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Fourth Judicial District, Ada County
Phil McGrane, Clerk of the Court
By: Deputy Clerk - Cardinale, Korby

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

BIG CITY COFFEE, dba, BIG CITY COFFEE & CAFÉ, and SARAH JO FENDLEY, an individual,

Plaintiffs,

-vs-

BOISE STATE UNIVERSITY, MARLENE TROMP, individually and in her official capacity as President of Boise State University; LESLIE WEBB, individually and in her official capacity as Vice-President of Student Affairs and Enrollment Management; ALICIA ESTEY, individually and in her official capacity as Vice President for University Affairs and Chief of Staff, and FRANCISCO SALINAS, individually and in his official capacity as Assistant to the Vice-President for Equity Initiatives, and DOES-20.

Defendants.

Case No. CV01-21-15332

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION TO DISMISS

On October 1, 2021, Plaintiffs filed this case against Defendants asserting the following claims: (1) Count One: Violation of Plaintiff's First Amendment Right to Freedom of Speech (42 U.S.C. §§ 1983 and 1988); (2) Court Two: Violation of Plaintiffs' Fifth and Fourteenth Amendment Rights to Procedural and Substantive Due Process of Law (42 U.S.C. §§ 1983 and 1988); (3) Violation of Plaintiffs' Fourteenth Amendment Right to Equal Protection Under the Law (42 U.S.C. §§ 1983 and 1988); (4) Count Four: Violation of Plaintiffs' Right to Freedom of

Speech Under the Idaho Constitution; (5) Count Five: Violation of Plaintiffs' Right to Due Process of Law Under the Idaho Constitution; (6) County Six: Violation of Plaintiffs' Right to Equal Protection Under the Idaho Constitution; (7) Count Seven: Tortious Interference with a Contract; (8) Count Eight: Fraud by Omission; (9) Count Nine: Violation of the Idaho Consumer Protection Act; and (10) Count Ten: Declaratory Relief. (Compl. at 19-30.) For Counts One through Nine, Plaintiffs seek damages in an amount to be proven at trial, but no less than $10,000,000.00. (Compl. ¶¶ 78; 83; 92; 101; 106; 115; 120; 125; 131.) For Count Ten, Plaintiffs seek "at an absolute minimum, nominal damages." (*Id.* ¶ 134.) Plaintiffs also request punitive damages. (*Id.* ¶ 135.)

Defendants Boise State University ("Boise State"), Marlene Tromp, Leslie Webb, Alicia Estey, and Francisco Salinas, filed a motion to dismiss on October 28, 2021, and Plaintiffs filed their opposition on January 21, 2022. Briefing has concluded, oral argument took place (along with post-argument briefing) and the motion is ripe for decision.

I. BACKGROUND

A summary of the pertinent facts alleged by Plaintiffs in the Complaint are below.

In May of 2020, Big City Coffee was selected as Boise State's new coffee vendor for the on-campus Albertson Library. (Compl. ¶ 38.) Sarah Jo Fendley, the owner of Big City Coffee, borrowed approximately $150,000 from the Small Business Administration to open the new shop. (*Id.* at 2; ¶ 42.)

On August 17, 2020, Big City Coffee entered into a contract with Aramark, the company in charge of all food and beverage services at Boise State. (*Id.* ¶ 43.) Unbeknownst to Fendley, various persons and BSU organizations, including the student activist group, Inclusive Excellence Student Council ("IESC"), objected to Big City Coffee's opening on campus because

of Fendley's engagement to a police officer, Kevin Holtry, and the coffee shop's known support for law enforcement. (*Id.* ¶¶ 44-46.) According to emails Plaintiffs discovered, Webb and unidentified representatives of Boise State were aware of a controversy surrounding the coffee shop and discussed the matter as early as July 28, 2020. (*Id.* ¶ 45.)

In October of 2020, a Snapchat message from the ASBSU Chief of Staff protested Big City Coffee's support of Thin Blue Line, a law enforcement support movement. (*Id.* ¶ 47.) In response, Fendley drafted a social media post on October 21, 2020, explaining her reasons for supporting first responders. (*Id.*) Plaintiffs allege that the IESC found Fendley's post objectionable and complained to "Defendants," though Plaintiffs fail to identify exactly which Defendant heard these complaints. (*Id.* ¶ 48.) The next day, Fendley was "summoned" to a meeting with Webb and Estey and during the meeting, Fendley asked Webb if "Defendants" would support her in the face of the unfair criticism. (*Id.* ¶¶ 49; 59.) Again, Plaintiffs do not specify precisely which Defendant this inquiry was directed to. Webb responded, "That's not going to happen." (*Id.* ¶ 59.) An Aramark representative then suggested that Fendley close the campus location until January to see if the matter would resolve itself. (*Id.*) Fendley asked if, after such a temporary closing, Defendants would then support Big City Coffee. (*Id.*) Estey said, "I think it is best that we part ways." (*Id.*) Plaintiffs contend that based upon this meeting, they were forced off of Boise State's campus. (*Id.* ¶¶ 60; 68.)

II. STANDARD

A district court's decision on a motion to dismiss filed under Idaho Rule of Civil Procedure 12(b)(6) is reviewed *de novo*. *Clark v. Jones Gledhill Fuhrman Gourley, P.A.*, 163 Idaho 215, 220, 409 P.3d 795, 800 (2017) (citation omitted). When considering a 12(b)(6) motion, the Court must look only to the pleadings to determine whether a claim for relief has

been stated. *Id.* (citation omitted). A motion to dismiss for failure to state a claim should not be granted unless it appears beyond doubt that the plaintiff can prove no set of facts in support of its claim that would entitle the plaintiff to relief. *Id.* The Court must draw all reasonable inferences in favor of the non-moving party. *Id.* (citations omitted).

It need not appear that the plaintiff can obtain the particular relief prayed for, as long as the court can ascertain that some relief may be granted. *Harper v. Harper*, 122 Idaho 535, 536, 835 P.2d 1346, 1347 (Ct. App. 1992) (citing WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE § 1357, at 339 (1990)). As a practical matter, a dismissal under Rule 12(b)(6) is likely to be granted only in the unusual case in which the plaintiff includes allegations showing on the face of the complaint that there is some insurmountable bar to relief. *Id.* (citation omitted).

Idaho Rule of Civil Procedure 8(a)(2) requires that a pleading stating a claim for relief must contain a "short and plain statement of the claim showing that the pleader is entitled to relief." Idaho R. Civ. P. 8(a)(2). And Idaho Rule of Civil Procedure 9(b) requires that allegations asserting the violation of civil or constitutional rights must state with particularity the circumstances constituting such violation(s). Idaho R. Civ. P. 9(b). It is appropriate to dismiss claims under 12(b)(6) when such claims are required to be pled with particularity and the allegations are insufficient. *See Dengler v. Hazel Blessinger Fam. Tr.*, 141 Idaho 123, 128, 106 P.3d 449, 454 (2005).

III. DISCUSSION

A. Plaintiffs' Fifth Amendment claim is dismissed because there are no federal actors named in this case.

As a threshold matter, the Court can determine on its own whether it has subject matter jurisdiction to hear a case and may raise the issue at any time. *Ackerschott v. Mountain View*

Hosp., LLC, 166 Idaho 223, 237, 457 P.3d 875, 889 (2020) (citations omitted). Here, the Court does not have subject matter jurisdiction to hear Plaintiffs' Fifth Amendment Claim in Count Two of the Complaint. Plaintiffs allege a due process claim under the Fifth Amendment to the United States Constitution, claiming that they were deprived of their constitutional right of "speech and expression" and their "interests under the Contract." (Compl. ¶¶ 79-83.) However, the Fifth Amendment only applies to the federal government. *See Farrington v. Tokushige*, 273 U.S. 284, 299 (1927); *Betts v. Brady*, 316 U.S. 455, 462 (1942); *Bingue v. Prunchak*, 512 F.3d 1169, 1174 (9th Cir. 2008). The federal government is not a defendant here. As a result, Plaintiffs' Fifth Amendment claim is dismissed.

B. Plaintiffs' claims for money damages against Boise State and each defendant in their official capacity, asserted in Counts One and Two are dismissed.

Defendants argue that Plaintiffs' Counts One and Two should be dismissed because Boise State cannot be sued under 42 U.S.C. § 1983, as an arm of the State, and that neither Tromp, Webb, Estey, or Salinas can be sued for money damages in their official capacities under section 1983. Plaintiffs argue that dismissal cannot be had against Defendants absent further factual development. However, this issue can be disposed of here without further factual development.

The Eleventh Amendment bars suits against the State unless the State waives its immunity, or unless Congress has exercised its power under section 5 of the Fourteenth Amendment to override that immunity. *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 67, 109 S. Ct. 2304, 2310, 105 L. Ed. 2d 45 (1989). Absent a waiver or immunity override, a State cannot be sued without its consent. *Von Lossberg v. State*, No. 48220, 2022 WL 775577, at *6 (Idaho Mar. 15, 2022), *as amended* (Mar. 17, 2022) (citation omitted). Federal statute 42 U.S.C. § 1983 was enacted by Congress pursuant to its power under section 5 of the Fourteenth

Amendment. *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 66. This statute effectively creates a Fourteenth Amendment action for damages as outlined in the statute.

Plaintiffs assert damage claims under the First and Fourteenth Amendment, pursuant to 42 U.S.C. § 1983. These claims are alleged against Boise State as well as each Defendant in his or her "official capacity." (Compl. ¶¶ 70-92.) Section 1983 states in relevant part:

> Every *person* who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress....

42 U.S.C. § 1983 (emphasis added). It is well settled, however, that "the state of Idaho is not a "person" for purposes of section 1983. *Kessler v. Barowsky*, 129 Idaho 647, 655, 931 P.2d 641, 649 (1997) (citing *Arnzen v. State,* 123 Idaho 899, 903, 854 P.2d 242, 246 (1993), *cert. denied,* 510 U.S. 1071 (1994)); and *see Will v. Michigan Dep't of State Police*, 491 U.S. at 65-66, 70 (holding that neither a State nor its officials acting in their official capacities are "persons" under § 1983 and therefore suit cannot be had against them). It is similarly well settled that governmental entities that are arms of the State are not "persons" under section 1983. *See Alden v. Maine*, 527 U.S. 706, 731, 119 S. Ct. 2240, 2255, 144 L. Ed. 2d 636 (1999); *N. Ins. Co. of New York v. Chatham Cty., Ga.*, 547 U.S. 189 (2006); *Worzala v. Bonner Cty.*, No. CV06-308-N-EJL, 2007 WL 328829, at *1 (D. Idaho Jan. 31, 2007); *see also Strayer v. Idaho State Patrol*, No. 2:20-CV-450-DWM, 2021 WL 1250319, at *2 (D. Idaho Mar. 16, 2021) (finding that the Idaho State Police is not a "person" under section 1983 as it is directly funded by the Idaho Legislature, is described as an executive department of state government under Idaho Code, and its director is appointed by the governor, who fixes his or her salary).

Moreover, a suit against a state official acting in an official capacity is nothing more than a suit against the state, and state officials acting in their official capacity are not "persons" under section 1983. *Id.* (citation omitted). Similarly, there is no respondeat superior or vicarious liability for claims brought under 42 U.S.C. § 1983. *Monell v. Dep't of Soc. Servs. of City of New York*, 436 U.S. 658, 691 (1978). Instead, a plaintiff must show that the individual who is sued under section 1983 had personal involvement in the alleged constitutional violation, or affirmatively acts, participates in, or omits to perform an act, which he or she is legally obligated to do and caused the constitutional deprivation. *See Taylor v. List,* 880 F.2d 1040, 1045 (9th Cir.1989); *Leer v. Murphy,* 844 F.2d 628, 633 (9th Cir.1988).

To determine whether an entity or agency is an "arm of the State," the United States Supreme Court has inquired into the relationship between the State and the entity in question, and sometimes examines "the essential nature and effect of the proceeding" or focuses on the "nature of the entity created by state law." *Regents of the Univ. of California v. Doe*, 519 U.S. 425, 429-30 (1997) (citations omitted). The Court also noted that, "whether a money judgment against a state instrumentality or official would be enforceable against the State is of considerable importance to any evaluation of the relationship between the State and the entity or individual being sued." *Id.* at 430 (citations omitted). The Court made clear, however, that ultimate responsibility for the payment of a potential money judgment is not dispositive as to whether an entity is an "arm of the State." *Id.* Thus, for example, if an agency could be indemnified for a potential judgment by sources other than state funds, this will not necessarily convert an otherwise qualifying state entity into a non-state entity in the "arm of the State" analysis. *Id.* at 431. Rather, it is the "potential legal liability, rather than its ability or inability to require a third party to reimburse it, to discharge the liability in the first instance, that is

relevant." *Id.* In short, the "Eleventh Amendment protects the State from the risk of adverse judgments even though the State may be indemnified by a third party." *Id.*

Federal circuit courts have established their own precedent outlining tests that govern the determination of whether an entity or agency is an "arm of the state." Here, Plaintiffs urge the Court to apply the Ninth Circuit's precedent in *Mitchell v. L.A. Cmty. Coll. Dist.*, 861 F.2d 198, 201 (9th Cir. 1988), which outlined a five-factor balancing test to determine whether a governmental agency is an "arm of the state." In *Mitchell*, the Court examined the following factors: (1) whether a money judgment would be satisfied from state funds; (2) whether the entity performs central governmental functions; (3) whether the entity may sue or be sued; (4) whether the entity has the power to take property in its own name or only the name of the state, and (5) the corporate status of the entity. *Id.* Plaintiffs also argue that the case of *Hutton v. Blaine Cty. Sch. Dist. #61*, No. 1:19-CV-00116-DCN, 2020 WL 1339120, at *6 (D. Idaho Mar. 23, 2020) is "instructive" and "advises against dismissal" here. This Court disagrees.

First, the *Hutton* case does not advance the ball for Plaintiffs. In *Hutton*, the U.S. district court weighed the *Mitchell* factors and held that a local school district (the Blaine County School District #61) had not established Eleventh Amendment immunity on a motion to dismiss. *Id.* at *1 and *8. The court noted that "at this stage of the litigation there is very little evidence addressing whether a money judgment would be paid out of state funds, which is the first—and most important—*Mitchell* factor." *Id.* at *8. However, because Eleventh Amendment immunity does not apply to lesser entities, such as municipal corporations, it is easier to see why a motion against such an entity—a local school district—is a closer call. *See e.g.*, *Alden v. Maine*, 527 U.S. 706, 756. But here, Plaintiffs fail to implicate any extraordinary factual difficulty regarding the issue of Boise State's entitlement to immunity, discussed below.

Second, Idaho has not adopted the Ninth Circuit's precedent in *Mitchell*. However, even if the Court applied the *Mitchell* factors here, this Court finds that Boise State is an arm of the State and is therefore not a "person" that can be sued under 42 U.S.C. § 1983.[1] *See also Joseph v. Boise State Univ.*, 998 F. Supp. 2d 928, 946 (D. Idaho 2014) (holding that Boise State is an arm of the State); *Milbouer v. Keppler*, 644 F. Supp. 201, 207 (D. Idaho 1986) (finding Boise State is entitled to Eleventh Amendment immunity). Under Idaho Code § 33-4001, Boise State was established "as an institution of higher education of the state of Idaho." Idaho Code § 33-4001. The "general supervision, government and control" of Boise State is "vested in the state board of education which...act[s] as the board of trustees of said university." Idaho Code § 33-4002. The Board of Trustees has "all rights and title to real estate and personal property" of Boise State, and has: control over all buildings, power to elect presidents and contract with faculty, power to supervise students, and all powers and duties granted by Idaho Code to the board of regents of the University of Idaho, and the board of trustees of Idaho State University. Idaho Code § 33-4005. The State Board of Education is an executive department of the State of Idaho and requests appropriations for Boise State through the Idaho Legislature. Idaho Code §§ 33-101, 33-111. The State Board of Education directs and controls all funds so appropriated. Idaho Code § 33-111. These statutes establish Boise State's entitlement to immunity as an arm of the State. Moreover, in this case, there are no allegations that either Boise State, or the individual Defendants in their official capacity, waived their immunity.

[1] Notably, Boise State falls within the definition of "State" under the Idaho Tort Claims Act. Idaho Code § 6-902(1).

Plaintiffs fail to state a claim for relief in Counts One and Two against Boise State and Tromp, Webb, Estey, and Salinas, in their official capacities, because they are immune from Plaintiffs' claim for damages under section 1983. Such claims are therefore dismissed.

C. The motion to dismiss Webb, Estey, and Salinas, in their individual capacities, is denied as to Count One, but granted as to Tromp.

The First Amendment prohibits government officials from subjecting an individual to retaliatory actions for engaging in protected speech. *Riley's Am. Heritage Farms v. Elsasser*, 29 F.4th 484, 496 (9th Cir. 2022) (citing *Nieves v. Bartlett*, —— U.S. ——, 139 S. Ct. 1715, 1722, (2019) (quoting *Hartman v. Moore*, 547 U.S. 250, 256 (2006))). "If an official takes adverse action against someone based on that forbidden motive, and non-retaliatory grounds are in fact insufficient to provoke the adverse consequences, the injured person may generally seek relief by bringing a First Amendment claim." *Id.* (citation omitted). However, the government may impose certain restraints on speech of its employees that would be unconstitutional if applied to the general public. *Id.* (citing *City of San Diego v. Roe*, 543 U.S. 77, 80 (2004) (per curiam)).

The United States Supreme Court established a framework to balance the competing interests between a government employer and employee, referred to the as the *Pickering* framework, which requires a fact-sensitive and deferential weighing of the government's legitimate interests as an employer, against the First Amendment rights of an employee. *Id.* (citation omitted). The *Pickering* framework has been extended to cases brought by government contractors.[2] *Id.* (citations omitted). If a plaintiff brings a First Amendment retaliation claim, and the *Pickering* framework applies, a two-step burden shifting approach applies:

> First, a plaintiff must establish a prima facie case of retaliation. This requires the plaintiff to show that "(1) it engaged in expressive conduct that addressed a matter

[2] Plaintiffs did not plead sufficient facts that would allow the Court to determine if the *Pickering* framework applies in this case.

> of public concern; (2) the government officials took an adverse action against it; and (3) its expressive conduct was a substantial or motivating factor for the adverse action."..... This final element of the prima facie case requires the plaintiff to show causation and the defendant's intent. Because § 1983 itself contains no intent requirement, we look to the underlying constitutional violation alleged.....Where, as here, a plaintiff alleges First Amendment retaliation, the plaintiff must show that the government defendant "acted with a retaliatory motive." .... Put another way, a plaintiff must establish that the defendant was motivated (or intended) to take the adverse action because of the plaintiff's expressive conduct.

Id. at 497 (citations omitted). If the plaintiff carries its burden, the burden shifts to the government, which can avoid liability in one of two ways: (1) by demonstrating that its legitimate administrative interests in promoting efficient service-delivery and avoiding workplace disruption outweighs Plaintiff's First Amendment interests; or (2) by showing that it would have taken the same actions in the absence of plaintiff's expressive conduct. *Id.* (citations omitted).

Plaintiffs assert that they were "removed" as a vendor from Boise State's campus in retaliation for expressive conduct under the First Amendment, which is alleged as: (1) displaying flags and Thin Blue Line emblems at Fendley's downtown location; and (2) Fendley's social media post on October 21, 2020, discussing her support for first responders, including police, fire, and EMS. (Compl. ¶¶ 2; 21; 27; 47; 55; 68.) In support of their claims, Plaintiffs allege several allegations collectively against "Defendants." (Compl. ¶¶ 28; 32; 36; 38; 44; 46; 48; 49; 51; 53; 54; 55; 56; 57; 58; 61; 62; 63; 65; 66; 67; 68.) However, to survive a motion to dismiss, Plaintiffs must do more than assert conclusory allegations concerning collective conduct by "Defendants." Rather, Plaintiffs must put each individual Defendant on notice of the facts and allegations against them. *See, e.g., Pearce v. Labella*, 473 F. App'x 16, 20 (2d Cir. 2012); *Lawrence v. Thornburg Mortg. Home Loans Inc.*, 624 F. App'x 721, 722 (11th Cir. 2015); *Feinstein v. Resol. Tr. Corp.*, 942 F.2d 34, 45 (1st Cir. 1991).

Here, Count One may proceed against Webb, Estey, and Salinas, in their individual capacities, as set forth below. However, there are insufficient facts putting Tromp on notice of this claim, and thus, Count One is dismissed against Tromp.

At the outset, Plaintiffs assert minimal allegations with respect to the individual Defendants' personal involvement in the alleged constitutional violation at issue.[3] However, the October 22, 2020 meeting at which Plaintiffs allege that Big City Coffee was removed from Boise State's campus occurred one day after Fendley's social media post supporting first responders. Proximity alone is rarely sufficient to establish the causation element of a First Amendment retaliation claim. *See, e.g., Sensabaugh v. Halliburton*, 937 F.3d 621, 630 (6th Cir. 2019) (citation omitted); *George v. Newman,* 726 F. App'x 699, 708 (10th Cir. 2018) (citation omitted); *Penley v. McDowell Cty. Bd. of Educ.*, 876 F.3d 646, 656 (4th Cir. 2017) (citation omitted); *Gonzalez-Droz v. Gonzalez-Colon*, 660 F.3d 1, 16 (1st Cir. 2011) (citation omitted). Plaintiffs must generally allege other indicia of retaliatory conduct. *Sensabaugh*, 937 F.3d at 630. Nonetheless, given the temporal proximity between the allegations in the Complaint and the October 22, 2020 meeting, the Court cannot say that Plaintiffs have failed to state a claim upon which relief can be granted as to Count One at this point in time. Similarly, allegations as to Count One meet the threshold to survive dismissal under the applicable pleading standards.

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[3] Plaintiffs' Complaint contains several conclusory allegations aimed at Boise State, including: (1) Tromp's commitment to the "social justice movement;" (2) Defendants being a resource for "left-wing activist groups;" (3) using policies that only "protect causes and persons favored by the Left;" and (4) that Defendants have "bias against law enforcement and its supporters." (Compl. ¶¶ 30; 32; 34; 54.) These conclusory allegations do not put the individual Defendants on notice of Plaintiffs' constitutional claims. Plaintiffs also assert a number of allegations that do not involve named parties in this case, such as Nicole Nimmons, Jeremy Harper, Terry Wilson, and Dr. Arthur Scarritt. (Compl. ¶¶ 33-35; 36; 37; 40.) Yet to be clear, there is no vicarious liability under 42 U.S.C. § 1983 for the alleged acts and/or omissions by these non-parties.

As to Defendant Webb, Plaintiffs have alleged sufficient facts to state a claim against her under Count One. Plaintiffs' allegations against Webb include that: (1) as of July 28, 2020, Webb discussed "the potential for controversy" regarding Big City Coffee, and continued such discussions through October 2020; (2) Webb attended meetings held by the IESC (a student activist group), at which the IESC's objections to Big City Coffee were discussed; (3) Webb attended an IESC meeting on September 7, 2020, at which the group complained about "Big City's alleged racism and mistreatment of people of color;" (4) Webb participated in an IESC meeting on September 29, 2020, at which Webb discussed the contractual penalties associated with causing the termination of the contract with Big City Coffee; and (5) Webb summoned Fendley to a meeting on October 22, 2022, over which she presided, and at which time Fendley claims Big City Coffee was forced off campus. (Compl. ¶¶ 45; 52; 54; 55.) The Court is not making any determination as to whether such allegations are sufficient to ultimately hold Webb liable for Count One. The Court notes, for example, that the allegation asserting discussions about a "potential for controversy" is conclusory. But based upon the remaining allegations as a whole, it cannot be said that there are no set of facts that would entitle Plaintiffs to relief on Count One. Moreover, Plaintiffs have put Webb on notice of their claim to sufficiently meet the pleading requirements for Count One.

As to Defendant Estey, although a much closer call, the Court finds that Plaintiffs have alleged sufficient facts to state a claim against her under Count One. Plaintiffs' lone allegation against Estey includes that Estey attended the October 22, 2020 meeting and was the individual who stated to Fendley, "I think it is best that we part ways," which Fendley understood to mean that "Big City's time on BSU campus had come to an end." (Compl. ¶ 59.) The Court is not making any determination as to whether such allegation is sufficient to ultimately hold Estey

liable for Count One. However, Plaintiffs have pled enough for this claim to withstand dismissal under Rule 12(b)(6) and the pleading requirements at issue.

As to Defendant Salinas, it is again a closer call. However, Plaintiffs have alleged sufficient facts to state a claim against him under Count One. Plaintiffs' allegations against Salinas include that: (1) Salinas attended meetings held by IESC, at which the IESC's objections to Big City Coffee were discussed; (2) Salinas attended an IESC meeting on September 7, 2020, at which the group complained about "Big City's alleged racism and mistreatment of people of color;" and (3) Salinas participated in an IESC meeting on September 29, 2020, at which Salinas discussed the contractual penalties connected with causing the termination of the contract with Big City Coffee. (Compl. ¶¶ 32; 45; 52; 54.) These allegations plead an inference of causation, given the temporal proximity of the September 29, 2020 meeting to the October 22, 2020 meeting, combined with the allegation that Salinas discussed terminating the contract with Big City Coffee at the September 29, 2020 meeting. Again, the Court is not making any determination as to whether these facts are sufficient to sustain liability against Salinas on Count One. However, Plaintiffs have pled sufficient facts to avoid dismissal under Rule 12(b)(6) and the pleading requirements applicable here.

The motion to dismiss is granted on Count One in favor of Tromp because Plaintiffs have failed to plead sufficient facts to sustain that claim against her. As to Defendant Tromp, Plaintiffs' allegations include that: (1) Tromp made statements and took positions, both before and during her tenure at BSU, that "leaves little doubt that she too is fully-committed to the social justice movement;" (2) Tromp received a letter on or around July 27, 2020, in which the IESC objected to the presence of the Boise Police Department on campus; (3) Tromp called Boise Mayor Lauren McLean on October 22, 2020 "presumably to have Holtry and Holland

silenced;" (4) weeks later, "Tromp called Chief Lee directly and shared her dismay at the public outcry over Big City's mistreatment, complaining that Defendants risked losing financial and political support due to the controversy;" and (5) since October 2020, Tromp made "obfuscating" statements. (Compl. ¶¶ 29; 44; 62; 63; 68.) In addition to restating the allegations in the Complaint against Tromp, Plaintiffs argue that the Court should infer that Tromp played an affirmative part in removing Plaintiffs from campus because she, "is an agenda-driven individual" and that she "quite likely set in motion the unconstitutional acts of Webb and Estey" and attempted to "undertake damage control after the October 22, 2020 meeting." (Pls.' Opp'n to Defs.'s Mot. to Dismiss at 10.)

However, Plaintiffs' arguments and allegations are insufficient to state a claim against Tromp because there are no allegations that could be construed as Tromp having either participated in or caused the alleged constitutional violations at issue. The Complaint *does* contain allegations that Salinas and Webb reported to Tromp. (Compl. ¶¶ 32; 49.) However, again, there is no vicarious liability under 42 U.S.C. § 1983. Any claim asserted against Tromp, or any other individual Defendant, must be supported by factual allegations that state a cognizable claim, and sufficiently put them on notice of such claim. The Complaint fails to do that as to Count One against Tromp and the motion to dismiss is granted in that regard.

D. The motion to dismiss Count Two is granted in part and denied in part.

1. <u>Plaintiff's procedural due process claim in Count Two may proceed</u>.

"A Section 1983 claim based upon procedural due process contains two elements: (1) a deprivation of liberty or property interest protected by the Constitution; and (2) a denial of adequate procedural protections." *Cameron v. Owyhee Cty.*, No. CV-09-423-REB, 2011 WL 2945820, at *10 (D. Idaho July 20, 2011) (citing *Brewster v. Bd. of Educ. Of the Lynwood*

Unified Sch. Dist., 149 F.3d 971, 982 (9th Cir.1998)). "To state a claim under the Due Process Clause, Plaintiffs must first establish they possessed a property interest, deserving of constitutional protection. *Id.* (citations omitted). "If a property interest exists, the essential requirements of due process are notice and an opportunity to respond." *Id.* (citing *Cleveland Bd. of Educ. v. Loudermill et al.*, 470 U.S. 532, 546 (1985)).

Court Two alleges a Fourteenth Amendment procedural due process claim. Plaintiffs allege that Defendants deprived them of a protected liberty interest—*i.e.*, their right to speech and expression—or a property interest (Plaintiffs' interest in the contract at issue), without due process. (Compl. ¶ 81.) "Liberty" under the Fourteenth Amendment includes the right of free speech. *Near v. State of Minnesota ex rel. Olson*, 283 U.S. 697, 707 (1931) (citations omitted). Citing *Hudson v.* Palmer, 468 U.S. 517 (1984), Defendants argue that this claim should be dismissed because Plaintiffs have not pled that the state procedures available to challenge the deprivation are inadequate. The Court agrees that ultimately, Plaintiffs will have to prove that the procedures available to them were inadequate in order to sustain a procedural due process claim. However, at this stage, Plaintiffs have pled sufficient facts for their claim to move forward.

As set forth above, Plaintiffs have adequately pled a First Amendment violation against Webb, Estey, and Salinas. Plaintiffs allege that they were forced off of Boise State's campus after Fendley posted her support for first responders and alleges that they were denied due process in connection with that alleged constitutional deprivation. Defendants offer no argument

that the liberty or property interests asserted in the Complaint are inadequate on their face.[4] Plaintiffs' procedural due process claim may proceed against Webb, Estey, and Salinas.

2. Plaintiffs' substantive due process claim in Count Two is dismissed.

The crux of the constitutional violation alleged by Plaintiffs hinges on their First Amendment claim. However, "an infringement of the right to free speech cannot provide the basis for a violation of due process." *Denney v. Drug Enf't Admin.*, 508 F. Supp. 2d 815, 833–34 (E.D. Cal. 2007). The United States Supreme Court has held that "where a particular amendment 'provides an explicit textual source of constitutional protection' against a particular sort of government behavior, 'that Amendment, not the more generalized notion of "substantive due process," must be the guide for analyzing these claims.'" *Id.* (citing *Albright v. Oliver,* 510 U.S. 266, 273 (1994) (Rehnquist, C.J., for plurality) (quoting *Graham v. Connor,* 490 U.S. 386, 395 (1989))). Since the First Amendment provides explicit protection for the right to free speech, which Plaintiffs claim has been violated, they may not additionally base a substantive due process claim on a violation of their right to free speech. Here, Plaintiffs' substantive due process claim is duplicative of, or in the alternative, subsumed by the more particular allegations of their First Amendment claim. As a result, Plaintiffs' substantive due process claim in Count Two is dismissed.

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[4] Commercial contracts generally do not create property interests entitling a party to procedural due process. *See Mid–American Waste,* 49 F.3d at 289–90; *Linan–Faye Constr. Co. v. Hous. Auth. of City of Camden,* 49 F.3d 915, 931–32 (3rd Cir.1995); *S & D Maintenance Co. v. Goldin,* 844 F.2d 962, 965–69 (2nd Cir.1988); *San Bernardino Physicians' Services Med. Group v. County of San Bernardino,* 825 F.2d 1404, 1407–10 (9th Cir.1987). However, Defendants have not sought dismissal on this basis.

E. The motion to dismiss Plaintiffs' equal protection claim is denied.

The Equal Protection Clause of the Fourteenth Amendment "commands that no State shall 'deny to any person within its jurisdiction equal protection of the laws,' which is essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 439 (1985) (quoting U.S. Const., amend. XIV, § 1). In order to state an equal protection claim, a plaintiff must allege facts demonstrating that defendants acted with the intent and purpose to discriminate against plaintiff based upon membership in a protected class, or that defendants purposefully treated plaintiff differently than similarly situated individuals without any rational basis for the disparate treatment. *Lee v. City of Los Angeles*, 250 F.3d 668, 686 (9th Cir. 2001); *see also Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000). In cases where the plaintiff is in a non-protected class or a "class one ," such plaintiff must allege that he or she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment. *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564, (2000) (citations omitted).

Defendants argue that Plaintiffs' equal protection claim is premised upon a violation of their First Amendment rights, and thus should be dismissed because it is properly analyzed under the First Amendment framework. (Mem. in Supp. of Defs.' Mot. to Dismiss at 22.) There is merit to Defendants' argument. The driving allegation in Plaintiffs' Complaint is that they were forced off of Boise State's campus because they engaged in expressive conduct protected by the First Amendment. However, in Count Three itself, Plaintiffs allege that they were treated differently from other contractors, vendors and/or visitors to Boise State because they exercised their "constitutional rights and/or Plaintiffs' status (or perceived status) as supporters of first

responders (including police) and the Thin Blue Line."[5] (Compl. ¶ 90.) They do not specify the "constitutional rights" they were exercising when this occurred, and at this point, the Court finds it premature to dismiss this claim, except with respect to Tromp. Plaintiffs fail to put Tromp on notice of their equal protection claim for the same reasons that Plaintiffs failed to put Tromp on notice of their First Amendment claim, discussed above. Thus, Count Three is dismissed against Tromp, but may proceed against Webb, Estey, and Salinas in their individual capacities.

The record may reveal that Plaintiffs' equal protection claim will ultimately be subsumed by or co-extensive with their First Amendment claim, thus making it duplicative. *See Orin v. Barclay*, 272 F.3d 1207, 1213 (9th Cir. 2001) (noting that it is generally unnecessary to analyze laws which burden the exercise of First Amendment rights by a class of persons under the equal protection guarantee, because the substantive guarantees of the Amendment serve as the strongest protection against the limitation of these rights) (citation omitted). However, the Court will not presuppose the basis for Count Three at this juncture. The motion to dismiss Count Three as to Estey, Webb, and Salinas is therefore denied.

F. Plaintiffs' claims for money damages under Idaho's Constitution, outlined in Counts Four, Five, and Six are dismissed.

Counts Four, Five, and Six assert claims for money damages under the Idaho Constitution. Plaintiffs claim that their free speech rights were violated under Article I, section 9 (Count Four) of the Idaho Constitution, that they were denied due process of law under Article I, sections 2, 13, and 18 (Count Five) of the Idaho Constitution, and that they were denied equal

[5] Defendants validly point out that Plaintiffs appear to have shifted their equal protection argument in their opposition to the motion to dismiss. On page 18 of their opposition, Plaintiffs argue that Defendants treated "certain speakers" such as the IESC better than speakers such as Fendley. Nonetheless, the Court has focused on the allegations in the Complaint as the basis for this order.

protection under the law under Article I, sections 1 and 2 (Count Six) of the Idaho Constitution. Defendants argue that because Idaho had not passed a statute analogous to 42 U.S.C. § 1983, which is used as the method to vindicate violations of federal rights, Plaintiffs may not bring their claims for money damages directly under the Idaho Constitution. Defendants also rely on cases decided by the United States District Courts that have held that there is no direct cause of action for violations of the Idaho Constitution. Plaintiffs argue that the U.S. district court decisions are conclusory and not binding on this Court. Plaintiffs also argue that the case of *Tucker v. State*, 162 Idaho 11, 394 P.3d 54 (2017), indicates that a cause of action under the Idaho Constitution must exist. And finally, Plaintiffs argue that cases from other jurisdictions recognize a cause of action under their respective state constitutions, and thus, this Court should follow suit.

This Court holds that Idaho Courts do not have the authority to create or imply a cause of action for money damages under the Idaho Constitution. Rather, it is within the province of the Idaho Legislature—not the judiciary—to enact the mechanism giving litigants the ability to recover money damages from the State's treasury for state constitutional claims. Moreover, even if this Court could create a cause of action for money damages for Plaintiff's state constitutional law claims, it is not necessary to do so in this case. The federal analytical framework discussed below is instructive.

1. **This Court will not—and cannot—create or imply a cause of action for money damages for Plaintiffs' claims under the Idaho Constitution.**

At the outset, the Court recognizes that the Idaho Supreme Court has not decided whether litigants may sue for money damages directly under Idaho's Constitution. A number of U.S. district court cases have decided the issue in the negative. *See Dreyer v. Idaho Dep't of Health & Welfare*, 455 F. Supp. 3d 938, 944 (D. Idaho 2020); *Hamell v. Idaho Cty.*, No. 3:16-CV-

00469-EJL, 2017 WL 2870080, at *5 (D. Idaho July 5, 2017) (citing *Kangas v. Wright*, 2016 WL 6573943, at *6 (D. Idaho Nov. 4, 2016)); *see also Thomas v. Cassia Cty., Idaho*, No. 4:17-CV-00256-DCN, 2019 WL 5270200, at *10 (D. Idaho Oct. 17, 2019) (stating "No Idaho authority suggests the existence of statutory or direct causes of action for violations of the Idaho Constitution.") (citing *Campbell v. City of Boise*, 345 Fed. Appx. 299, 300 (9th Cir. 2009)); *McCabe v. Gonzales*, No. 1:13-CV-00435-CWD, 2015 WL 5679735, at *9 (D. Idaho Sept. 25, 2015) (stating "No direct cause of action exists for violations of the Idaho Constitution."); *Johnson v. City of Caldwell*, 2015 WL 5319012, at *17 (D. Idaho Sept. 11, 2015) (citing cases). These cases are not determinative or binding on this Court and offer little by way of analysis on the issue.

However, the analytical framework adopted by the U.S. Supreme Court in *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 389 (1971) provides a structural lens within which to begin the analysis related to this question. In *Bivens*, the Supreme Court created a cause of action for money damages against individual federal officials acting under color of authority, who violate the Fourth Amendment's prohibition against unreasonable searches and seizures. *Id.* In *Bivens*, petitioner filed suit alleging his arrest and the search of his home was conducted without a warrant, and that agents used unreasonable force. *Id.* After discussing the protections granted by the Fourth Amendment and the inadequacy of other remedies to remediate the violation at issue, the Court analyzed whether money damages for the constitutional violation should be allowed. *Id.* at 395.

The Supreme Court noted in *Bivens* that "damages have been regarded as the ordinary remedy for an invasion of personal interests in liberty." *Id.* The Court stated that the text of the Fourth Amendment did not provide for enforcement by an award of money damages for

consequences of its violations. *Id.* at 396. Nonetheless, "it is well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done." *Id.* (citation omitted). The Court also noted that "[t]he present case involves no special factors counseling hesitation in the absence of affirmative action by Congress," *i.e.*, the case did not involve "federal fiscal policy" or a case where an official acted "in excess of the authority delegated to him by the Congress." *Id.* at 396-37 (citations omitted). The Court also noted that it was not simply choosing between two alternative remedies, one where "persons injured by a federal officers' violation of the Fourth Amendment" may not recover damages, but are "remitted to another remedy, equally effective in the view of Congress." *Id.* at 397. The issue was "whether petitioner, if he can demonstrate an injury consequent upon the violation of federal agents of his Fourth Amendment rights, is entitled to redress his injury through a particular remedial mechanism normally available in the federal courts." *Id.* (citations omitted). The Court held that, having stated a claim for a Fourth Amendment violation, petitioner is entitled to the recovery money damages for injuries he suffered as a result of the violation. *Id.* A cause of action for money damages under the U.S. Constitution was authorized under general principles of federal jurisdiction.

There are two clear takeaways from *Bivens* that remain intact: (1) if an alternate and equally effective remedy exists to remediate the alleged misconduct at issue, no cause of action need be created by the Court; and (2) where the legislative branch has not acted, and if there are special factors counseling hesitation with respect to the issue at hand, no cause of action should be created by the Court. The concurring and dissenting opinions in *Bivens* outline the policy and separation of powers considerations raised by the creation of a cause of action for money

damages for constitutional violations, which are equally at issue in the question before this Court.

Justice Harlan concurred with the opinion in *Bivens*, disagreeing with the argument that the petitioner's damage claim was dependent upon the passage of a statute creating a "federal cause of action." *Id.* at 399, J. Harlan concurring. Justice Harlan similarly disagreed that petitioner must rely on a remedy provided by the State in which he resides to be free from the type of official conduct prohibited by the Fourth Amendment, which requirement is incompatible with the availability of federal equitable relief. *Id.* at 400. Justice Harlan noted that the question was not the "source" of petitioner's right, but rather whether the power to authorize damages as a judicial remedy to vindicate that right was placed in the hands of Congress by the Constitution. *Id.* at 401-402. Justice Harlan cited cases in which the Supreme Court authorized damages for violation of federal statues, in order to effectuate the congressional policy behind such statutes where an express damage remedy was lacking. *Id.* at 402 (citations omitted). Thus, simply because the creation of a damage remedy arose from the Constitution, as opposed to a statute, it did not leave courts powerless to grant damages without congressional authorization. *Id.* at 403.

Citing 28 U.S.C. § 1331(a), Justice Harlan observed that the "general grant of jurisdiction to the federal courts by Congress is thought adequate to empower a federal court to grant equitable relief for all areas of subject-matter jurisdiction," and also empowered the Court to "grant a traditional remedy at law." *Id.* at 405 (citing 28 U.S.C. § 1331(a)). The version of 28 U.S.C. § 1131(a), in effect when *Bivens* was decided stated:

> The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States

28 U.S.C. § 1331(a).[6] Justice Harlan also noted that "the judiciary has a particular responsibility to assure vindication of constitutional interests such as those embraced by the Fourth Amendment." *Bivens*, 403 U.S. at 407, J. Harlan concurring. And, "[f]or people in Bivens' shoes, it is damages or nothing," since the sovereign remains immune from suit and the exclusionary rule is irrelevant if he is innocent of the crime charged. *Id.* at 410.

Chief Justice Burger dissented from the opinion in *Bivens*. Though most of Justice Burger's dissenting opinion focused on the workability—or lack thereof—of the suppression doctrine and the exclusionary rule, he too noted the separation of powers and policy issues underpinning the Court's decision in *Bivens*. Justice Burger noted that neither the Constitution nor any enactment by Congress provided a damage provision for petitioner's cause of action. *Id.* at 411, J. Burger dissenting. Justice Burger also noted that the values of separation of powers would be better preserved by leaving the solution to the issue to Congress, which has legislative power that the Court does not possess. *Id.* at 412. Justice Burger stated that the holding in *Bivens* sought to fill one of the gaps in the suppression doctrine "at the price of impinging on the legislative and policy functions that the Constitution vests in Congress." *Id.* at 418. Justice Burger concluded that a remedy other than the exclusionary rule was necessary to address Fourth Amendment violations, but that "Congress should develop an administrative or quasi-judicial remedy against the government itself to afford compensation and resolution for persons whose Fourth Amendment rights have been violated." *Id.* at 422.

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[6] Today, 28 U.S.C. § 1331 reads: "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C.A. § 1331.

A number of state courts have recognized a cause of action for damages under their state constitutions, relying in whole or in part on the reasoning of *Bivens*. *See Binette v. Sabo*, 244 Conn. 23, 39–41, 710 A.2d 688, 696–97 (1998) (citing *Gay Law Students Assn. v. Pac. Telephone & Telegraph Co.*, 595 P.2d 592 (Cal. 1979) (damages action for violation of equal protection provision, citing *Bivens*); *Newell v. Elgin,* 340 N.E.2d 344 (Ill. 1976) (damages action for illegal search and seizure, citing *Bivens*); *Moresi v. Dept. of Wildlife & Fisheries,* 567 So.2d 1081, 1091-93 (La. 1990) (same, relying on framers' intent, English common law, and *Bivens*); *Widgeon v. E. Shore Hosp. Ctr.*, 479 A.2d 921 (Md. 1984) (recognizing existence of common-law action for violations of search and seizure and due process violations, citing English common law, the Magna Charta, and *Bivens*); *Strauss v. State,* 330 A.2d 646 (N.J. 1974) (damages action for due process violation, citing *Bivens*); *Brown v. State,* 674 N.E.2d 1129 (N.Y. 1996) (damages action for violations of search and seizure and equal protection provisions, relying on *Bivens* and English common-law antecedents); *Corum v. Univ. of North Carolina,* 413 S.E.2d 276 (N.C. 1992) (recognizing cause of action for violation of free speech provision, citing *Bivens,* but leaving choice of remedy to trial court); *Bott v. DeLand,* 922 P.2d 732, 737-40 (Utah 1996) (damages action for violation of constitutional rights by prison officials, relying on *Bivens,* framers' intent and Magna Charta).

Other courts have created a cause of action for damages without citation to *Bivens*. *See, e.g., Walinski v. Morrison & Morrison,* 377 N.E.2d 242 (Ill. 1978) (damages action for equal protection violation, relying on framers' intent); *Smith v. Dept. of Pub. Health,* 410 N.W.2d 749 (Mich. 1987) (damages action against state for constitutional violations may be recognized in appropriate cases).

Also relying in whole or in part on the reasoning in *Bivens*, courts in other states have declined to recognize a cause of action for money damages under their state constitutions. *Dick Fischer Dev. No. 2, Inc. v. Dept. of Admin.*, 838 P.2d 263, 268 (Alaska 1992) (denying damages for due process violation where other administrative remedies available); *Bd. of Cty. Comm'rs v. Sundheim*, 926 P.2d 545, 549-53 (Colo. 1996) (same, where judicial review of administrative decision and relief pursuant to 42 U.S.C. § 1983 available); *Rockhouse Mountain Prop. Owners Assn., Inc. v. Conway*, 503 A.2d 1385 (N.H. 1986) (denying damages for equal protection and due process violations, where other administrative remedies available); *Provens v. Bd. of Mental Retardation & Developmental Disabilities*, 594 N.E.2d 959 (Ohio 1992) (same with respect to violation of free speech provision); *Shields v. Gerhart*, 658 A.2d 924 (Vt. 1995) (declining damages action for free speech violation because of legislatively created remedies); *Old Tuckaway Assoc. Ltd. P'ship v. Greenfield*, 509 N.W.2d 323 (Wis. App. 1993) (denying action for due process violation because plaintiffs failed to establish deprivation of constitutional magnitude).

Other courts have concluded that certain provisions of their state constitutions do not give rise to a *Bivens*-type cause of action. *See Hunter v. Eugene*, 787 P.2d 881 (Or. 1990) (creation of private right of action for damages for governmental violations of nonself-executing provisions of constitution is task properly left to legislature); *Beaumont v. Bouillion*, 896 S.W.2d 143, 150 (Tex. 1995) (no historical or common-law justification for inferring direct cause of action under free speech and assembly clause).

2. **Idaho courts do not have the authority to create or imply causes of action for money damages under Idaho's Constitution in this case.**

Idaho's Constitution establishes the jurisdiction of the Idaho Supreme Court and the district courts. The jurisdiction of the Idaho Supreme Court is set forth in Article V, section 9 of the Idaho Constitution, as follows:

> Section 9. ORIGINAL AND APPELLATE JURISDICTION OF SUPREME COURT. The Supreme Court shall have jurisdiction to review, upon appeal, any decision of the district courts, or the judges thereof, any order of the public utilities commission, any order of the industrial accident board, and any plan proposed by the commission for reapportionment created pursuant to section 2, article III; the legislature may provide conditions of appeal, scope of appeal, and procedure on appeal from orders of the public utilities commission and of the industrial accident board. On appeal from orders of the industrial accident board the court shall be limited to a review of questions of law. The Supreme Court shall also have original jurisdiction to issue writs of mandamus, certiorari, prohibition, and habeas corpus, and all writs necessary or proper to the complete exercise of its appellate jurisdiction.

Idaho Const. Art. V, section 9. Nothing in the text of Article V, section 9 addresses the Idaho Supreme Court's ability to create a cause of action for money damages under Idaho's Constitution. Notably, the Idaho Supreme Court has held that it "has the inherent power to render decisions regarding Idaho law," under Article V, section 2 of the Idaho Constitution, which vests "the judicial power of the state" in the courts. *See Sunshine Mining Co. v. Allendale Mut. Ins. Co.*, 105 Idaho 133, 136, 666 P.2d 1144, 1147 (1983); and Idaho Const. Art. V, section 2. However, Plaintiffs fail to cite any supporting text of the Idaho Constitution addressing the judicial creation of a cause of action for money damages in this case.

Similarly, there is nothing in the text of Article V, section 20 that confers jurisdiction in the district courts to create a cause of action for money damages under Idaho's Constitution, which states:

> Section 20. JURISDICTION OF DISTRICT COURT. The district court shall have original jurisdiction in all cases, both at law and in equity, and such appellate jurisdiction as may be conferred by law.

Idaho Const., Art. I, section 20. Plaintiffs offer no argument that the jurisdiction of the district court "at law" includes the ability to create a cause of action for money damages under Idaho's Constitution. Instead, Plaintiffs argue that the case of *Tucker v. State*, 168 Idaho 570, 484 P.3d 851 (Idaho 2020), "indicates that a cause of action under the Idaho Constitution ***must exist.***" (Pls.' Opp'n to Defs.' Mot. to Dismiss at 20). This Court disagrees. The *Tucker* case did not decide whether a cause of action for *money* damages is created or implied under Idaho's Constitution. The litigants in *Tucker* were seeking declaratory and *injunctive* relief. *Tucker*, 168 Idaho at 574. Plaintiffs in this case also seek a declaratory judgment. (Compl. ¶ 134.) However, the remedy they seek is not injunctive relief—they seek $10,000,000.00 for Counts One through Nine, and "at an absolute minimum, nominal damages" for Count Ten. (Compl. ¶¶ 78; 83; 92; 101; 106; 115; 120; 125; 131; 134.) The *Tucker* decision simply does not answer the question at bar.

Similarly, Congress passed 42 U.S.C. § 1983 as the mechanism to vindicate federal rights against deprivation under color of state law. *Chapman v. Houston Welfare Rts. Org.*, 441 U.S. 600, 671 at n. 50 (1979) (White, J., concurring). Section 1983 does not create substantive rights but provides a remedy for certain violations of certain federal rights. *Id.* at 618.[7] Unlike Congress' enactment of Section 1983, Plaintiff has failed to identify a statute (or a statutory scheme) enacted by the Idaho Legislature that effectuates a cause of action for money damage claims resulting from state constitutional law violations.

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[7] Under federal law, individuals can also bring claims under the Federal Tort Claims Act, which permits suit against the United States for state negligence torts committed by federal agencies and agents. 28 U.S.C. § 1346.

In short, allowing Plaintiffs' claims for money damages under Idaho's Constitution in Counts Four, Five, and Six is not expressly established by the Idaho Constitution, and the Court cannot and will not create new causes of action for money damages under Idaho's Constitution in this case.

3. Alternate and equally effective remedies exist in this case and thus, even if the Court could create or imply a cause of action, it would not be necessary.

Even if the Court had the authority to create a new cause of action for money damages directly arising under Idaho's Constitution, it would not be necessary here because alternate and equally effective remedies exist. In this case, Plaintiffs can assert, and indeed have alleged, cognizable section 1983 claims to redress the alleged violations of the First and Fourteenth Amendment to the U.S. Constitution. *See Puckett v. City of Emmett*, 113 Idaho 639, 644, 747 P.2d 48, 53 at n. 4 (1987) (noting state courts have concurrent jurisdiction to hear actions under 42 U.S.C. § 1983). Section 1983 provides a cause of action against any person who deprives an individual of federally guaranteed rights, "under color of state law," and if one's conduct is even "fairly traceable to the State," such individual is a state actor under section 1983. *See Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982). Plaintiffs offer no argument that Idaho's constitutional provisions they cite afford more protection than the U.S. Constitution vis-à-vis their claims in Counts Four, Five, and Six. And, Plaintiffs offer no argument that section 1983 is insufficient to remediate their constitutional claims under the First and Fourteenth Amendments.[8]

[8] Other remedies, unpled here, may also apply, such as those provided under the Idaho Administrative Procedures Act or the State Procurement Act. Moreover, a driving allegation in Plaintiffs' complaint is that they were forced off of Boise State's campus and were thus unable to perform under the contract. Plaintiffs offer no argument as to why contract theories of liability, including breach of contract remedies, are unavailable or inapplicable here. And, similar to the Federal Tort Claims Act, which allows money damages for tort claims against federal officials,

Moreover, litigants, like Plaintiffs in this case, can sue the State, and any other state official who has engaged in state action, for a declaratory judgment and obtain prospective injunctive relief to remedy constitutional violations. *See Tucker v. State*, 168 Idaho 570, 574, 484 P.3d 851, 855 (2021); *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 269, 117 S. Ct. 2028, 2034, 138 L. Ed. 2d 438 (1997) (discussing the *Ex Parte Young* doctrine). Litigants may also sue the State, and any other state official, when the acts or omissions of such State officials are *ultra vires*, *i.e.*, where a government official exceeds his or her authority to act from the outset. *See Century Distilling Co. v. Defenbach*, 61 Idaho 192, 99 P.2d 56, 59 (1940); and *see W. Radio Servs. Co. v. U.S. Forest Serv.*, 578 F.3d 1116, 1123-24 (9th Cir. 2009) (deciding that Administrative Procedures Act provided sufficient process "notwithstanding the unavailability of money damages against individual officers or the right to a jury trial" and observing that "the case law of the Supreme Court and this court makes clear that a remedial scheme may be adequate even if it does not include" such rights and remedies). Plaintiffs have alternative remedies available to them here. Thus, even if the Court could create an implied cause of action for money damages under Idaho's Constitution, it is not necessary to do so in this case.

4. Caution must be exercised when determining whether to imply a new claim for money damages as a constitutional remedy.

In addition to the reasons set forth above, there are special factors counseling hesitation with respect to Idaho courts creating an implied cause of action for money damages under Idaho's Constitution. Since the *Bivens* decision, the United States Supreme Court has cautioned

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the Idaho Tort Claims Act is also an alternate remedy that allows money damages arising out of the "negligent or otherwise wrongful acts" of state governmental entities and employees acting "within the course and scope of their employment." Idaho Code § 6-903(1). Thus, if Plaintiffs have facts that employees of Boise State acted with malice or criminal intent, etc., such facts can be pled to support an ITCA claim.

courts from extending the *Bivens* reasoning to imply new causes of action under federal statutes and the U.S. Constitution. The Court takes heed of the Supreme Court's caution in this case.

In *Ziglar v. Abbasi*, 137 S. Ct. 1843 (2017), the Supreme Court defined the limits of the *Bivens* decision when courts are asked to decide whether to find that an implied cause of action exists either in statue or under the federal Constitution. In *Ziglar*, the Court noted that since its decision in *Bivens*, there were only two other instances in which the Court allowed an implied cause of action for money damages under the U.S. Constitution. *Id.* at 1854-55. *Bivens* recognized a claim for money damages under the Eighth Amendment in 1971. Thereafter, the Court decided *Davis v. Passman*, 442 U.S. 228 (1979), which recognized an implied cause of action for money damages under the Fifth Amendment, and *Carlson v. Green*, 446 U.S. 14 (1980), which recognized an implied cause of action for money damages under the Eighth Amendment. *Id.* When *Bivens* was decided, the Court would imply causes of action not explicit in statutory text as a matter of routine because it believed it was a proper judicial function to provide such remedies to make statutory purposes effective. *Id.* at 1855 (citations and quotation marks omitted).

However, the arguments for recognizing implied causes of action "lost their force" and the Court "adopted a far more cautious course before finding implied causes of action." *Id.* The Court recognized that the "far better course" was for Congress to confer remedies in explicit terms, and that the determinative factor when deciding whether to recognize an implied statutory cause of action is "one of statutory intent." *Id.* (citation omitted). If a statute does not provide for a private right of action, one will not be created through "judicial mandate." *Id.* at 1856 (citation omitted). The Court in *Zigler* noted that when it comes to finding an implied cause of action under the Constitution, different considerations are at play:

> When Congress enacts a statute, there are specific procedures and times for considering its terms and the proper means for its enforcement. It is logical, then, to assume that Congress will be explicit if it intends to create a private cause of action. With respect to the Constitution, however, there is no single, specific congressional action to consider and interpret.

Id.. The Court stated that, "it is a significant step under separation-of-powers principles for a court to determine that it has the authority, under the judicial power, to create and enforce a cause of action for damages against federal officials in order to remedy a constitutional violation." *Id.* This is because there are a number of economic and governmental concerns to consider, including the substantial costs caused by the defense and indemnification of such claims and the time and administrative costs resulting from discovery and trial. *Id.* The Supreme Court has made it clear that, "expanding the *Bivens* remedy is now a 'disfavored' judicial activity." *Id.* at 1857 (citation omitted). The Court has not extended the *Bivens* reasoning to any new context or category of defendants since the *Green* decision, and has rejected creating a cause of action under the First Amendment, and for substantive due process claims. *See Bush v. Lucas,* 462 U.S. 367, 390 (1983); *United States v. Stanley,* 483 U.S. 669, 671–672, 683–684 (1987); *Schweiker v. Chilicky,* 487 U.S. 412, 414 (1988); *FDIC v. Meyer,* 510 U.S. 471, 473–474 (1994).

The Court also noted that "when a party seeks to assert an implied cause of action under the Constitution itself, just as when a party seeks to assert an implied cause of action under a federal statute, separation-of-powers principles are or should be central to the analysis. The question is 'who should decide' whether to provide for a damages remedy, Congress or the courts?" *Id.* at 1857 (citation omitted). The answer will most often be Congress because "[w]hen an issue involves a host of considerations that must be weighed and appraised, it should be committed to those who write the laws rather than those who interpret them." *Id.* (citations

and internal quotation marks omitted). "[T]he Legislature is in the better position to consider if the public interest would be served by imposing a new substantive legal liability." *Id.* (citation and internal quotation marks omitted). The special factors counseling hesitation in *Bivens*, concentrate on "whether the Judiciary is well suited, absent congressional action or instruction, to consider and weigh the costs and benefits of allowing a damages action to proceed." *Id.* at 1857-58. And, "if there is an alternative remedial structure present in a certain case, that alone may limit the power of the Judiciary to infer a new *Bivens* cause of action." *Id.* at 1858.

The same special considerations outlined and addressed in *Ziglar* are equally at play in this case, and warrant caution here. The Idaho Legislature is best suited to weigh the costs and benefits of allowing a damage action to proceed directly under Idaho's Constitution. The Supreme Court correctly noted that "the decision to recognize a damages remedy requires an assessment of its impact on governmental operations systemwide" including "the burdens on Government employees who are sued personally, as well as the projected costs and consequences to the Government itself when the tort and monetary liability mechanisms of the legal system are used to bring about the proper formulation and implementation of public policies." *Ziglar*, 137 S. Ct at 1858. The Idaho Legislature has already enacted statutory remedies available to litigants who wish to sue the government, such as the Idaho Administrative Procedures Act, Idaho Code §§ 67-5240 *et seq.*, the Idaho Tort Claims Act, Idaho Code §§ 6-901 *et seq.*, and the Idaho Public Records Act, Idaho Code §§ 4-101 *et seq.*, for example. No doubt, creating a cause of action for damages directly under Idaho's Constitution would require the Legislature to consider the existing legislative landscape, as well as the impact of such decision on the system as a whole, particularly in cases where plaintiffs seek millions of taxpayer dollars to redress their claims. The Idaho Legislature, charged with drafting the law, is better suited to weigh the costs and

benefits of such a decision. In light of this, this Court must exercise restraint and caution in taking on policy calls properly left to the legislative branch of government.

G. Plaintiffs have failed to plead sufficient facts that Defendants were acting with "malice" and therefore, Defendants are immune from Count Seven.

In Count Seven of the Complaint, Plaintiffs allege that Defendants "knowingly, wrongfully and intentionally interfered with the Contract, thereby causing the Contract's termination." (Compl. ¶ 119.) "One who intentionally and improperly interferes with the performance of a contract ... between another and a third person by inducing or otherwise causing the third person not to perform the contract, is subject to liability...." *Tricore Invs., LLC v. Est. of Warren through Warren*, 168 Idaho 596, 619, 485 P.3d 92, 115 (2021) (citations omitted). Tortious interference with contract has four elements: "(1) the existence of a contract; (2) knowledge of the contract on the part of the defendant; (3) intentional interference causing breach of the contract; and (4) injury to the plaintiff resulting from the breach." *Id.* (citations omitted). "A plaintiff may show the defendant's interference with another's contractual relation is intentional if the actor desires to bring it about or 'if he knows that the interference is certain or substantially certain to occur as a result of his action.'" *Id.* (citations omitted).

However, under the Idaho Tort Claims Act ("ITCA"), governmental entities and their employees[9] are immune from liability for claims alleging interference with contract rights. Idaho Code § 6-904(3). As set forth above, the State cannot be sued without its consent. *Von Lossberg*, 2022 WL 775577 at *6. ITCA is a "limited waiver by the State of its sovereign immunity, allowing tort claims arising out of certain circumstances so long as certain procedures

[9] Under the Idaho Tort Claims Act, the State is defined as, "the state of Idaho or any office, department, agency, authority, commission, board, institution, hospital, college, university or other instrumentality thereof." Idaho Code § 6-902(1). Governmental entities "includes the State and political subdivisions" as defined in the Act. *Id.* § 6-902(3).

are observed." *Ware v. City of Kendrick*, 168 Idaho 795, 801, 487 P.3d 730, 736 (2021) (citation and emphasis in original omitted). Idaho Code § 6-904(3) states:

> 6-904. EXCEPTIONS TO GOVERNMENTAL LIABILITY. A governmental entity and its employees while acting within the course and scope of their employment and without malice or criminal intent shall not be liable for any claim which:
>
> 3. Arises out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or *interference with contract rights*.

Idaho Code § 6-904(3) (emphasis added). A governmental entity, which includes Boise State, is immune from interference with contract claims irrespective of allegations of malice or criminal intent. *Hoffer v. City of Boise*, 151 Idaho 400, 402-03, 257 P.3d 1226, 1228-29 (2011). However, employees—including Tromp, Estey, Webb, and Salinas—are only immune from suit if there are no allegations of malice or criminal intent. *Id.* (citation omitted). "Malice" under ITCA means a wrongful act without justification, combined with ill-will. *Evans v. Twin Falls Cnty.*, 118 Idaho 210, 222, 796 P.2d 87, 99 at n. 6 (1990) (citation omitted).

Defendants argue that Plaintiffs have failed to plead sufficient facts describing how Defendants interfered with the contract at issue and failed to plead facts inferring malice or criminal intent. Plaintiffs argue that the Complaint sufficiently states a claim for tortious interference with contract under Count Seven. Plaintiffs also argue that they have sufficiently pled malice and point to their request for exemplary and punitive damages in which they allege, "Defendants' acts and omissions were, among other things, repeated, flagrant, reckless, oppressive, fraudulent, malicious and outrageous." (Pls.' Opp'n to Defs.' Mot. to Dismiss at 25; Compl. ¶ 135.) Plaintiffs also ask the Court to look at the Complaint "as a whole" and argue in a conclusory fashion that the allegations "are more than sufficient for the Court to conclude that

malice was pled" or that Plaintiffs could prove malice. (Pls.' Opp'n to Defs.' Mot. to Dismiss at 25.) This Court disagrees.

First, in ruling on a Rule 12(b)(6) motion, it is not enough for a complaint to make conclusory allegations. *Owsley v. Idaho Indus. Comm'n*, 141 Idaho 129, 136, 106 P.3d 455, 462 (2005) (citation omitted). Plaintiffs' allegation that Defendants acted "maliciously" is too conclusory to withstand dismissal here. Second, the Court has analyzed the specific allegations related to the individual defendants in this case, which are outlined above. These allegations do not rise to the level of proving malice or criminal intent. In the absence of pleading sufficient facts that the individual defendants acted without justification and with ill-will, Count Seven is dismissed.

H. Plaintiffs have failed to allege sufficient facts to put Defendants on notice of their fraud by omission claim in Count Eight.

Count Eight alleges fraud by omission on the part of Defendants. (Compl. ¶¶ 121-125.) Plaintiffs allege that Defendants had a duty to disclose, but failed to disclose: the animosity and rancor directed toward Plaintiffs that Defendants fomented on campus as well as the animosity and rancor of others on Boise State's campus aimed at Plaintiffs and based on their beliefs and expression. Defendants argue that Plaintiffs have failed to plead sufficient facts to put them on notice of Plaintiffs' fraud claim and have failed to plead that claim with particularity. Defendants further argue that Plaintiffs have failed to allege that Defendants owed Plaintiffs a duty to disclose in this case.

It is generally understood that, "[o]ne who fails to disclose to another a fact that he knows may justifiably induce the other to act or refrain from acting in a business transaction is subject to the same liability to the other as though he had represented the nonexistence of the matter that he has failed to disclose, if, but only if, he is under a duty to the other to exercise reasonable care

to disclose the matter in question." Restatement (Second) of Torts § 551 (1977) (updated Oct. 2021).

"Fraud may be established by silence where the defendant had a duty to speak." *James v. Mercea*, 152 Idaho 914, 918–19, 277 P.3d 361, 365 (2012) (citation omitted).

A duty to disclose exists in the following circumstances:

> (1) if there is a fiduciary or other similar relation of trust and confidence between the two parties; (2) in order to prevent a partial statement of the facts from being misleading; or (3) if a fact known by one party and not the other is so vital that if the mistake were mutual the contract would be voidable, and the party knowing the fact also knows that the other does not know it.

Id. at 365-366; and *see Humphries v. Becker*, 159 Idaho 728, 736, 366 P.3d 1088, 1096 (2016).[10]

In their opposition to Defendants' motion to dismiss, Plaintiffs outline that their fraud by omission claim is premised on the fact that before Fendley entered into business on Boise State's campus, Nicole Nimmons (who is not a named defendant in this case) "assured" Plaintiffs that negative interactions in social media posts in 2016 between Fendley and Boise State faculty

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[10] Restatement (Second) of Torts § 551 (1977) (updated Oct. 2021): One party to a business transaction is under a duty to exercise reasonable care to disclose to the other before the transaction is consummated,

> (a) matters known to him that the other is entitled to know because of a fiduciary or other similar relation of trust and confidence between them; and
> (b) matters known to him that he knows to be necessary to prevent his partial or ambiguous statement of the facts from being misleading; and
> (c) subsequently acquired information that he knows will make untrue or misleading a previous representation that when made was true or believed to be so; and
> (d) the falsity of a representation not made with the expectation that it would be acted upon, if he subsequently learns that the other is about to act in reliance upon it in a transaction with him; and
> (e) facts basic to the transaction, if he knows that the other is about to enter into it under a mistake as to them, and that the other, because of the relationship between them, the customs of the trade or other objective circumstances, would reasonably expect a disclosure of those facts.

member Jeremy Harper[11] (who is also not a named defendant in this case), would not be an issue. (Compl. ¶ 40; Pls.' Opp'n to Defs.' Mot. to Dismiss at 27.) However, a "firestorm" was brewing, and Boise State failed to disclose it. (Compl. ¶ 51; Pls.' Opp'n to Defs.' Mot. to Dismiss at 27.) Plaintiffs further argue that the source of the duty to disclose the "firestorm" to Plaintiffs was the August 17, 2020 contract between Big City Coffee and Aramark. (Pls.' Opp'n to Defs.' Mot. to Dismiss at 28-29.) Plaintiffs argue that Boise State had the power to terminate the contract, that Plaintiffs were required to perform the contract to the satisfaction of Boise State, that the contract was subject to the terms and conditions of the contract between Aramark and Boise State, that Boise State had the ability to accept the employees who worked on campus, and that Aramark acted as an agent of Boise State. (*Id.*) However, none of these allegations are before the Court, as they are not alleged in the Complaint. And, the factual allegations that are contained in the Complaint are insufficient to put Defendants on notice of a fraud by omission claim.

Plaintiffs fail to plead even the basic facts necessary to put Defendants on notice of a fraud by omission claim. The Complaint fails to allege that either Boise State, Tromp, Webb, Estey, or Salinas knew of the assurances provided by Nimmons to Fendley nor does the Complaint allege the source of the duty compelling either Boise State, Tromp, Webb, Estey, or Salinas to disclose that a "firestorm" was brewing on campus. Moreover, even if the Complaint did allege the source of the duty requiring Defendants to disclose that a "firestorm" was brewing on campus, Plaintiffs must do more than simply call the material information a "firestorm."

[11] Plaintiffs allege that in 2016, Harper claimed in social media posts that Fendley was promoting "white supremacy" and called for a boycott of Big City Coffee, simply because Fendley displayed Thin Blue Line flags and emblems at her downtown location. (Compl. ¶ 34.) However, Plaintiffs have not named Harper as a defendant in this case.

Plaintiffs must plead the basic facts comprising the information, which they claim make up the "firestorm," that Defendants failed to disclose. Because the Complaint fails to allege sufficient facts putting the named Defendants on notice of Plaintiffs' fraud by omission claim, such claim is dismissed.

I. Plaintiffs have failed to plead sufficient facts to put Defendants on notice of their Idaho Consumer Protection Act claim in Count Nine.

Count Nine alleges that that Defendants violated the Idaho Consumer Protection Act ("ICPA"), Idaho Code §§ 48-601 *et seq.*, because they engaged in acts and practices that are misleading, false and deceptive to consumers, and engaged in an unconscionable method, act or practice in the conduct of trade or commerce. (Compl. ¶¶ 126-131.) Defendants argue that Plaintiffs' claim under the Idaho Consumer Protection Act fails because they have not alleged that Defendants were engaged in any "trade or commerce" with Plaintiffs. Similarly, Defendants argue that the ICPA does not apply because Plaintiffs have not alleged that any contract existed between the parties. Plaintiffs argue that paragraphs 44-48 in the Complaint sufficiently plead a violation of the ICPA. This Court disagrees.

Paragraphs 44 to 48 allege that: (1) between the date that the contract was signed and Big City Coffee's opening on campus, "BSU representatives" who are not identified, and Fendley were in regular contact. (Compl. ¶ 44.) During that period, Defendants did not give Fendley an indication that "there was a growing controversy due to her support of law enforcement and her engagement to Holtry." (*Id.*) Defendants had notice that IESC and other unidentified "radical elements of the BSU campus" objected to Plaintiffs' law enforcement connection. (*Id.*) Nimmons (who is not a defendant) and Webb, and other unidentified "BSU administrators" discussed the "potential for controversy" through October 2020. (*Id.* ¶ 45.) Had Defendants not concealed this "critical information" Plaintiffs would not have opened a second location,

borrowed money, or hired employees, and would have taken other measures to mitigate their damages. (*Id.* ¶ 46.) In October 2020, the "ASBSU Chief of Staff," who is unidentified, created a snapchat, to which Fendley responded on October 21, 2020, discussing her support for first responders. (*Id.* ¶ 47.) IESC was outraged by Fendley's post. (*Id.* ¶ 48.)

In short, the above allegations do not put Defendants on notice that: they fall within the definitions of the ICPA, what activities they engaged in to qualify as "trade or commerce" under the ICPA, nor how their conduct was misleading, false, deceptive, or unconscionable to consumers. On the one hand, Plaintiffs rest their allegations on individuals who are not named as defendants in this case, *i.e.*, Nimmons, the ASBSU Chief of Staff, and IESC. On the other hand, Plaintiffs support this claim with conclusory statements that "Defendants" committed wrongdoing or that unidentified "BSU representatives" or "radical elements of the BSU campus" were involved with or connected to the wrongdoing at issue. Moreover, Plaintiffs do not set forth the basic facts and information that comprise the "potential for controversy" discussed in paragraph 45 of the Complaint, together with how such facts are attributable to each Defendant individually. Because Plaintiffs failed to plead sufficient facts to put Defendants on notice of Count Nine, that claim is dismissed.

IV. CONCLUSION

For the reasons set forth above, Defendants' Motion to Dismiss is GRANTED in part and DENIED in part. The motion is GRANTED as follows:

1. Count Two, asserting a violation of the Fifth Amendment, is dismissed in its entirety;
2. Count One, Count Two asserting a due process claim under the Fourteenth Amendment, and Count Three are dismissed against Boise State, and each

individual Defendant in his or her official capacity: Marlene Tromp, Leslie Webb, Alicia Estey, and Francisco Salinas;

3. Count One is dismissed against Tromp, in her individual capacity;
4. Count Two, asserting a procedural due process claim under the Fourteenth Amendment, is dismissed against Tromp, in her individual capacity;
5. Count Two, asserting a substantive due process claim under the Fourteenth Amendment, is dismissed as to Tromp, Webb, Estey, and Salinas, in their individual capacities;
6. Count Three, asserting an equal protection claim under the Fourteenth Amendment, is dismissed against Tromp, in her individual capacity;
7. Counts Four, Five Six, Seven, Eight, and Nine are dismissed against all Defendants.

Defendants' Motion to Dismiss is DENIED as follows:

1. The motion is denied as to Count One against Webb, Estey, and Salinas, in their individual capacities, which claim may proceed;
2. The motion is denied as to Count Two asserting a Fourteenth Amendment procedural due process claim against Webb, Estey, and Salinas, in their individual capacities, which claim may proceed; and
3. The motion is denied as to Count Three against Webb, Estey, and Salinas, in their individual capacities, which claim may proceed.

Plaintiffs are hereby granted leave to file an amended complaint on or before May 27, 2022. Defendants' response to the operative complaint in this case shall be due on or before June 24, 2022.

IT IS SO ORDERED.

Dated: 4/22/2022 2:04:14 PM

CYNTHIA YEE-WALLACE
District Judge

CERTIFICATE OF SERVICE

I, the undersigned, certify that on 4/22/2022, I caused a true and correct copy of the foregoing **ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION TO DISMISS** to be forwarded with all requires charges prepaid, by the method(s) indicated below, in accordance with the Rules of Civil Procedure, to the following person(s):

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CLERK OF THE DISTRICT COURT
FOURTH ★ JUDICIAL ★ DISTRICT
ADA COUNTY, IDAHO

PHIL McGRANE
Clerk of the District Court

By _____
Deputy Clerk 4/22/2022 2:08:30 PM