public-sector unions may no longer extract
20 agency fees from nonconsenting employees . . . [u]nless employees clearly and
21 affirmatively consent before any money is taken from them[.]” *Id.* at 2486.

22 In the present context, First Amendment rights “must be analyzed in light of
23 the special characteristics of the school environment.” *Widmar*, 454 U.S. at 268, n.5
24 (internal quotation marks omitted). In the public university context, the *Southworth*
25 court analyzed “whether a public university may require its students to pay a fee
26 which creates the mechanism for [] extracurricular speech[.]” *Id.* at 233. The
27 *Southworth* court reasoned that if a university determines “its mission is well served
28 if students have the means to engage in dynamic discussions [from philosophy to

1 societal politics] . . . it is entitled to impose a mandatory fee to sustain an open
2 dialogue to the ends.” *Id.* at 233. The Court made clear that, if a university conditions
3 the opportunity to receive a college education on an agreement to support
4 extracurricular expression by other students that the paying student finds
5 objectionable, the speech and beliefs of the objecting student may be infringed. *Id.* at
6 231. The *Southworth* court balked however at imposing an optional or refund system
7 as a constitutional requirement to protect students’ First Amendment rights due to the
8 unknown ramifications, but the Court expressed that universities are free to do so. *Id.*
9 at 232. Nonetheless, the *Southworth* court concluded that a university “may sustain
10 the extracurricular dimensions of its programs by using mandatory student fees with
11 *viewpoint neutrality* as the operational principle.” *Southworth*, 529 U.S. at 233-34
12 (emphasis added).

13 In *Southworth*, students were statutorily authorized to disburse a portion of a
14 mandatory, nonrefundable activity fee each full-time student at the University of
15 Wisconsin-Madison paid each year in excess of their tuition. *Southworth*, 529 U.S.
16 at 222. The students mainly disposed of the funds through their student government,
17 the Associated Students of Madison (“ASM”) and its various subcommittees. *Ibid.*
18 The board of regents designated approximately 80% of the fee as “nonallocable” to
19 cover expenses and purposes not challenged in *Southworth*. *Id.* at 223. Meanwhile,
20 the allocable portion of the fee maintained extracurricular activities of the university’s
21 RSOs. RSOs could seek allocable funds in three ways: (1) apply for funding from the
22 Student Government Activity Fund (“SGAF”), administered by ASM, (2) apply for
23 funding from the General Student Services Fund (“GSSF”), administered by ASM’s
24 finance committee, and (3) a student referendum where the student body votes either
25 to approve or disapprove an allocation of funds for a particular RSO. *Id.* at 223-24.
26 While RSOs obtained funding support by reimbursement after submitting receipts or
27 invoices to the university, the university’s policy specified certain purposes for which
28 funds could not be allocated. *Id.* at 225. Among the prohibitions, RSOs were

1 prevented from receiving reimbursements for “activities which are politically partisan
2 or religious in nature.” *Ibid.* However, one RSO, WISPIRG, operated outside the
3 bounds of the university’s guidelines as it received lump sum payments from the
4 university, reduced the amount of GSSF’s available funds due to its funding
5 allocation, and spent a portion of its activity fees on political lobbying and other
6 efforts aimed at influencing legislation. *Id.* at 226. Notably, WISPIRG received
7 \$45,000 during the relevant academic year resulting from a student referendum. The
8 parties in *Southworth* stipulated that SGAF’s and GSSF’s funding mechanism were
9 viewpoint neutral but did not extend the stipulation to the referendum process. *Id.* at
10 224-25. The *Southworth* court found that students’ constitutional protections would
11 be infringed upon to the extent the referendum replaced majority voting for viewpoint
12 neutrality. *Id.* at 235. As such, the Supreme Court remanded the case to the Seventh
13 Circuit to reexamine *Southworth* in light of the Court’s viewpoint neutrality
14 principles. *Id.* at 235-36.

15 On remand, the Seventh Circuit clarified the viewpoint neutrality parameters
16 by addressing a different, but related, issue of whether the unbridled discretion
17 standard is a component of viewpoint neutrality.³ *Southworth v. Bd. of Regents of*
18 *University of Wisconsin Sys.*, 307 F.3d 566, 574 (7th Cir. 2002) (“*Southworth I*”).
19 *Southworth II* was “a facial challenge to the unbridled discretion the University
20 grant[ed] the student government for deciding which RSOs to fund[.]” *Ibid.* The
21 *Southworth II* court noted the Supreme Court made clear that viewpoint neutrality is
22

23
24 ³ On remand, the parties stipulated to the dismissal of the students’ claim challenging
25 the constitutionality of the referendum on mootness grounds as the university had
26 amended its student activity fee policy. *Southworth II*, 307 F.3d at 570. Also, the
27 district voided the earlier stipulation of viewpoint neutrality made in the original suit.
28 *Ibid.* Following a bench trial, the district court held “the University’s mandatory fee
system violated the plaintiffs’ First Amendment rights by granting the student
government too much discretion for determining which student organizations to
fund.” *Ibid.*

1 threatened when a decisionmaker can use unduly broad discretion to favor or disfavor
2 speech based on its viewpoint or content. *Id.* at 579 (citing *Thomas v. Chicago Park*
3 *Dist.*, 534 U.S. 316, 323 (2002)). For that reason, the *Southworth II* court concluded
4 that unbridled discretion is a component of the viewpoint-neutrality requirement
5 because the risks the Supreme Court intended to protect with the unbridled discretion
6 standard are analogous to the risks the viewpoint-neutrality mandate protects. *Ibid.*

7 In *Southworth II*, the Seventh Circuit found the university’s fee system set
8 numerous and specific standards that greatly limited the discretion of the ASM
9 Finance Committee and the Student Services Finance Committee (“SSFC”).⁴ *Id.* at
10 587-89. Some of the funding standards included: (1) an express policy prohibiting
11 viewpoint discrimination and requiring conformity with the *Southworth* requirements,
12 (2) adopting specific deadlines for SSFC funding applications and ASM Finance
13 Committee decisions, (3) specific, narrowly drawn and clear criteria to guide the
14 student government in their funding decisions, (4) requiring notice of hearing and
15 public hearings of the ASM Finance Committee and SSFC, and (5) recording the
16 hearings. *Id.* at 587-91. However, the *Southworth II* court prohibited the university
17 from using mandatory fees of objecting students for travel grants until the ASM
18 Finance Committee adopted criteria governing the award of travel grants. *Id.* at 592.
19 The Seventh Circuit reasoned that, “without knowing the standards [] applied to travel
20 grants, a federal court would be unable to determine whether the ASM Finance
21 Committee’s discretion was exercised to discriminate against groups with unpopular
22 viewpoints.” *Ibid.* Therefore, the *Southworth II* court held “the mandatory fee system
23 unconstitutionally grant[ed] the ASM Finance Committee unbridled discretion for
24 awarding travel grants to organizations which engage in speech and expressive
25 activities.” *Ibid.* Otherwise, the *Southworth II* court concluded that the funding
26

27 ⁴ The ASM Finance Committee and the SSFC administered funding granted by
28 SFGAF and GSSF, respectively. *Southworth II*, 307 F.3d at 569.

1 standards “sufficiently bridled the SSFC and ASM Finance Committee’s discretion
2 to satisfy the First Amendment’s mandate of viewpoint neutrality and the prohibition
3 on granting decisionmakers unbridled discretion[.]” *Ibid.*⁵

4 As an initial matter, this Court finds that the *Janus* court’s prohibition of
5 extracting union dues from nonunion members does not call for a wholesale
6 invalidation of CSUSM’s mandatory ASI fee. To the extent Plaintiffs contend
7 mandatory student fees should be invalidated under *Janus* because it overruled *Abood*,
8 the Court notes that *Abood* is only the beginning of the analysis here in that the
9 reasoning *Abood* sets forth mandates that a university cannot require student to pay
10 subsidies for speech of other students without some First Amendment protection.
11 *Southworth*, 529 U.S. at 231. Along that line, this Court finds that *Janus* supplanting
12 *Abood* did not undermine this safeguard. The *Southworth* court previously instructed
13 that *Abood*’s germane speech standard is unworkable in the public university context
14 as “[i]t is all but inevitable that the fees will result in subsidies to speech which some
15 students find objection and offensive to their personal beliefs.” *Id.* at 232. The Court
16 here believes *Janus* bears little significance in the public university context where the
17 case law and the parties all agree that schools have expansive latitude in the manner
18 educational missions are implemented. *See Rosenberger*, 515 U.S. at 833. Thus,
19 Plaintiffs’ reliance on *Janus* to invalidate the mandatory student fee system is
20 misplaced here.

21 However, it is appropriate to evaluate the constitutionality of the ASI fee as a
22 speech forum in that payment of the ASI fee is required to enroll at CSUSM and
23 Plaintiffs object to certain expressive activities supported by the ASI fee. *See*
24 *Southworth II*, 307 F.3d at 580 (“[W]hile a mandatory fee system is ‘a forum more in
25 a metaphysical than in a spatial or geographic sense . . . the same principles are
26

27 _____
28 ⁵ The Ninth Circuit adopted the *Southworth II* standard in *Kaahumanu v. Hawaii*,
682 F.3d 789, 806 (9th Cir. 2012)

1 applicable.”) (quoting *Rosenbeger*, 515 U.S. at 830)); *see also The Koala v. Khosla*,
2 2019 WL 3311148, at *11 (9th Cir. July 24, 2019). The ASI fee is a mandatory fee
3 that every CSUSM student undergraduate student pays a condition of enrollment.
4 Doc. 58-7 at 225. Plaintiffs paid the ASI fee and object to Defendant ASI’s expressive
5 activities, specifically the Centers’ pro-abortion viewpoint and viewpoints which
6 advocate for sexual acts beyond sexual activity between a man and a woman in a
7 marital relationship. Plaintiffs do not want to fund these activities. Defendant ASI
8 and its attendants entities are authorized statutorily to fund extracurricular activities.
9 As such, Defendants are required to allocate the mandatory ASI fee in a viewpoint
10 neutral manner to safeguard Plaintiffs from “furnish[ing] contributions of money for
11 the propagation of opinions which he disbelieves and abhor[s][.]” *Janus*, 128 S. Ct.
12 at 2464 (citing A Bill for Establishing Religious Freedom, in 2 Papers of Thomas
13 Jefferson 545 (J. Boyd ed. 1950).

14 **1. ASI’s ALF Funding Process**

15 While Plaintiffs sought funding from three separate ASI-funding entities, only
16 ASI’s ALF funding process can be evaluated by the Court against Plaintiffs’ as-
17 applied challenge. “Standards provide the guideposts that check the [decisionmaker]
18 and allow courts quickly and easily to determine whether the [decisionmaker] is
19 discriminating against disfavored speech.” *City of Lakewood*, 486 U.S. at 758.
20 “[W]ithout standards to fetter [a decisionmaker’s] discretion, the difficulties of proof
21 and the case-by-case nature of “as applied” challenges render the [decisionmaker’s]
22 action in large measure effectively unreviewable.” *Id.* at 759. “[W]ithout standards
23 governing the exercise of discretion, a govern[ing] official may decide who may speak
24 and who may not based on the . . . viewpoint of the speaker.” *Id.* at 763-64. For our
25 purposes here, a court cannot effectively review a challenged provision if it does not
26 “contain adequate standards to guide the official’s decision[.]” *Southworth II*, 307
27 F.3d at 578 (quoting *Thomas v. Chicago Park Dist.*, 534 U.S. 316, 323 (2002)).

28 Defendants contend Plaintiffs sought ALF funding for a speaker fee despite

1 knowing that speaker fee expenses were not eligible. The eligibility criteria for ALF
2 funding on-campus events funding reads as follows:

3 1. Student Organization must be officially recognized by CSUSM through
4 Student Life & Leadership (SLL).

5 2. Student event coordinator **MUST** work with their SLL Coordinator to plan
6 the event.

7 3. Events must be held on-campus.

8 4. If the event is not open to the entire campus community, the maximum ALF
9 amount is \$250. This includes graduation ceremonies.

10 5. If the event is open to the campus community, the maximum ALF amount
11 is \$500.

12 6. Funding is available for consumable items and facility costs, which support
13 the event such as food for attendees, paper products, and advertising specific for the
14 event.

15 7. Programs must **not** make a profit. Event must be free to attend.

16 8. ASI Leadership Funding (ALF) up to \$500 per student organization per
17 semester.

18 9. Student organizations may co-sponsor an event with another student
19 organization. ALF contribution for co-sponsored events up to \$1,000.

20 10. Funding is **not** available for individual student organization members.

21 11. Funding is **not** available for door prizes, raffles, or opportunity drawings.
22 It also is **not available** for honorariums, speaker fees, donations, gifts, or give-away
23 items.

24 12. Only original forms and signatures are accepted.

25 13. Incomplete applications will be rejected.

26 Doc. 58-6 at 6. The ALF Application and Guidelines (“Guidelines”) direct student
27 organizations to describe its program, including the event’s purpose, benefit to
28 students, whether the organization held the event before, and, if so, the need to hold

1 the event again. *Ibid.* The Guidelines also directed applicants to “include an itemized
2 budget of event allowable expenses. Fill in your itemized budget on the attached
3 application form. Include as much detail as possible.” *Ibid.* Moreover, the ALF
4 Guidelines provided due dates before which a student organization was required to
5 submit its ALF application. *Ibid.*

6 Here, Defendants’ denial ALF funding for the abortion lecture and the ALF
7 Guidelines as applied to Plaintiffs’ ALF application were not based on viewpoint-
8 neutral criteria. Plaintiffs knowingly submitted an incomplete application seeking
9 \$500 for general event, logistic, and advertising expenses. Plaintiffs’ application
10 failed to satisfy the Guidelines as it did not include an itemized budget and provided
11 no detail regarding the expenses. The record shows that, in rejecting Plaintiffs’
12 application, Defendants’ made a notation on the application, “Please be more specific
13 with items in Budget. Ex: pizza[,] flyers[.]” Doc. 55-10 at 41. As such, the Court
14 finds that the application could be deemed incomplete and permissibly rejected on
15 that viewpoint-neutral ground alone. Yet, Plaintiffs attempted to cloak its funds
16 request for a speaker fee/honorarium as a general expense request until Plaintiff
17 Apodaca admitted the true intention for the ALF funds. The Guidelines make clear
18 that ALF funding is not available for honorariums or speaker fees. Accordingly,
19 Defendants’ preclusion of a revised ALF application submitted by Plaintiffs to fund
20 speaker-related expenses was also legitimate. Moreover, the record demonstrates that
21 ALF funding was not granted for speaker fees to other organizations and ALF funding
22 was granted to other religious-based RSOs that fully complied with the ALF
23 Guidelines. *See* ECF No. 55-10 at 26, 29-30, 32. In light of the record, the Court
24 finds that Defendants’ denial of Plaintiffs’ ALF funding application was not based on
25 Plaintiffs’ viewpoint. Therefore, Plaintiffs’ as-applied challenge to ASI’s ALF
26 funding denial of Plaintiffs’ ALF application is **DENIED** and Defendants’ motion for
27 summary for summary judgment is **GRANTED** on this ground.

28 In a facial challenge to Defendants’ funding mechanisms, Plaintiffs’ contend

1 their First Amendment rights right were violated by Defendants’ exercise of unbridled
2 discretion to discriminate against Plaintiffs’ in a speech forum. With respect to
3 Plaintiffs’ facial challenge, Defendants maintains ASI administers its ALF funding
4 process pursuant to viewpoint-neutral criteria. “[T]he success of a facial challenge
5 on the grounds that an ordinance delegates overly broad discretion to the
6 decisionmaker rests [on] . . . whether there is anything in the ordinance preventing
7 him from [exercising his discretion].” *Southworth II*, 307 F.3d at 577-78 (citing
8 *Forsyth Cty. v. Nationalist Movement*, 505 U.S. 123, 133 n. 10 (1992)). The ASI
9 Executive Vice President and professional staff members, who meet five times a
10 semester, determine the allocation of the funds after reviewing all eligible
11 applications. *Ibid.* The ALF application states, “Funding is based on eligibility per
12 the ALF Guidelines and Instructions[.]” and “awarded on first come, first served
13 basis.” Doc. 58-6 at 6.

14 The Court disagrees with Defendants that the ALF funding process disburses
15 the mandatory ASI fee based on viewpoint-neutral criteria. Like *Southworth II*, ASI’s
16 ALF Application and Guidelines dictate “specific, narrowly drawn and clear criteria”
17 to regulate the ASI Executive Vice President’s and professional staff members’
18 funding allocation decisions. However, the Court finds the criteria above mainly
19 strike at the applicant’s burden in applying and the logistics of the ALF funding
20 application process, but the criteria fail to provide “reasonable and definite
21 standard[s], guiding the hand of the [] [] administrator.” *Forsyth*, 505 U.S. at 132.
22 Although the ALF Guidelines set forth deadlines by which the ALF applications must
23 be submitted by RSOs and a policy to distribute ALF funding on a first come, first
24 served basis, which the Court find are viewpoint neutral, the Guidelines do not contain
25 any express policy prohibiting viewpoint discrimination and/or a required conformity
26 with *Southworth*. While the Court recognizes that most ALF Guidelines’ prohibitions
27 apply evenhandedly to all CSUSM RSOs eligible for ALF funding regardless of
28 viewpoint or content, nothing in the guidelines “prevent[.] the official[s] from

1 encouraging some views and discouraging others through arbitrary [grants of
2 funding].” *Id.* at 133. For example, the Guidelines mandate that applicant RSOs
3 describe its program, including the event’s purpose, benefit to students, whether the
4 organization held the event before, and, if so, the need to hold the event again. The
5 Court finds that this requirement is an impermissibly viewpoint-based criterion
6 without standards dictating viewpoint-neutral considerations for this information.
7 The consideration of these factors is unconstitutional as the factors naturally relate to
8 the content of the speech and have the effect of excluding unpopular viewpoints. The
9 “purpose” and “student benefit” inquiries allow officials the discretion to pass
10 judgment on the content, merit, and potential impact of a program. Programs
11 benefitting a larger number may wind up receiving more favorable consideration than
12 programs effecting a smaller population of students in violation of the First
13 Amendment as “minority views are [to be] treated with the same respect as [] majority
14 views[.]” *Southworth II*, 307 F.3d at 594-95 (citing *Southworth*, 529 U.S. at 235).
15 Similarly, consideration of a program’s history and need to return to campus is
16 improper under the First Amendment as a governing entity “may not discriminate . .
17 . in favor of [or against] established parties[.]” *Southworth II*, 307 F.3d at 594
18 (modified). The Court finds that these aspects of the ALF funding process provide
19 the decision-making officials unbridled discretion to promote or suppress certain
20 viewpoints through the allocation of ALF funds. To that end, CSUSM, at its election,
21 can modify to, but is not limited to, implement viewpoint-neutral regulations to guide
22 the consideration of such information, eliminate this directive for the Guidelines,
23 make explicit to grant all ALF applications that meet the valid-remaining criteria as a
24 matter of course, or any other constitutional valid remedy. To the extent the
25 Guidelines are unrelated to a program’s content or otherwise facially valid, this order
26 should have no effect. However, the ALF Fund cannot use the mandatory fees of
27 objecting students until specific and detailed standards guiding decision making is
28 adopted. For the foregoing reasons, Plaintiffs’ facial challenge to ASI’s ALF funding

1 process is **GRANTED IN PART** and **DENIED IN PART** and Defendants' motion
2 for summary for summary judgment is **GRANTED IN PART** and **DENIED IN**
3 **PART** on this ground.

4 2. ASI's Board of Director's Cosponsorship Funding

5 Plaintiffs also contend Defendants' distribution of the mandatory ASI fee is
6 viewpoint discriminatory because Defendant ASI's Board of Directors has unbridled
7 discretion. "A standardless discretion [] makes it difficult to detect, and protect the
8 public form, unconstitutional viewpoint discrimination by the [sponsoring] official."
9 *Kaahumanu v. Hawaii*, 682 F.3d 789, 807 (9th Cir. 2012) (citing *City of Lakewood*,
10 486 U.S. at 759).

11 It is undisputed that Defendant ASI's Board of Directors has its own budget to
12 host their own programs through its budget and through cosponsorship. Docs. 58-5
13 at 289; 58-7 at 109-111. Also, it is evident after review of Defendant ASI's Bylaws
14 that there is no explicit provision to facilitate how Defendant ASI should distribute its
15 funds in a viewpoint neutral manner. *See* Doc. 58-4 at 2-18. This is exactly the type
16 of unbridled discretion the *Forsyth* court cautioned us against; a scenario where there
17 are no articulated standards in ASI's Bylaws or its established practice, the ASI's
18 Board of Directors is not required to rely on any objective factors, and it need not
19 provide any explanation for its decision. As such, the Court finds that Defendant
20 ASI's Bylaws confer upon Defendant ASI's Board of Directors virtually unbridled
21 discretion to allocate CSUSM students' mandatory ASI fee in violation of the First
22 Amendment.

23 Defendants respond that ASI Board of Director's distribution of the mandatory
24 ASI fee is government speech. This Court is not persuaded by Defendants' assertion.
25 Government speech comes into play when the challenged speech was (1) financed by
26 tuition dollars and (2) the University and its officials were responsible for its content.
27 *Southworth*, 529 U.S. at 229. As the *Southworth* court stated, "That is not the case
28 before us." *Ibid*.

1 The Preamble of Defendant ASI’s Bylaws reads, in part,
 2 “We, *the students of [CSUSM]*, in order to provide: . . . (4) fiscal means
 3 and the management procedures that allow the campus to carry on
 4 activities providing those instructional and service aids *not normally*
 5 *furnished by the state budget . . . as a campus auxiliary organization . .*
 6 *.exercise all right and powers . . . to improve the quality of student life[.]”*

7 Doc. 58-4 at 5. As follows, it is undisputed that Defendant ASI’s sole source of
 8 funding is the mandatory ASI fee and any accrued interest. For that reason alone, the
 9 challenged speech here (ASI’s use of the mandatory ASI fee) is outside the realm of
 10 government speech. Moreover, like the university in *Southworth*, CSUSM’s “whole
 11 justification for fostering the [ASI and its ability to cosponsor RSO activities] is that
 12 it springs from the initiative of the students, who alone give it purpose and content in
 13 the course of their extracurricular endeavors.” *Southworth*, 529 U.S. at 229. The
 14 Court is troubled that the ASI Bylaws in fact permit the ASI Board of Directors to
 15 hold closed sessions to consider ASI matters, without a prohibition that all funding
 16 considerations must be considered in a open session or include some type of
 17 recordation. No mandate exists to ensure the ASI Board of Directors consider and/or
 18 fund cosponsorship requests in a viewpoint-neutral manner. Therefore, Plaintiffs’
 19 facial challenge to ASI’s Board of Director’s cosponsorship funding process is
 20 **GRANTED** and Defendants’ motion for summary for summary judgment is
 21 **DENIED** on this ground. Accordingly, the ASI Board cannot use the mandatory fees
 22 of objecting students for cosponsorship until specific and detailed standards guiding
 23 Defendant ASI’s Board of Directors’ discretion.

24 3. The Centers’ Funding

25 Plaintiffs also contend the Centers exercise unbridled discretion to favor specific
 26 viewpoints in violation of Plaintiffs’ First Amendment rights. The undisputed
 27 evidence reveals that the Centers have neither a formal funding request form nor a
 28 written policy governing whether a community center will grant an RSO’s request.
 Docs. 58-5 at 52; 58-7 at 113. The evidence also reveals that cosponsorship

1 consideration is made on a case-by-case basis by the Centers’ director and assistant
2 director based on their assessment of whether the proposed content serves the Centers’
3 learning objectives. Doc. 58-7 at 115, 127, 364. However, neither Centers’ governing
4 codes express what those learning objectives are. Doc. 58-7 at 323-28. The Court
5 finds that this is unconstitutionally unbridled discretion and exactly the kind of
6 behavior the First Amendment is in place to prevent. For example, Plaintiffs
7 contacted GEC to request a cosponsorship of the abortion lecture on February 24,
8 2017. Doc. 58-8 at 42. Upon receipt Plaintiffs’ request, Abrahán Monzón emailed
9 Robert Aiello-Hauser, Director of Student Engagement & Inclusion for ASI at
10 CSUSM, about how to compile an appropriate response. After a closed-door meeting
11 concerning Plaintiffs’ request, Monzón eventually responded to Plaintiffs’ denying
12 the funding request for budgetary reasons. Now, the Court is precluded for verifying
13 the veracity of the denial reasoning because this meeting was neither recorded audibly
14 nor in writing. These “back room deliberations” are exactly type of considerations
15 the First Amendment is designed to prevent. Nothing prevents these officials from
16 encouraging some views while suppressing others through cosponsorship funding.
17 Thus, the unbridled discretion the Centers have in cosponsorship funding violates
18 Plaintiffs’ First Amendment rights against compelled speech. Therefore, Plaintiffs’
19 facial challenge to the Centers’ cosponsorship funding process is **GRANTED** and
20 Defendants’ motion for summary for summary judgment is **DENIED** on this ground.
21 Consequently, until narrowly drawn, reasonable, and definite standards are adopted,
22 the Centers cannot use the mandatory ASI fee of objecting students for
23 cosponsorships.

24 Accordingly, until narrowly drawn, reasonable, and definite standards are
25 adopted by Defendant ASI and its ASI committees responsible for student activity
26 funding through the ASI fee, ASI RSO-funding entities cannot use the mandatory fees
27
28

1 of objecting students.⁶

2 **C. Whether CSUSM’s emphasis on the Centers violates the Fourteenth**
 3 **Amendment Equal Protection Clause.**

4 Under the Equal Protection Clause of the Fourteenth Amendment, “all persons
 5 similarly situated should be treated alike.” *City of Cleburne v. Cleburne Living Ctr.*,
 6 473 U.S. 432 439 (1985). Collectively, the equal protection progeny instructs: When
 7 a barrier “makes it more difficult for members of one group to obtain a benefit than it
 8 is for members of another group, a member of the former group seeking to challenge
 9 the barrier need not allege that he would have obtained the benefit but for the barrier
 10 in order to establish standing.” *Northeastern Fla. Chapter of Associated Gen.*
 11 *Contractors of America v. City of Jacksonville, Fla.*, 508 U.S. 656, 666 (1993).
 12 “Parties allegedly treated differently in violation of the Equal Protection Clause are
 13 similarly situated when they are arguably indistinguishable.” *Erickson v. Cty. of*
 14 *Nevada ex rel. Bd. of Supervisors*, 607 Fed.Appx. 711 (2015).

15 Here, Plaintiffs and the Centers are not arguably indistinguishable. The Court
 16 finds that undisputed record reveals distinctions between their distinct missions,
 17 purposes, and derivations. For example, ASI’s Vision Statement states, “ASI strives
 18 to provide representation, to offer an inclusive environment, and to promote campus
 19 pride for *all* students.” Doc. 58-5 at 6. ASI fulfills its vision by employing each
 20 element of its Core Values: “Advocacy, Solidarity, and Integrity.” *Id.* at 7.
 21 Additionally, The Centers were specifically contemplated in the ASI Bylaws to fulfill
 22 ASI’s Mission, Values and Bylaws. *Id.* at 13. Meanwhile, Plaintiff SFL’s Purpose is
 23 “to engage, equip and empower our fellow classmates to make the best decision when
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25
 26 ⁶ The Court notes that a Memorandum of Agreement became effective July 1, 2018,
 27 which calls for a gradual three-year defunding of the Centers through the ASI fee.
 28 The Centers’ funding will come from the general tuition budget, and the Centers’
 director and assistant director will become employees of CSUSM, not ASI. Docs. 58-
 5 at 31; 58-7 at 264.

1 faced with an unexpected pregnancy.” Doc. 58-4 at 378. Plaintiff SFL fulfills its
2 Purpose by “engaging in events that share knowledge and education about abortion
3 and its effects on women and men.” *Ibid.* Defendants point out several other
4 contrasting aspects these campus organizations, from the size and staff to oversight.
5 Doc. 55-1 at 34. The Court finds that these distinctions demonstrate that Plaintiff SFL
6 and the Centers are not similarly situated as envisioned in the Equal Protection cases.
7 Therefore, Plaintiffs’ Equal Protection Clause claim fails. Accordingly, Plaintiffs’
8 motion for summary judgment is **DENIED** and Defendants’ motion for summary for
9 summary judgment is **GRANTED** on this ground.

10 **D. Whether Qualified Immunity applies to the Individual Defendants.**

11 The threshold question a court considers when determining qualified immunity
12 is, taken in the light most favorable to the party asserting injury, whether the
13 challenged conduct by the party asserting qualified immunity violated a constitutional
14 right. *Saucier v. Katz*, 533 U.S. 194, 201 (2001). If no constitutional right was
15 infringed upon, then no further inquiry is required. *See e.g., Scott v. Harris*, 550 U.S.
16 372 (2007). However, if evidence of a constitutional right violation is found, the court
17 then “ask[s] whether the right was clearly established” such that “it would be clear to
18 a reasonable officer that [his or her] conduct was unlawful in the situation he
19 confronted.” *Saucier*, 533 U.S. at 201-202. “[E]xisting precedent must have placed
20 the statutory or constitutional question beyond debate.” *Ashcroft v. al-Kidd*, 563 U.S.
21 731, 741 (2011). “The dispositive question is whether the violative nature of the
22 *particular* conduct is clearly established.” *Mullenix v. Luna*, 136 S. Ct. 305, 308
23 (internal quotation marks and citation omitted) (emphasis in original). The burden is
24 on the plaintiff to show the challenged conduct violated a clearly established federal
25 right. *Davis v. Scherer*, 468 U.S. 183, 197 (1984).

26 As explained above, the Court finds that the evidence demonstrated that
27 Plaintiffs’ First Amendment right against compelled speech was violated by
28 Defendants’ unbridled discretion to disburse the ASI fee in support of viewpoints to

1 which Plaintiffs object without having narrowly drawn, reasonable, and definite
2 standards.

3 Plaintiffs assert that the law mandating that universities allocate mandatory
4 student fees in a viewpoint-neutral manner has been clearly established for almost two
5 decades. Defendants contend individual Defendants Chancellor White and President
6 Hayes are entitled to qualified immunity because they acted lawfully at the time or
7 with at least a reasonable belief that their conduct was lawful. This Court agrees with
8 Plaintiffs as Defendants do not touch on the relevant standard guiding the Court's
9 determination. On March 22, 2000, the *Southworth* Court set out the viewpoint
10 neutral standard in a case challenging conduct identical to the challenged conduct
11 here. *See Southworth*, 529 U.S. at 233-34. Although not binding, on October 2, 2002,
12 the Seventh Circuit clarified that a university's absence of criteria governing the use
13 of mandatory student fees gave the decision-making official unbridled discretion to
14 awards funds based on viewpoint; thus, the conduct violates the viewpoint neutrality
15 principle and the objecting students First Amendment rights. *See Southworth II*, 307
16 F.3d at 592. On June 6, 2012, the Ninth Circuit adopted the *Southworth II* unbridled
17 discretion standard. *See Kaahumanu*, 682 F.3d at 806. Defendant Haynes began her
18 career as a university president in 1995 and became the president at CSUSM in
19 February 2004. Due to the development and state of the law in this area when
20 President Haynes joined CSUSM, the Court expects that she should have been aware
21 the violative nature of the ASI fee funding mechanisms, especially since she is tasked
22 to supervise the ASI under the ASI bylaws. *See Doc. 58-4* at 18. Likewise,
23 Chancellor White, having been at CSUSM since 2012, is also on notice due to his
24 position of approving all mandatory student and campus-based fees and tenure that
25 viewpoint neutrality is an operational principle when disbursing mandatory student
26 fees. *Doc. 58-7* at 221-23. Thus, qualified immunity does not shield the individual
27 Defendants in this case. Accordingly, Plaintiffs' motion for summary judgment is
28 **DENIED** and Defendants' motion for summary for summary judgment is

1 **GRANTED** on this ground.

2 **IV. CONCLUSION**

3 Based on the foregoing reasons, the hereby orders in accordance with the
4 reasoning above. As such, Defendants’ motion for summary judgment [doc. 55] is
5 **GRANTED IN PART** and **DENIED IN PART**. Defendants’ conditional motion to
6 sever and to strike jury demand [doc. 56] is **DENIED AS MOOT** as the standing,
7 ripeness, and qualified immunity issues have been disposed. Plaintiffs’ motion for
8 summary judgment [doc. 58] is **GRANTED IN PART** and **DENIED IN PART**.

9 **IT IS SO ORDERED.**

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Date: August 13, 2019


Hon. M. James Lorenz
United States District Judge