No. 20-55999

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RILEY'S AMERICAN HERITAGE FARMS, a California corporation and JAMES PATRICK RILEY, an individual,

Plaintiffs-Appellants,

v.

CLAREMONT UNIFIED SCHOOL DISTRICT; JAMES ELSASSER; ET AL.,

Defendants-Appellees.

On Appeal from the United States District Court
for the Central District of California, Riverside
No. 5:18-cv-02185-JGB-SHK
Hon. Jesus G. Bernal

APPELLANT'S OPENING BRIEF

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CORPORATE DISCLOSURE STATEMENT

Riley's American Heritage Farms has no "parent corporation" nor "any publicly held corporation that owns 10% or more of its stock." [FRAP 26-1.]

Date: January 4, 2021

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INTRODUCTION

The First Amendment provides that "Congress shall make no law…abridging the freedom of speech." (U.S. CONST. Amend. I.) There is a "profound national commitment" to the principle that "debate on public issues should be uninhibited, robust, and wide-open." (*New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).) "Freedoms such as these are protected not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference." (*Bates v. City of Little Rock*, 361 U.S. 516, 523 (1960).) State action designed to retaliate against and chill political expression strikes at the heart of the First Amendment. (*Gibson v. United States*, 781 F.2d 1334, 1338 (9th Cir. 1986).)

This appeal is necessary to vindicate these vital, settled rights in the face of a decision by the District Court that threatens, at the worst possible cultural moment, to push the doctrine of qualified immunity far beyond its already overextended frontiers. The District Court's insistence that a constitutional right is not "clearly established" unless a previous precedent occurred in a substantially identical circumstantial context contradicts Supreme Court and Ninth Circuit precedent and must be reversed.

For years, Riley's American Heritage Farms ("Riley's Farm") hosted field trips for school groups across Southern California, bringing history to life with

immersive "living history" programs. After plaintiff James Patrick Riley ("Mr. Riley"), one of Riley's Farm's proprietors, made comments on social media about political and cultural matters that officials of the Claremont Unified School District (the "District") feared would be controversial, and expressly because of those comments, the District issued "guidance" instructing that District schools cease their longstanding patronage of Riley's Farm for school field trips. The District's officials admitted that this guidance was never "revisited" or withdrawn.

The District therefore deprived Appellants of a long-recognized "valuable government benefit" – public patronage under an established business relationship – because of Mr. Riley's speech. Under clearly established law, this constituted unlawful retaliation against Mr. Riley's exercise of his First Amendment rights.

Under clearly established law, "conditions upon public benefits cannot be sustained if they so operate, whatever their purpose, as to inhibit or deter the exercise of First Amendment freedoms." (*Sherbert v. Verner*, 374 U.S. 398, 405 (1963). Government officials "'may not deny a benefit to a person on a basis that infringes his constitutionally protected…freedom of speech' even if he has no entitlement to that benefit." (*Bd. of Cty. Com'rs, Wabaunsee Cty., Kan. v. Umbehr*, 518 U.S. 668, 674 (1996) [quoting *Perry v. Sindermann*, 408 U.S. at 593, 597 (1972)]; hereinafter *Umbehr*.)

It is further clearly established that the termination of a "pre-existing commercial relationship" with the government constitutes the deprivation of a valuable government benefit (*Umbehr*, 518 U.S. at 674; *Zeitchick v. Lucey*, 495 Fed. Appx. 792, 794-795 (9th Cir. 2012)), and that this doctrine applies to existing commercial relationships even when there is no contract between the government and a vendor. (*O'Hare Truck Serv., Inc. v. City of Northlake*, 518 U.S. 712, 714-15, 721 (1996); *Kinney v. Weaver*, 367 F.3d 337, 368 (5th Cir. 2004).)

For a constitutional principle to be "clearly established" for purposes of the qualified immunity doctrine, a prior case "directly on point," occurring in a nearly identical factual context, is not required – only that the *"statutory or constitutional question* [be] beyond debate." (*Ashcroft v. al-Kidd*, 563 U.S. 731, 742 (2011); emphasis added.) It is the *legal* question of whether a particular act – in whatever context it occurs – is clearly unconstitutional, that matters.

When Appellants sought judicial relief from the District's unlawful retaliation, the District Court at first acknowledged that Appellants alleged a valid First Amendment claim. However, it granted summary judgment to the defendants (consisting of District administrators and school board members; hereafter "Respondents") based on the doctrine of qualified immunity, ruling that it was not "clearly established" that the District's cutoff of business over Mr. Riley's speech violated the First Amendment. Its rationales were that "schools have special First

Amendment status," that Mr. Riley's tweets "potentially implicate government speech," and that no previous First Amendment case alleging retaliatory termination of public business patronage involved a school.

Astonishingly, the District Court applied qualified immunity not only as to Plaintiffs' damages claims, but also its claim for injunctive relief. When Plaintiffs moved for relief from the judgment pursuant to Federal Rules of Civil Procedure 59 and 60, the District Court acknowledged this error. However, it then ventured beyond the matters either side had raised and ruled its error "harmless." Without affording Appellants any opportunity to respond to this newly raised issue, the District Court ruled *sua sponte* that Appellants would be unable to prove their entitlement to an injunction. Improperly weighing the evidence and even more improperly indulging every inference in favor of the parties seeking summary judgment, the District Court declared that (notwithstanding the undisputed fact that guidance against Riley's Farm field trips was issued and never withdrawn), "[t]here is no blacklist." The District Court further rationalized that because field trips have been suspended due to the Covid-19 pandemic, an injunction would not immediately benefit Appellants.

In summary, the District Court (1) improperly applied qualified immunity to Appellants' injunction claim; (2) improperly held that for a constitutional principle to be "clearly established," a plaintiff must cite a case "directly on point"; (3)

decided *sua sponte*, without soliciting further briefing or evidence, the unraised, unbriefed and contested issue of whether effective injunctive relief could be granted; and (4) failed to grant the partial summary judgment requested by Appellants, despite that all the elements of a claim for First Amendment retaliation were established by undisputed evidence.

Appellants respectfully request that this Court reverse both the Judgment and the order denying Appellants' motion for partial summary judgment and remand the matter to the District Court with directions to enter an order granting the latter and proceed to trial on the remaining issues.

JURISDICTIONAL STATEMENT

This action arises under the First and Fourteenth Amendments to the United States Constitution and is authorized pursuant to 42 U.S.C. section 1983 to remedy Respondents' violation of Appellants' constitutional rights. The District Court therefore had federal question jurisdiction under 28 U.S.C. sections 1331 and 1343. The Court of Appeal has jurisdiction to hear this appeal as from a final judgment disposing of all parties' claims. The District Court entered the judgment on July 17, 2020. [1 ER 8-9.] On August 4, 2020, Appellants timely filed a motion for relief from, or to amend or alter, the judgment pursuant to Rules 59 and 60 of the Federal Rules of Civil Procedure (the "Motion to Reconsider"). [2 ER 70 et seq.] The District Court denied the Motion to Reconsider on August 27, 2020. [1 ER 2

et seq.] Pursuant to Rule 4(a)(4)(A) of the Federal Rules of Civil Procedure, the filing of the Motion to Reconsider restarted the time to appeal from the judgment. This appeal was timely filed on September 25, 2020. [6 ER 1115-1122.]

ISSUES PRESENTED

1. Whether the District Court erred in applying the doctrine of qualified immunity to Appellants' claim for injunctive relief.

2. Whether the District Court erred by framing the inquiry into whether Appellants' rights were "clearly established" too narrowly by requiring a precedent with an extreme level of factual similarity.

3. Whether the District Court erred by ruling that it was not "beyond debate" that Respondents' denial of a pecuniary benefit – business patronage pursuant to an established commercial relationship – based on Appellants' exercise of their constitutionally protected freedom of speech violated the First Amendment.

4. Whether the District Court erred in denying Appellants' motion for partial summary judgment where undisputed facts demonstrated that Respondents deprived Appellants of a valuable government benefit because of Mr. Riley's protected speech.

5. Whether the District Court erred in declaring its erroneous application of qualified immunity to injunctive relief "harmless" by determining *sua sponte*,

based on matters not raised on summary judgment, that Appellants could not obtain injunctive relief.

6. Whether the District Court erred in construing the evidence in a light more favorable to Respondents, as moving parties on summary judgment, in finding that "there was no blacklist."

STATEMENT OF THE CASE

I. RILEY'S FARM HAD A LONGSTANDING BUSINESS RELATIONSHIP WITH THE DISTRICT

Appellant Riley's American Heritage Farms "(Riley's Farm"), a California corporation, operates an agritourism business – a "living history farm" – in the rural community of Oak Glen, San Bernardino County, California. [3 ER 523.] Its varied business activities include seasonal "U-Pick" apple picking, produce sales, pie, cider, and other food sales, historical and other novelty item sales, a seasonal pumpkin patch, a restaurant and tavern, dinner theater events, hosting of corporate, family and associational events, summer "day camp," film and commercial location shooting, historically-themed activities such as tomahawk throwing, candle dipping and archery, and school field trips. [3 ER 523.]

Riley's Farm has been hosting school field trips since 2001. [3 ER 506, 523.] School field trips comprised the largest single category of Riley's Farm's

business, accounting for approximately 50% of revenues for the past 10 years. [3 ER 506, 523.]

Riley's Farm's field trip programs include immersive presentations focused on the American Revolution, the Civil War, American colonial farm life, the California Gold Rush, and the pioneer homesteading history of Oak Glen and the surrounding region. [3 ER 523.]. The trips have been very popular, and until the fall of 2018 (when the events at issue took place) patronage had steadily increased, reaching a total of $2,083,449 in the 2017-2018 season. [3 ER 506, 524.]

Of these field trips, the American Revolution presentation is the most popular. A large area of the Riley's Farm premises is themed as "Colonial Chesterfield," portraying a New Hampshire village of the 1770s. Students are divided into small groups (each accompanied by a teacher, aide or chaperone) and spend the day rotating among "stations" where "living historians" in period dress provide interactive presentations on different aspects of the history of the American Revolution. [3 ER 523-524.] Towards the end of the day, the student groups join in a reenactment of a skirmish between "Minutemen" and "Redcoats." [3 ER 524.] After the skirmish, a presenter (in the character of a Revolutionary-era figure) delivers a speech, highlighting the sacrifices made "so that we can live in a nation where we can vote, where we can speak our minds without fear, we can bear arms, where we can worship as we choose," and reminding the students that

despite America's faults, we live in a free nation; that liberty may be compared to a chain, and that they are the next link in that chain. [3 ER 524.]

Riley's Farm works diligently to present an authentic historical experience in both the content and staging of the presentations. [3 ER 506, 524.] Riley's Farm's staff and management are careful to avoid "editorializing," or inserting commentary on contemporary issues into their presentations. [3 ER 506, 524.]

Riley's Farm and its predecessor in interest have hosted field trips for schools of the Claremont Unified School District since 2001, with patronage increasing from two field trips in 2001 to 12 field trips in 2017. [3 ER 506, 524.] In the last season not affected by the events at issue in this litigation, Riley's Farm generated $11,913 in direct revenue hosting District schools for field trips. [3 ER 506-507, 525.]

Riley's Farm maintains an Internet web site at rileysfarm.com, a Facebook page, and a Twitter account, @rileysfarm76. [3 ER 507, 525.]

II. MR. RILEY COMMENTED ABOUT MATTERS OF PUBLIC CONCERN ON HIS PERSONAL SOCIAL MEDIA ACCOUNTS

James Patrick Riley is the owner of more than 30% of the stock of Riley's Farm. [3 ER 507, 525.] Mr. Riley has his own personal social media accounts, including a Facebook account and Twitter account. [3 ER 507, 525.] His Twitter account is currently inactive. [3 ER 507, 525.] He has used those accounts, and

still uses the Facebook account, to keep in touch with a wide circle of family, friends and acquaintances he has accumulated over the years. [3 ER 507, 525.] He has also commented on those accounts on matters of public concern, including matters of politics, religion, and social relations. [3 ER 507, 525.]

Certain of Mr. Riley's "tweets" on the Twitter social media platform were declared by the District, through its attorneys Atkinson, Andelson Loya Ruud & Romo, to be "objectionable. These included the following [3 ER 507, 525]:

"What is this country coming to if a girl can't even use her bosoms to smack customers and then sue the president for unwanted sexual advances?" (This pertained to the 2018 controversy involving claims by pornographic actress Stormy Daniels that she had been paid to deny having an affair with President Donald Trump, and her subsequent arrest for improper contact with patrons of a strip club.) [3 ER 525.]

"'Missing ISIS' Heartwarming story of a former Jihad fighter, now readjusting to life as a BLM protester." (This was in the context of a humorous exchange speculating about what kind of television programming would be prepared pursuant to former President and First Lady Michelle Obama's content deal with Netflix.) [3 ER 525.]

"When #Elizabeth Warren comes on @MSNBC, it's therapeutic to issue a very earthy Cherokee war chant. ("hey-ah-hey-ah…etc.) I'm doing it right now.

I'm running around; I'm treating the various desk lamps like mesquite campfires. You can probably hear it in Oklahoma." (This was in the context of presidential candidate Elizabeth Warren's being accused of having played up an insubstantial and possibly nonexistent Native American background for perceived career advantage.) [3 ER 526.]

"A friend saw an ice sculpture of [Democratic presidential hopeful] *Kirsten Gillibrand at a Democratic fundraiser. She actually looked more human that way – a bit more color in her cheeks."* [3 ER 508, 531, 562.]

"*So I'm planning a high school reunion and I just realized we may have been the last generation born with only two genders*." [3 ER 508-509, 531, 562.]

"*White supremacy? … You mean those 3 guys who live in two different counties in Arkansas? If there's a problem in America today it's BLACK supremacy, Farrakhan, Obama, Lebron James, etc. Typical brain dead feminist*." [3 ER 509, 531, 562.]

All of these comments (the "Comments") were made on one of Mr. Riley's personal social media accounts. [2 ER 181, 3 ER 509, 526.] None of them appeared on any of Riley's Farm's social media accounts or web site. [2 ER 182, 3 ER 509, 526.] Mr. Riley did not reference the District, Riley's Farm, school field trips, or anything with any connection to the District in any of the Comments. [2 ER 183, 3 ER 509, 526.] The District has no connection with Mr. Riley's personal

social media accounts. [2 ER 184, 3 ER 509, 526.] No reasonable reader of the Comments could possibly interpret them as representing the views of the District or of its Superintendent, Dr. Elsasser or of any of the members of the District's school board. None of the Comments addressed Riley's Farm's business relationship with the District or its schools. [2 ER 185, 3 ER 526.] Mr. Riley is not a District policymaker, official spokesperson or employee. [2 ER 185, 3 ER 509, 526.]

III. RESPONDENTS CUT OFF PATRONAGE OF RILEY'S FARM OVER MR. RILEY'S SOCIAL MEDIA COMMENTS

Pursuant to California Education Code section 35010(a), the District is under the control of a board of school trustees. Pursuant to Education Code section 35035(a), the superintendent of schools "is the chief executive officer of the governing board." Superintendent Elsasser was, at all times relevant to this action, the Superintendent of the District. [2 ER 185, 3 ER 509.]

On Sunday, September 2, 2018 – a few days after the California Democratic Party chairman called for a boycott of the legendary In-N-Out Burger chain over contributions to the Republican Party – Respondent David Nemer ("Nemer"), a member of the District's Board of Education, sent an e-mail to Superintendent Elsasser discussing a viral Facebook social media campaign launched against

Plaintiffs launched by a person going by the *nom de guerre* of "Elizabeth Adams."[1] [2 ER 186, 3 ER 509-510, 569-570.] Nemer wrote, "There is concern on Facebook about some extremely inappropriate and unacceptable tweets by the owner of an establishment in Oak Glen that has apparently been visited by CUSD field trips." [2 ER 186, 3 ER 510, 569.] Nemer stated further:

"Her ['Elizabeth Adams''] post was 'shared' to me by Lee Kane, with the comment, 'Well. I had been thinking of heading there over the long weekend. Guess we will grace another establishment. Doesn't the school district have field trips here Dave Nemer?' I said I would try to find out Tuesday." [2 ER 187, 3 ER 510, 569.]

On September 4, 2018, Superintendent Elsasser convened a meeting of all of the principals and assistant principals of District schools. [3 ER 510, 575-576.] At this meeting, Superintendent Elsasser informed the administrators that he had learned there had been posts on social media by Mr. Riley that had caused concern with some District parents and community members, and asked the principals if they had received any complaints or concerns from parents. [2 ER 188, 3 ER 510, 540.] Some of the principals, including Respondents Ann O'Connor and Brenda

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[1] Plaintiffs later learned through investigation and discovery that "Elizabeth Adams" was a pseudonym for Crystal MacHott, a Corona Norco Unified School District public schoolteacher.

Hamlett, stated that they had. [3 ER 510-511, 540-541.] Superintendent Elsasser did not know, at the time of this meeting, how many parents had complained about Mr. Riley's comments. [2 ER 189, 3 ER 511, 541.] Superintendent Elsasser requested that the principals "go back and talk to their teachers," and stated that schools "could consider not going [on Riley's Farm field trips] because of…our parents having concerns." [3 ER 511, 543.] Superintendent Elsasser requested that the principals inquire of their teachers to see if they still wanted to go to Riley's Farm; if not, because of the (unspecified number of) parental complaints about Mr. Riley's comments, District schools "could go to a different farm." [2 ER 190, 3 ER 511, 583.] Superintendent Elsasser's purpose in "looking for other farms" was to "appease our parents." [2 ER 190, 3 ER 511, 544.] Unless there were teachers who "really want[ed] to go to Riley's Farm," Superintendent Elsasser's intention was to "find another alternative." [2 ER 191, 3 ER 511, 545, 548]

Subsequently, on September 4, 2018, Nemer sent Superintendent Elsasser another e-mail, stating "I think many of our stakeholders would be uncomfortable with these tweets." [3 ER 510, 570.] Nemer invited Superintendent Elsasser to "view the gory details of the tweets" on his (Nemer's) Facebook page, or alternatively he could share them with Superintendent Elsasser privately. [3 ER 510, 569.]

On or before September 7, 2018, the District's Assistant Superintendent, Julie Olesniewicz ("Olesniewicz") sent an e-mail to Superintendent Elsasser, which read as follows:

> "Hi Jim,
> Principals are asking for some guidance on Riley's, Jenny [Jennifer Adams, the principal of Oakmont Elementary School] especially. Apple Farm is part of Oakmont [Elementary School's] Biomes, and all of the farms are associated with a Riley, so they are panicking. I will add it to Cabinet for Monday."

[2 ER 192, 3 ER 511-512, 577.]

"Cabinet" is a regular meeting attended by Superintendent Elsasser the District's assistant superintendents, including Assistant Superintendent Olesniewicz. [3 ER 512, 536-537.] Superintendent Elsasser immediately responded with the following e-mail to Olesniewicz:

> "Okay, we'll come up with some guidelines during Monday's Cabinet. In the meantime, do you think it would be a good idea to send a quick e-mail to the elementary principals asking each of them to tell you if they have plans to go this year and, if so, to which property?"

[2 ER 193, 3 ER 512, 577.]

Three minutes later, Olesniewicz sent an e-mail to all of the District's principals, asking if they had any "grade levels planning on going to Riley's Farm or another Riley's owned property this year," and if so, which property. "We are

trying to give you all some guidance on this," Olesniewicz wrote. [2 ER 194, 3 ER 512, 579.]

After the principals responded, Superintendent Elsasser determined that "no one feels strongly about going to Riley's," and so "we can pick another farm." [3 ER 512, 549.] At the Cabinet meeting, Superintendent Elsasser decided to "switch farms." [3 ER 512, 553.] Accordingly, Superintendent Elsasser instructed Olesniewiecz to "ask them [i.e. the principals] to pick one of the other farms." [3 ER 512, 550.]

After the Cabinet meeting ended, at 1:14 p.m., Olesniewicz sent an e-mail (the "Guidance Directive") to the District's principals, which read as follows:

> "Hello,
> We discussed Riley's Farm today in Cabinet. We have researched as much as we possibly can, and the only farm in Oak Glen that we can directly link to James Patrick Riley is the actual Riley's Farm. There are many other farms up there that are owned and run by other members of the Riley family, but don't seem to be linked to him. *Therefore, we are asking that no CUSD school attend Riley's Farm field trips.* However, other farms such as Los Rios Rancho and Stone Soup Farm should be fine as it does not appear that James Patrick Riley is involved in those farms."

(Emphasis added.) [3 ER 512-513, 551-553, 581] This guidance was given based on "parent concerns" about Mr. Riley's speech. [2 ER 190, 199, 3 ER 513, 544.] Superintendent Elsasser did not consider the option of organizing an

alternative educational experience (in lieu of a Riley's Farm field trip) any students whose parents preferred they not attend such a field trip. [3 ER 513, 544.]

Both of the field trips by District schools that had already been booked for the 2018-2019 season were subsequently cancelled. [3 ER 513, 526.] Superintendent Elsasser subsequently, on September 18, sent an e-mail to Nemer, confirming that "[a]ll schools that were scheduled to go to Riley's Farms [sic] that are operated by John [sic] Riley have been canceled." [3 ER 513, 555-556, 583.] Riley's Farm has received no District patronage or bookings since the Guidance Directive was issued. [3 ER 513, 526.] The guidance requesting that no CUSD school attend Riley's Farm field trips has never been revisited, and, consequently, is still in place. [3 ER 513, 554-555.]

IV. THE DISTRICT DOUBLES DOWN: "NOTHING IN THE FIRST AMENDMENT OBLIGATES THE DISTRICT TO CONTINUE DOING BUSINESS WITH ANY INDIVIDUAL OR ORGANIZATION THAT MAKES PUBLIC STATEMENTS WHICH ARE INIMICAL TO THE DISTRICT'S EDUCATIONAL MISSION"

On September 25, 2018, Mr. Riley, through his counsel, caused a letter to be sent to the District, Superintendent Elsasser, and each of the members of the Board, alerting them that retaliatory action had been taken against Riley's Farm based on Mr. Riley's expressed opinions, setting forth the legal authorities that demonstrate the illegality of this action, and demanding remedial action. [3 ER 513, 514.]

The District, through its legal counsel, Atkinson, Andelson, Loya, Ruud & Romo, responded by letter on October 2, 2018 (the "October 2 Letter"). [3 ER 514.] The October 2 Letter referenced, quoting verbatim, each of the Comments. [3 ER 514, 564-565.] The letter denied that District had issued a policy forbidding District teachers from taking field trips to Riley's Farm, stating instead that "[a]fter the District became aware of racist, sexist and homophobic statements published in social media by the proprietor of Riley's Farm, individual schools decided whether to sponsor field trips to Riley's Farm during the 2018-2019 school year. [3 ER 514, 564.] That denial was belied by the Guidance Directive, which specifically stated "we are asking that no CUSD school attend Riley's Farm field trips." [3 ER 512-513, 581.] The October 2 Letter stated that "[n]othing in the First Amendment obligates the District to continue doing business with any individual or organization that makes public statements which are inimical to the District's educational mission." [3 ER 514, 565.] The letter also asserted that it had "no obligation to expose children to an individual who engages in these crude and tasteless comments." [3 ER 514, 566.] The letter stated that the Comments were "simply offensive to the point where school administrators decided against associating with his organization." [3 ER 514, 566.] The letter concluded by declaring that the "District declines to take any of the [remedial] actions" requested in Riley's Farm's counsel's letter. [3 ER 514-515, 567.] The decision to decline to

take those remedial actions was made by Superintendent Elsasser. [3 ER 515, 557.]

V. THE DISTRICT COURT PROPERLY APPLIED THE "ORDINARY CITIZEN" FIRST AMENDMENT STANDARD, NOT *PICKERING* BALANCING

This litigation followed. Respondents moved to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6). After extensive briefing, the District Court entered an order granting in part and denying Respondents' motion [5 ER 963-975.] In this order (the "12(b)(6) Order"), the District Court considered the parties' supplemental briefing on the question of which legal standard to apply to the retaliation analysis: namely, (1) the balancing test, applicable to public employees and certain government contractors, set forth in *Pickering v. Board of Education*, 391 U.S. 563 (1968) or (2) "the more First Amendment friendly standard enunciated in *Perry* [*v. Sindermann*], 408 U.S. 593 (1972) that applies to private citizens generally." (6 ER 978.) The District Court examined the kind of services Riley's Farm performed for the District and determined that these were distinct from "services that are ordinarily provided by government employees." Accordingly, the District Court held, "[o]n the spectrum[2] of government

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[2] *See Umbehr* at 680 (unconstitutional conditions precedents span a "spectrum" from government employees, "whose close relationship with the government

entanglement, [Riley's] Farm falls much closer to private citizen than to government employee." [5 ER 970.]

Citing *Alameda Newspapers v. City of Oakland*, 95 F.3d 1406 (9th Cir. 1996), the District Court held that "[n]ot all entities doing business with the government are included within the *Pickering* framework." [5 ER 970.] "*Pickering's* analysis does not extend to plaintiffs falling in this range. Accordingly, the government has even less interest in regulating Plaintiffs' viewpoints on matters of public concern than it would if [Riley's] Farm were an independent contractor." [*Ibid*.]

Therefore, the District Court held – critically for the legal posture of the case – "Defendants cannot avail itself [sic] of the *Pickering* balancing test." [*Id*.]

VI. THE PARTIES FILED CROSS MOTIONS FOR SUMMARY JUDGMENT

Appellants filed a First Amended Complaint ("Amended Complaint") addressing allegedly insufficient allegations as to Superintendent Elsasser's personal involvement in the constitutional violation. [5 ER 919-962.] Respondents answered the Amended Complaint. After discovery, both sides moved for

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requires a balancing of important free speech and government interests," to private citizens, "whose viewpoints on matters of public concern the government has *no legitimate interest* in repressing." (Emphasis added.)

summary judgment. Appellants sought partial summary judgment, on the ground that there existed no disputed material fact, as to the following issues:

1. Superintendent Elsasser, acting under color of law, unlawfully retaliated against constitutionally protected speech by Mr. Riley.
2. Superintendent Elsasser is liable to Appellants pursuant to 11 U.S.C. section 1983 for unlawful retaliation, in an amount to be determined at trial.
3. Nemer, acting under color of law, unlawfully retaliated against constitutionally protected speech by Mr. Riley.
4. Nemer is liable to Appellants pursuant to 11 U.S.C. section 1983 for unlawful retaliation, in an amount to be determined at trial.
5. Superintendent Elsasser took adverse action against Riley's Farm by issuing guidance, in his capacity as the Superintendent of Claremont Unified School District, that District schools discontinue their long-standing patronage of Riley's Farm for school field trips.
6. The Comments made on social media by Mr. Riley which caused Superintendent Elsasser to take this adverse action against Riley's Farm constituted constitutionally protected activity, namely, speech protected by the First Amendment.
7. There was a substantial causal relationship between the Comments and the adverse action.
8. This adverse action (i.e., the deprivation of longstanding business patronage) "would chill a person of ordinary firmness" from continuing to engage in constitutionally protected activity.

[3 ER 472-474.] Appellants did not seek summary judgment as to issues expected to be contested, such as damages and the liability of Respondents other than Superintendent Elsasser and Nemer. Nor did Appellants seek summary judgment as to their entitlement to injunctive relief, as Appellants anticipated that this would likely also involve disputed facts.

Respondents filed two separate motions for summary judgment, or in the alternative, partial summary judgment. One motion was filed on behalf of Superintendent James Elsasser and school principals Ann O'Connor and Brenda Hamlett [4 ER 592 et seq.], and another motion was filed on behalf of the members of the Board of Education. [5 ER 752 et seq.]

Although Respondents' notices of motion purported to address all three of Appellants' claims for relief (i.e., violation of civil rights under the First and Fourteenth Amendments, conspiracy to violate civil rights, and injunctive relief) [5 ER 753-764, 4 ER 593-601], their memoranda of points and authorities and separate statements did not address the injunction issue. [4 ER 603 et seq., 5 ER 769 et seq.] Instead, Respondents' arguments were centered on their purported right to "design their curriculum," and an invitation to the District Court to reconsider its previous holding that *Pickering* balancing did not apply. (4 ER 623-625; 5 ER 782-785.) In both motions, the discussion of qualified immunity was brief – just three pages in each. Respondents argued that "[t]here simply was no

existing precedent at the time CUSD canceled its Riley's Farm field trips which would have placed defendants on notice that they were constitutionally prohibited from canceling field trips in response to parent complaints." [4 ER 627; 5 ER 786.) In addition, Respondents argued that they were entitled to qualified immunity because, in a variation on the old saying "fifty million Frenchmen can't be wrong," "administrators at several other public school districts made similar decisions to cancel field trips in response to parent complaints over Riley's tweets." (4 ER 628-629; 5 ER 787-788.)[3]

VII. THE COURT GRANTED SUMMARY JUDGMENT TO RESPONDENTS BASED ON AN INTERPRETATION OF QUALIFIED IMMUNITY REQUIRING AN EXTREME LEVEL OF FACTUAL SPECIFICITY

By a minute order entered July 17, 2020 (the "Summary Judgment Order"), and ruling without a hearing or argument, the District Court denied Appellants' motion for partial summary judgment and granted summary judgment to Respondents "on all claims," all based on the single issue of qualified immunity. [1 ER 15.] The District Court distinguished the cases cited by Appellants on the ground that they involved different factual circumstances. For instance, the

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[3] Appellants have located no authority supporting such a "herd immunity" theory of qualified immunity, where the mere fact that multiple officials all make the same unconstitutional decision immunizes them all.

District Court held that "[b]ecause Plaintiffs are not government employees, any holding regarding retaliation in the employment context is too general to create a clearly established right applicable to the facts of this case." [1 ER 14.] The District Court next distinguished *Umbehr* because "Plaintiffs are not government contractors." [*Ibid*.]

The District Court characterized Appellants' framing of the "clearly established" constitutional principle involved as "the First Amendment prohibits government officials from subjecting an individual to retaliatory actions." [1 ER 15.] That was incorrect: Appellants had framed the relevant issue much more tightly. Appellants identified the principles that would apply under both the "private citizen" framework the District Court had applied to the case, as well as under the *Pickering* balancing framework. If the former, Appellants framed the "clearly established" right as the right of a person not to be deprived of a valuable government benefit "on a basis that infringes his…freedom of speech." [3 ER 324-325, citing *Perry v. Sindermann*, *supra*, 408 U.S. at 597.] If the latter, Appellants argued, it was "clearly established" that an adverse community reaction is not a legitimate ground for restricting speech outside the limited context of persons formally employed in unusually sensitive government jobs, such as police officers or schoolteachers. [3 ER 325-326.]

Despite this, the District Court ruled that "[the] cases cited by Plaintiffs…lack a 'parallel or comparable fact pattern to alert an officer that a series of actions would violate an existing constitutional right.'" [1 ER 16.] "Because schools have special First Amendment status and the contract relationships potentially implicate government speech, cases involving government employees or denial of direct government benefits would not put a reasonable school official on notice that canceling a field trip in response to inflammatory speech violates the First Amendment." [*Ibid*.] "At a minimum," the District Court went on, "Plaintiffs would need to cite a case in which the court found that a school violates the First Amendment when it refuses to contract with a vendor in retaliation for the vendor's speech." [*Ibid*.]

The District Court proceeded to order, and subsequently enter, summary judgment as to "all claims." [1 ER 8-9, 16.]

VIII. THE DISTRICT COURT CLAIMED ITS ERRONEOUS APPLICATION OF QUALIFIED IMMUNITY TO APPELLANTS' INJUNCTIVE RELIEF CLAIM WAS "HARMLESS"

On August 4, 2020, Appellants timely filed a combined motion (hereafter the "Motion to Reconsider") for relief from the Summary Judgment Order under Rule 60 of the Federal Rules of Civil Procedure, and to alter or amend the judgment under Rule 59 based on the District Court's clear error in applying the doctrine of qualified immunity to Appellants' third claim for relief seeking injunctive relief.

[2 ER 70 et seq.] Appellants also urged the District Court to reconsider its incorrect ruling that, in effect a case "directly on point" or "on all fours," with "materially or fundamentally similar facts" was required in order for a constitutional principle to be "clearly established" for purposes of qualified immunity. [2 ER 47.]

Again ruling without argument or hearing, the District Court denied the Motion for Reconsideration on August 27, 2020. [1 ER 2.] It acknowledged that "qualified immunity does not apply to requests for injunctive relief," and that Appellants sought such relief. [1 ER 2.] However, District Court then stated that "[b]ecause motions to reconsider are not properly granted on harmless error, the Court must assess the merits of Plaintiffs' claim for injunctive relief *as briefed in the parties' motions*." [1 ER 3; emphasis added.] This was incorrect; as noted above, neither side's summary judgment motions had briefed the issue of injunctive relief.

The District Court proceeded to rule as follows:

> "[Appellants] have failed to prove they will meet their burden to demonstrate danger of direct injury in the future. Three of Plaintiffs' four requested injunctions presuppose that Defendants have an ongoing policy dissuading or forbidding patronage of Riley's Farm because of Mr. Riley's speech. [Internal citations to record omitted.] Plaintiffs repeatedly assert Riley's Farm has been 'blacklisted' by the District. [Citations omitted.] However, the record reveals no such standing, future-looking prohibition against CUSD affiliates patronizing Riley's Farm because of Mr. Riley's speech. It is

> undisputed that on September 4, 2018, Superintendent Elsasser asked each of the school site administrators to speak with their teachers and determine whether any of them maintained a desire to attend field trips to Riley's Farm. [Citations omitted.] It is additionally undisputed that as of September 10, 2018, no administrator, teacher or staff member expressed to Elsasser a desire to continue going to Riley's Farm. [Citations omitted.] Superintendent Elsasser has testified that the issue has not come up again, and thus there has been no occasion to revisit the issue of field trips to Riley's Farm. [Citations omitted.] *There is no blacklist*."
>
> [1 ER 6; emphasis added.]

The District Court took a sarcastic swipe at one of the four components of the injunction Appellants' First Amended Complaint prayed for: "Apparently blind to the irony in this First Amendment case," Appellants had prayed for (in addition to an injunction against the "guidance" forbidding Riley's Farm field trips) an apology and a commitment to respect freedom of speech. (5 ER 936-937; 1 ER 6.) The District Court ruled that "[s]uch a remedy does not meet the standards…for injunctive relief under Section 1983." [1 ER 6.]

Finally, the District Court noted the ongoing COVID-19 pandemic, which had curtailed all field trips by District schools. Therefore, the District Court held, "Plaintiffs are not at risk of imminent injury." [1 ER 7.] "It would be a futile exercise in judicial pantomime to allow – or at least not prohibit – field trips to Riley's Farm during a time when all field trips are prohibited for the foreseeable future." [1 ER 7.]

SUMMARY OF THE ARGUMENT

1. Qualified immunity applies only to claims for damages, not injunctive relief.
2. A constitutional principle is "clearly established," even if conduct previously recognized as violating it occurs in a new circumstantial context. A case "directly on point" or "on all fours" is not required.
3. It is a clearly established principle of First Amendment law that existing public business patronage is a "valuable government benefit" which may not be taken away in retaliation for the exercise of constitutional rights, regardless of which government agency does the taking.
4. Appellants should have been granted partial summary judgment. Undisputed evidence demonstrated that Superintendent Elsasser, prompted by Nemer, (1) issued "guidance" forbidding Riley's Farm field trips, (2) as a result of Mr. Riley's extracurricular comments, made in his capacity as a private citizen; and (3) this deprivation of public patronage – a "pecuniary benefit" – based on speech is clearly established as being sufficient, as a matter of law, to chill a person of ordinary firmness from exercising his constitutional rights.
5. The District Court should not have ruled *sua sponte* on the issue of Appellants' entitlement to an injunction, when that issue was not raised below, nor was Appellant afforded an opportunity to address the issue.

6. The District Court improperly construed the evidence on the injunction issue in the light most favorable to Respondents, indulging every possible (and impossible) inference in their favor instead of the non-moving parties, as is required on summary judgment.

ARGUMENT

I. STANDARD OF REVIEW

A grant of summary judgment is reviewed de novo, using the same standard applied by the trial court. (*San Jose Christian Coll. v. City of Morgan Hill*, 360 F3d 1024, 1029–1030 (9th Cir 2004).) In reviewing the trial court's decision, the appeals court must determine whether there are any genuine issues of material fact, and whether the district court correctly applied the relevant substantive law. (*Universal Health Servs., Inc. v. Thompson*, 363 F3d 1013, 1019 (9th Cir 2004). A district court's decision on cross motions for summary judgment is also reviewed de novo. (*See Guatay Christian Fellowship v. County of San Diego*, 670 F.3d 957, 970 (9th Cir. 2011).)

A denial of a motion to alter or amend a judgment under Rule 59, or a motion for relief from a judgment pursuant to Rule 60, is reviewed for abuse of discretion. (*McQuillion v. Duncan*, 342 F.3d 1012, 1014 (9th Cir. 2003); *Latshaw v. Trainer Wortham & Co.*, 452 F.3d 1097, 1100 (9th Cir. 2006).) "Whether such a denial rests on an inaccurate view of the law and is therefore an abuse of

discretion requires [the reviewing court] to review the underlying legal determination de novo." (*Smith v. Pac. Props. & Dev. Corp.*, 358 F.3d 1097, 1100 (9th Cir. 2004).)

II. THE DISTRICT COURT ERRED IN APPLYING QUALIFIED IMMUNITY TO A CLAIM FOR INJUNCTIVE RELIEF

Qualified immunity is not available as a defense "in a suit to enjoin future conduct." (*Pearson v. Callahan*, 555 U.S. 223, 242 (2009), quoting *County of Sacramento v. Lewis*, 523 U.S. 833, 841 n. 5 (1998); see also *Morse v. Frederick*, 551 U.S. 393, 432 (2007) ["'qualified immunity' defense applies in respect to damages actions, but not to injunctive relief"]; *Henry A. v. Willden*, 678 F.3d 991, 999 (9th Cir. 2012) [application of qualified immunity to injunctive relief claims "plainly wrong"].)

Appellants' Third Claim for Relief, in its operative Amended Complaint is for injunctive relief, restraining and enjoining Respondents, and their successors in office, from continuing their unlawful policy restricting District schools from taking field trips to Riley's Farm. [1 ER 934-937.] This claim for relief was alleged against Respondents in their official capacities. [5 ER 934.] "Qualified immunity simply does not apply to these claims." (*Henry A. v. Willden*, *supra*, 678 F.3d at 999.)

This is not a "debatable" error of law. (*See Colonies v. Cty. of San Bernardino,* 2020 U.S. Dist. LEXIS 27136, *7 (2020).) It is the kind of elementary, clear error that the District Court did not have discretion to refuse to reconsider and correct. (*See McDowell v. Calderon*, 197 F.3d 1253, 1255 n. 4 (9th Cir. 1999); *In re Onecast Media, Inc*., 439 F.3d 558, 561 (9th Cir. 2006). As set forth in sections V and VI, below, the District Court's attempt to rationalize refusing to correct its mistake by invoking the "harmless error" doctrine was itself improper and must be reversed.

III. THE COURT ERRED IN HOLDING THAT QUALIFIED IMMUNITY APPLIES ABSENT PRECEDENT WITH "MATERIALLY OR FUNDAMENTALLY SIMILAR" FACTS

A. A Right Must Be Defined More Specifically Than The "General [Constitutional] Proposition," But Neither A "Case On Point" Nor "Closely Analogous Case Law" Is Required.

The District Court ruled that "[a]t a minimum, Plaintiffs would need to cite a case in which the court found that a school violates the First Amendment when it refuses to contract with a vendor in retaliation for the vendor's speech." [1 ER 15.] That is, the Court required "closely analogous case law" (*cf. Ellins v. City of Sierra Madre*, 710 F.3d 1049, 1064 (9th Cir. 2013), where "the specific facts [were] materially or fundamentally similar to the situation in question." (*Id*. at *35, citing *Hope v. Pelzer*, 536 U.S. 730, 742 (2002).) That is not the proper legal standard for determining whether a right is "clearly established."

The doctrine of qualified immunity protects "government officials performing discretionary functions . . . from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." (*Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982); *Pearson v. Callahan*, 555 U.S. 223, 231 (2009).) "If the law was clearly established, the immunity defense ordinarily should fail, since a reasonably competent public official should know the law governing his conduct." (*Harlow v. Fitzgerald*, *supra*, 457 U.S. at 818-819.)

The right the official is alleged to have violated must have been "'clearly established' in an appropriately particularized sense." (*Calabretta v. Floyd*, 189 F.3d 808, 812 (9th Cir. 1999).) This inquiry "must be undertaken in light of the specific context of the case, not as a broad general proposition." (*Brosseau v. Haugen*, 543 U.S. 194, 201 (2004).) "In other words, courts adjudicating claims of qualified immunity must look not to constitutional guarantees themselves but to the various doctrinal tests and standards that have been developed to implement and administer those guarantees." (*Brewster v. Bd. of Educ.*, 149 F.3d 971, 977 (9th Cir. 1998).)

In defining the "contours" of what specific interests are "clearly established" as being constitutionally protected (*see Anderson v. Creighton*, 483 U.S. 635, 640 (1987)), courts have struggled with defining the rights either "at [too] high [a] level

of generality" (*al-Kidd*, *supra*, 563 U.S. at 742) or, conversely, at "[too] extreme [a] level of factual specificity." (*United States v. Lanier*, 520 U.S. 259, 267 (1997).) The District Court erred decisively in the latter direction. It demanded an improperly extreme level of factual similarity between the prior precedents and the outward factual incidents of this case. It did so even though the actual constitutional principle – that an established business relationship with a public agency is a "valuable government benefit" which may not be cut off in retaliation for speech – is "beyond debate." (*al-Kidd*, *supra*, 563 U.S. at 735.) The District Court steered so wide of Scylla it crashed into Charybdis.[4]

The Supreme Court has explained that for a right to be "clearly established" does not "require a case directly on point." (*al-Kidd*, *supra*, 563 U.S. at 741). Nor is it necessary that a case be "on all fours." (*Shafer v. Cty. of Santa Barbara*, 868 F.3d 1110, 1118 (9th Cir. 2017). What matters is that the *"statutory or constitutional question* [be] beyond debate." (*al-Kidd*, *supra*, 563 U.S. at 741; emphasis added.) It is the *legal* question of whether a particular act – in whatever context it occurs – is clearly unconstitutional, that matters, not the "particular [factual] manifestation of unconstitutional conduct." (*Torres v. City of Madera*,

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[4] *See* HOMER, THE ODYSSEY, BOOK XII (Robert Fagles trans., Penguin Classics 2d ed. (1999).)

648 F.3d 1119, 1128 (9th Cir. 2011); *Deorle v. Rutherford*, 272 F.3d 1272, 1285-86 (9th Cir. 2001).) To be clearly established, a *legal principle* must have a sufficiently clear foundation in then-existing precedent. The *rule* must be "settled law." (*District of Columbia v. Wesby*, 138 S. Ct. 577, 590 (2018); emphasis added.) "Qualified immunity gives government officials breathing room to make mistaken but reasonable judgments about *open legal questions*." (*al-Kidd*, *supra*, 563 U.S. at 743; emphasis added.)

"The question is not whether an earlier case mirrors the specific facts here. Rather, the relevant question is whether 'the state of the law at the time gives officials fair warning that their conduct is unconstitutional." (*Ellins v. City of Sierra Madre*, *supra*, 710 F.3d at 1064, citing *Bull v. City & County of San Francisco*, 595 F.3d 964, 1003 (9th Cir. 2010) (en banc) [holding "the district court framed the inquiry much too narrowly"].) "[T]he specific facts of previous cases need not be materially or fundamentally similar to the situation in question." (*Ellins*, *supra*, at 1064, citing *Hope v. Pelzer*, *supra*, 536 U.S. at 742.) Even when there are "notable factual distinctions" between past precedents and the outward circumstances of a case under consideration, the past cases may give reasonable notice that the conduct at issue violated constitutional rights. (*United States v. Lanier*, *supra*, 520 U.S. at 267.) "'[I]t is not necessary that the alleged acts have been previously held unconstitutional' in order to determine that a right was clearly

established, "as long as the unlawfulness [of defendant's actions] was apparent in light of pre-existing law." (*Bonivert v. City of Clarkston*, 883 F.3d 865, 872 (9th Cir. 2018) [citing cases].)

"[O]fficials can still be on notice that their conduct violates established law even in novel factual circumstances." (*Hope v. Pelzer*, *supra*, 536 U.S. at 741, 122 S. Ct. 2508, 153 L. Ed. 2d 666 (2002). The Supreme Court has "expressly rejected a requirement that previous cases be fundamentally similar." (*Id.*; *see United States v. Lanier*, *supra*, 520 U.S. at 271, 117 S. Ct. 1219, 137 L. Ed. 2d 432 (1997) ["[G]eneral statements of the law are not inherently incapable of giving fair and clear warning, and . . . a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question, even though the very action in question has [not] previously been held unlawful"].) Mere differences in the outward factual details of cases (such as the identity of the parties; *see Hyland v. Wonder*, 117 F.3d 405, 411-12 (9th Cir. 1997) ("*Hyland II*")) do not render the law unsettled. Qualified immunity will be denied if a case involves "the mere application of settled law to a new factual permutation." *(Porter v. Bowen*, 496 F.3d 1009, 1026 (9th Cir. 2007).) Nor does it apply when "courts have agreed that certain conduct is a constitutional violation under facts not distinguishable in a fair way from the facts presented in the case at hand." (*Saucier v. Katz*, 533 U.S. 194, 202 (2001); *Orn v. City of Tacoma*, 949 F.3d 1167,

1178 (9th Cir. 2020).) Not just "distinguishable" – virtually any case will have at least some incidental differences from precedent – but "distinguishable in a fair way"; that is, in a way that has genuine, substantial implications for the parties' constitutional rights.

B. An Appropriately Particularized Legal Principle Does Not Require "Materially Similar Facts"

The Supreme Court cases of *Reichle v. Howards*, 566 U.S. 658 (2012) and *al-Kidd*, *supra*, 563 U.S. at 731, illustrate the requirement that the relevant *legal* questions be framed at an appropriately specific level of particularity. In *Reichle*, the plaintiff sought to frame the constitutional principle at an extremely general level, only one step removed from the language of the First Amendment itself: simply, that "'the First Amendment prohibits government officials from subjecting an official to retaliatory actions' for his speech." (*Reichle*, *supra*, 566 U.S. at 665.) The Supreme Court held that the appropriate analysis required one more degree of specificity: "the more specific right to be free from a retaliatory arrest *that is otherwise supported by probable cause*." (*Id.*; emphasis added.) That was critical, because the *legal* issue of whether the existence of probable cause rendered an allegedly retaliatory motive of an arrest irrelevant was unsettled. The Supreme Court's decision in *Hartman v. Moore*, 547 U.S. 250 (2006) had held that a plaintiff cannot state a claim of retaliatory prosecution if the charges were

supported by probable cause. Subsequent Circuit Court of Appeals decisions had split over whether this rule also applied to retaliatory arrests. (*Id*. at 666-667.) Therefore, a reasonable official could have concluded that *Hartman's* rule applied to retaliatory arrests. (*Id*. at 668-669.)

al-Kidd involved a similarly unsettled legal issue. The plaintiff had been arrested pursuant to an "objectively reasonable" material witness warrant, but claimed that the true, pretextual reason for detaining him as a material witness was that the government suspected, but could not prove, that he was a terrorist supporter. (*al-Kidd*, *supra*, 536 U.S. at 734, 736.) The Ninth Circuit ruled for the plaintiff, holding that "the Fourth Amendment prohibits pretextual arrests absent probable cause of criminal wrongdoing" (*id*. at 734) and cited, as the "clearly established" law obviating qualified immunity, "the broad 'history and purposes of the Fourth Amendment'." (*Id*. at 742.) With a hint of impatience at this Court's dogged persistence in cabining the scope of qualified immunity ("We have repeatedly told courts – and the Ninth Circuit in particular…not to define clearly established law at a high level of generality"), the Court ruled that the "general proposition…that an unreasonable search or seizure violates the Fourth Amendment is of little help." (*Id*.) Because the more particularized *legal* issue of whether subjective, pretextual motivations rendered an otherwise "objectively reasonable" warrant improper was not "clearly established" in the plaintiff's favor,

qualified immunity would apply. (*Id*. at 741-742.) Ultimately, the Supreme Court held that not only was the plaintiff's position not clearly established, but that it was not established at all: As long as the warrant was objectively reasonable, there was no constitutional violation. (*Id*. at 744.)

Conversely, *Ellins v. City of Sierra Madre*, *supra*, 710 F.3d 1049, is a good illustration of a district court making the opposite error, "fram[ing] the inquiry much too narrowly" and demanding that the outward facts of the case mirror those of a previous one. (*Id*. at *35.) There, the district court had found qualified immunity existed because no case had specifically held "that a police officer suffers a First Amendment violation when a certifying officer delays approval of an application that requires a certification of the applicant's good moral character." The Court of Appeals held that all that had to be "clearly established" was that (1) a public employee has a First Amendment right to be free from retaliation for commenting on matters of public concern, and (2) deprivation of an employee's salary (no matter the mechanism by which that occurred) was a sufficiently significant retaliatory sanction to violate those rights. (*Id*.; *see also Gonzales v. Burley High Sch*., 404 F. Supp. 2d 1269, 1292 (Dist. Id. 2019) [an "extreme level of specificity" is not required to defeat a qualified immunity defense].)

C. Inherently Fact-Intensive Contexts Like Fourth Amendment "Reasonableness" Inquiries Require Greater Specificity Than First Amendment Cases

Some district courts have suggested that the Supreme Court's *Hope* case, cited above, with its teaching that precedents with "materially or substantially similar facts" are not required, is no longer good law in light of subsequent cases like *Brosseau*, *Wesby*, *al-Kidd*, and *Reichle.* (*See, e.g.*, *Bentley v. City of Mesa*, 2020 U.S. Dist. Lexis 66958 at *17.) However, "[the Supreme] Court does not normally overturn, or…dramatically limit, earlier authority *sub silentio*." (*Shalala v. Ill. Council on Long Term Care*, 529 U.S. 1 (2000).) Courts remain bound by Supreme Court precedent until the Supreme Court says otherwise, "even if it appears to rest on reasons rejected in some other line of decisions." (*In re Twelve Grand Jury Subpoenas*, 908 F.3d 525, 529 (9th Cir. 2018).) Faced with controlling precedents that might appear to be in tension, courts "are required to reconcile prior precedents if [they] can do so." (*Cisneros-Perez v. Gonzales*, 465 F.3d 386, 392 (9th Cir. 2006); *Montana Chamber of Commerce v. Argenbright*, 226 F.3d 1049, 1062 (9th Cir. 2000) [courts must "do [their] best to reconcile" controlling precedents that appear to conflict].) Such reconciliation is readily done here.

The Supreme Court recently (on November 2, 2020) cited *Hope* and *Lanier* favorably in *Taylor v. Riojas*, 2020 U.S. LEXIS 5193 (2020) for the principle that "a general constitutional rule already identified in the decisional law may apply

with obvious clarity to the specific conduct in question." (*Id*. at *2.) Accordingly, those cases remain good law for at least that principle – and they have never been overruled as to the rest of their reasoning.

The holdings in *Hope* and *Lanier* that "materially or fundamentally similar" fact patterns are not required for a constitutional principle's application to a case to be "clearly established" are readily reconciled with later cases like *Brosseau*, *al-Kidd*, and *Reichle*, cited in the District Court's Summary Judgment Order. Many, perhaps most, qualified immunity defenses arise in the context of excessive force by police and probable cause under the Fourth Amendment. The constitutional analysis in these fields depends on highly fact-intensive determinations of what conduct by an officer was reasonable under particular circumstances. (*See, e.g*., *Maryland v. Pringle*, 540 U.S. 366, 371 (2003) [probable cause]; *Graham v. Connor*, 490 U.S. 386, 396-397 (1989) [excessive force; question "requires careful attention to the facts and circumstances of each particular case" because "police officers are often forced to make split-second judgments – in circumstances that are tense, uncertain and rapidly evolving – about the amount of force that is necessary in a particularly situation"].)

Naturally, that requires intensive inquiry into what the particular circumstances of an incident were. In these cases, courts must "slosh [their] way through the fact-bound morass of 'reasonableness.'" (*Scott v. Harris*, 550 U.S. 372,

383 (2007).) Determining the reasonableness of an officer's action is a highly fact-intensive task for which there are no *per se* rules. (*Id*.) Thus, even though, *as a general rule*, "materially or fundamentally similar facts" are not necessary to clearly establish a constitutional protection, in the *specific, limited context* of inherently fact-intensive circumstances like those presented in the typical Fourth Amendment case, "'a body of relevant case law'" is usually necessary to "'clearly establish' the answer." (*District of Columbia v. Wesby*, *supra*, 138 S. Ct. at 590; *Kisela v. Hughes*, 138 S. Ct. 1148, 1152 (2018) ["[S]pecificity is especially important in the Fourth Amendment context, where the Court has recognized that it is sometimes difficult for an officer to determine how the relevant legal doctrine, here excessive force, will apply to the factual situation the officer confronts"].) "Use of excessive force is an area of the law 'in which the result depends very much on the facts of each case', and thus police officers are entitled to qualified immunity unless existing precedent 'squarely governs' the specific facts at issue." (*Id*. at 1153.) "Precedent involving similar facts can help move a case beyond the otherwise 'hazy border between excessive force and acceptable force.'" (*Id*.; *see Brosseau*, *supra*, 543 U.S. at 198.)

Outside the "fact-bound morass" of Fourth Amendment "reasonableness" determinations, excessive or "extreme" factual specificity is neither necessary nor appropriate. Unlike the Fourth Amendment, the First Amendment lends itself to

much brighter, binary lines. With few, tightly-defined exceptions (like the *Pickering* balancing between the government's interests as employer and a public employee's free speech rights, which the District Court ruled inapplicable here),[5] it does not matter whether a public agency claims it is "reasonable" to take action against a citizen because of the content of his speech. Unlike with the Fourth Amendment, no fact-intensive "reasonableness" balancing applies in this sphere. (*See United States v. Alvarez*, 132 S. Ct. 2537, 2544 (2012), citing *United States v. Stevens*, 559 U.S. 460, 468, 470 (2010).) In the retaliation context (again, outside the scope of *Pickering* balancing), the question is stark and simple: The government has either deprived a citizen of a valuable government benefit, or it has not. There is no "hazy border" between these opposite poles. (*Cf. Brosseau*, *supra*, 543 U.S. at 198.) If a particular category of benefit is "clearly established" as being of greater than *de minimis* value[6], then if a public agency has taken it away because of "offensive" or "inflammatory" speech – it violates the First Amendment, as a matter of clearly established law.

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[5] Respondents did not cross-appeal to challenge the 12(b)(6) Order's finding that *Pickering* balancing does not apply. Under the party presentation principle, that ruling, setting the law of the case, should remain undisturbed. (*See United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1579-1580 (2020).

[6] *Cf. Blair v. Bethel School District*, 608 F.3d 540, 544 (9th Cir. 2010) [*de minimis* retaliatory actions do not give rise to constitutional violation].)

D. Respondents' Conduct Violated Clearly Established, Sufficiently Particularized Rights, And Was Not "Fairly Distinguishable" From Conduct Previously Held Unconstitutional

The following "constitutional question[s]", in ascending order of specificity, are clearly established and "beyond debate" (*see, e.g.*, *al-Kidd*, *supra*, 563 U.S. at 741):

- "[A]n individual ha[s] a clearly established right to be free of intentional retaliation by government officials based upon that individual's constitutionally protected expression." (*Soranno's Gasco, Inc. v. Morgan*, 875 F.2d 1310, 1319 (9th Cir. 1989).)
- The government "may not deny a benefit to a person on a basis that infringes his constitutionally protected…interest in freedom of speech." (*Perry v. Sindermann*, *supra*, 408 U.S. at 597; *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 604 (2013).)
- The rule of *Perry v. Sindermann* applies beyond the context of public employment. (*Hyland v. Wonder*, 972 F.2d 1129, 1143 (9th Cir. 1992) ("*Hyland I*"); see the Court's 12(b)(6) Order, ["the critical question[ ] is simply whether [a plaintiff] has alleged a loss of a valuable governmental benefit or privilege in retaliation for his speech," citing *Hyland I* at 1135].)

- The termination of a "pre-existing commercial relationship" with the government constitutes the deprivation of a valuable government benefit. (*Bd. Of Cnty. Comm'rs, Waubansee Cnty., Kan. v. Umbehr*, 518 U.S. 668, 674 (1996); *Zeitchick v. Lucey*, 495 Fed. Appx. 792, 794-795 (9th Cir. 2012).)
- This rule applies to commercial relationships even when there is no formal contract between the government and a vendor or service provider. (*O'Hare Truck Serv., Inc. v. City of Northlake*, 518 U.S. 712, 714-15, 721 (1996); *Kinney v. Weaver*, 367 F.3d 337, 368 (5th Cir. 2004)[7]; *cf*. the Summary Judgment Order, 1 ER 14 [erroneously distinguishing *Umbehr* on the ground that "Plaintiffs are not government contractors"].)
- An "ordinary citizen" whose pre-existing commercial relationship with the government has more First Amendment protection than an employee or quasi-employee "independent contractor," not less. (*See*

[7] In determining whether a constitutional or statutory rule is "clearly established," courts may look all relevant precedent, including decisions from other circuits. (See *Tarabochia v. Adkins*, 766 F.3d 1115, 1125 (9th Cir. 2014); *Elder v. Holloway*, 510 U.S. 510, 512, 516 (1994).) A court should "draw[ ] on its 'full knowledge' of relevant precedent rather than restricting its review to cases identified by plaintiff." (*Id*.)

Umbehr, *supra*, 518 U.S. at 680 ["Our unconstitutional conditions span a spectrum from government employees…to [persons with less close relationships with government] whose viewpoints on matters of public concern the government has no legitimate interest in repressing"]; *City of San Diego v. Roe*, 543 U.S. 77, 80 (2004) [government employees may be subjected to certain speech "restraints that would be unconstitutional if applied to the general public"]; *Kinney v. Weaver*, *supra*, 367 F.3d at 368 ["we reject the Police Officials' suggestion that it would have been reasonable for officers in their positions to believe that they were unfettered by the First Amendment merely because their economic relationship was non-employment and non-contractual"; *Blackburn v. City of Marshall*, 42 F.3d 925, 931 (5th Cir. 1995); see also the Court's 12(b)(6) Order, 5 ER 970: "On the spectrum of government relationships, the Farm lies between independent contractor and ordinary citizen…Accordingly, the government has even less interest in regulating Plaintiff's viewpoints on matters of public concern than it would if the Farm were an independent contractor," citing *Alameda Newspapers v. City of Oakland*, *supra*, 95 F.3d 1406)].)

Accordingly, the "constitutional question" here must be framed as follows: *When a person has a pre-existing commercial relationship with a public agency, is business patronage pursuant to that relationship a "valuable government benefit" which the agency may not take away based on the person's First Amendment-protected speech?*

The answer, established by ample, particularized, longstanding precedents, is "clearly yes." The "legal question" is not "open." (*See al-Kidd*, *supra*, 563 U.S. at 743.) This is not a case involving "such an undeveloped state of the law" that qualified immunity is necessary to protect officers from the special unfairness that results when they are "expected to predict the future course of constitutional law." (*Wilson v. Layne*, 526 U.S. 603, 617-18, (1999) (quoting *Procunier v. Navarette*, 434 U.S. 555, 562 (1978).) Rather, it is one demanding "knowledge of . . . basic, unquestioned constitutional rights." (*Wood v. Strickland*, 420 U.S. 308, 322 (1975); *see Bonivert v. City of Clarkston*, *supra*, 883 F.3d at 873; *see also* 2 ER 190 [Respondents admitted that "[t]he possibility that ceasing patronage of Riley's Farm could raise First Amendment issues never even occurred to Elsasser"].) The precedents above gave Respondents fair warning of what the Constitution required. At that point, qualified immunity could only exist if those precedents are "distinguishable in a fair way" from the present case. (*Saucier v. Katz*, *supra*, 533 U.S. at 202; *Orn v. City of Tacoma*, *supra*, 949 F.3d at 1178.)

They are obviously not. The District Court's Summary Judgment Order purported to distinguish this case because (1) Plaintiffs are not employees nor "government contractors" [1 ER 14]; (2) "schools have special First Amendment status" [1 ER 15]; and (3) "the contract [sic][8] relationships potentially implicate government speech" [1 ER 15]. None of these incidental details distinguishes this case in a fair or relevant way from the applicable settled First Amendment retaliation precedents.

With respect to (1), as set forth above, the District Court, in its 12(b)(6) Order, had already properly located Plaintiffs on the First Amendment "spectrum" that runs from public employees and "independent contractors" (whose First Amendment rights are protected, subject to certain balancing tests and exceptions)[9] to "ordinary citizens," "whose viewpoints on matters of public concern the government has no legitimate interest in repressing." Respondents could not logically have believed that Appellants, as "ordinary citizens," had *less* First Amendment protection than employees or "independent contractors." It is clearly

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[8] The District Court's Summary Judgment Order is contradictory here. On page 5, it said there was no contractual relationship; on page 8, it said there was. If there was in fact a "contract relationship," then *Umbehr* is directly on point.

[9] I.e., *Pickering* balancing, the "public concern" test under *Connick v. Meyers*, 461 U.S. 138 (1983) and the "official duties" restriction under *Garcetti v. Ceballos*, 547 U.S. 410 (2006).

established that "ordinary citizens" have *more, not less*, protection than persons in those categories. (*Kinney v. Weaver*, *supra*, 367 F.3d at 368 [characterizing as "inverted" the notion that employees and contractors are protected under *Pickering*, *Umbehr* and *O'Hare* while "ordinary citizens'" economic relationships are unprotected].)

Neither are precedents "fairly distinguishable" because they involve different types of parties. (*See Hyland II*, *supra*, 117 F.3d at 411 [rejecting the argument that the district court should have granted qualified immunity because no previous Ninth Circuit case involved a comparable plaintiff; the "Supreme Court and our case law do not require that degree of specificity"]; *see also Tarabochia v. Adkins*, *supra*, 766 F.3d at 1125 [no qualified immunity when fish and wildlife agents made a highway stop without individualized suspicion, notwithstanding that previous precedents involved police officers].) It is "what was done" that matters – whether a recognized constitutional violation occurred – not "who dunnit." In the specific context of First Amendment retaliation – outside the separate, distinct and limited scope of the Supreme Court's "school speech" cases– a school district has no more "special First Amendment status" than any other public entity. The same clearly established principle that officials may not deprive a vendor of valuable business patronage under a pre-existing commercial relationship applies to school districts as applies to any other public agency. It could not be seriously

argued that there was constitutional uncertainty as to whether a Mosquito Abatement District could cut off a longtime vendor's patronage over protected speech, simply because the prior precedent involved a Cotton Pest Abatement District.[10] "The dispositive question is 'whether the violative nature of particular *conduct* is clearly established." (*Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015) [quoting *al-Kidd*, *supra*, 563 U.S. at 742]; emphasis added.) The "particular conduct" here consisted of *the cutoff of established business patronage because of protected speech*. That such conduct is unlawful is clearly established, regardless of the name on the public building where the conduct happens to occur.

The District Court made a generalized reference to "schools hav[ing] special First Amendment status." [1 ER 15.] However, outside the specific scope of the Supreme Court's "school speech" jurisprudence, school officials do not have any greater license for constitutional error than other public officials. As set forth in Plaintiffs' motion for partial summary judgment, this is simply not a "school speech" case. The facts here do not fit under the four established "school speech" frameworks by any conceivable stretch. The First Amendment rights of District students (a class which obviously excludes the gray-haired Mr. Riley) are not

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[10] *See* Cal. Food & Agriculture Code sections 2000 et seq. and 6051 et seq., respectively.

involved. (*Cf. Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1960); *Bethel School District v. Fraser*, 478 U.S. 675 (1986).) The content of a school's curriculum, or speech in a school-sponsored expressive activity is not at issue. Respondents have never contended that the Comments, or the sentiments reflected in them, were ever expressed in Riley's Farm's living history field trip presentations, and the Comments could not have been reasonably perceived to bear the "imprimatur" of the District. (*Cf. Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988).) The Comments were not student speech promoting the use of illegal drugs. (*Cf. Morse v. Frederick*, 551 U.S. 393 (2007).) There is no legal authority anywhere for the proposition that school officials may take adverse action against a non-student's private speech, expressed outside the context of the schools' curriculum or a school-sponsored event, to "appease" or avoid a hostile reaction by parents or other "stakeholders" to that speech's content. To the contrary, it is "clearly established" that speech burdens based on a hostile community reaction are unconstitutional: "[A] speech burden based on audience reactions is simply government hostility and intervention in a different guise. The speech is targeted, after all, based on the government's disapproval of the speaker's message." (*Matal v. Tam*, 137 S. Ct. 1744, 1767 (2017).)

In any event, even if it were at all unclear whether ceasing patronage of a vendor because of a hostile public reaction to his speech violated the First

Amendment, Respondents would not be entitled to summary judgment, because there was a factual dispute as to whether avoiding a hostile reaction was the real reason for the District's decision, or a pretext. (*See Robinson v. York*, 566 F.3d 817, 826 (9th Cir. 2009); *Nunez v. Davis*, 169 F.3d 1222, 1229-1230 (9th Cir. 1999); *Ochoa v. Santa Clara Cty. Office of Educ*., 2017 U.S. Dist. LEXIS 86137 at *29-30 [when considering qualified immunity at the summary judgment stage, factual disputes must be resolved in non-moving party's favor, and factual dispute as to pretext prevents summary judgment].) On summary judgment, Appellants produced evidence from which a reasonable jury could find that District officials' own personal beliefs that the Comments were "extremely inappropriate and unacceptable" and "racist, sexist or homophobic" were the true moving force behind the District's issuance of guidance prohibiting Riley's Farm field trips. [3 ER 351, 376-377, 412-413, 564-567, 569, 574.]

Where defendants lack a "legitimate question" regarding whether or not their actions would violate a constitutional right, qualified immunity must be denied. (*Anderson*, *supra*, 483 U.S. at 658 [citing *Mitchell v. Forsyth*, 472 U.S. 511, 535, n.12 (1995)].) It is not enough for Respondents to throw up a generalized "schools are special" flag, with the implication that virtually any free-speech questions involving a school are inherently uncertain unless there is a precedent directly on point. Only if there is a *legitimate* question that one or more

specific "school speech" doctrines could logically apply to this case, "fairly distinguish[ing]" this case from the settled unconstitutional conditions precedents, would any legal uncertainty be raised as to whether Respondents could lawfully take adverse action against Riley's Farm over its "inflammatory" speech.

Similarly, a mere "whiff" of "government speech" – the mere undeveloped "potential" that the doctrine might be somehow involved (see the Summary Judgment Order, 1 ER 15) – is not enough to raise a "legitimate question" making the applicable First Amendment retaliation precedents "fairly distinguishable." There would have to be some reasonable uncertainty as to the *legal* issue of whether, in light of the factors[11] that differentiate "government speech" from a private citizen's speech, any reasonable official could have seriously believed that when Mr. Riley tweeted about, *inter alia*, Stormy Daniels' "bosoms," it was the Claremont Unified School District speaking. There is simply no serious way any reasonable, honest public official could possibly have thought so. (*See Rosenbaum*

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[11] I.e., whether the "central purpose" of the speaker's project is to promote the views of the private speaker vs. those of the government; whether the government exercised "editorial control" over the content of the speech; whether the government was the "literal speaker"; and whether "ultimate responsibility" for the speaker's project rested with the government; *see Arizona Life Coalition, Inc. v. Stanton*, 515 F.3d 956, 964-965 (9th Cir. 2008).

v. Washoe County, 663 F.3d 1071, 1075 (9th Cir. 2011) ["The linchpin of qualified immunity is the reasonableness of the official's conduct"].)

The doctrine of qualified immunity is coming under mounting criticism lately. Increasingly, it is seen as a key systemic enabler of serious, even deadly abuse by government agents. (*See, e.g.*, *Jamison v. McClendon*, 2020 U.S. Dist. LEXIS 139327 at *59 (S.D. Miss. 2020); *Zadeh v. Robinson*, 928 F.3d 457, 479-80 (5th Cir. 2019) (Willett, J., concurring in part and dissenting in part) ["To some observers, qualified immunity smacks of unqualified impunity, letting public officials duck consequences for bad behavior—no matter how palpably unreasonable—as long as they were the first to behave badly"].)

At the Supreme Court, Justice Thomas has expressed his "growing concern with our qualified immunity jurisprudence," which has "diverged from the historical inquiry mandated by the statute." (*Ziglar v. Abbasi*, 137 S. Ct. 1843, 1870, 1871 (2017) (Thomas, J., concurring).) Justice Sotomayor has lamented that her colleagues were making the "clearly established" analysis ever more "onerous." (*See Kisela v. Hughes*, 138 S. Ct. 1148, 1158 (2018) (Sotomayor, J., joined by Ginsburg, J., dissenting); *see also Mullenix v. Luna*, *supra*, 136 S. Ct. at 316 (Sotomayor, J., dissenting).) In Justice Sotomayor's view, an increasingly restrictive qualified immunity doctrine "tells officers that they can shoot first and

think later, and it tells the public that palpably unreasonable conduct will go unpunished." (*Id*. at 1162.)

This Court is bound by Supreme Court precedent, and it may well be true that those precedents grew more "onerous" over the last two decades. Indeed, this trend progressed to the point where "[e]ven in this hyperpartisan age, there is a growing, cross-ideological chorus of jurists and scholars urging recalibration." (*Zadeh v. Robinson*, *supra*, 928 F.3d at 480; *see also Jamison*, *supra*, 2020 U.S. Dist. LEXIS 139327 at *59 ["[T]here is increasing consensus that qualified immunity poses a major problem to our system of justice"].) However, as set forth above, even those increasingly criticized precedents do not demand the extreme level of similarity to previous cases' factual circumstances the District Court insisted upon.

As set forth above, since the Supreme Court's *Hope* and *Lanier* cases can be reconciled with later, more "restrictive" cases like *Brosseau*, *al-Kidd*, and *Reichle*, they should be. (*Montana Chamber of Commerce v. Argenbright*, *supra*, 226 F.3d at 1062.) "[E]ven if qualified immunity continues its forward march and avoids sweeping reconsideration, it certainly merits a refined procedural approach that more smartly—and fairly—serves its intended objectives." (*Zadeh v. Robinson*, *supra*, 928 F.3d at 481.)

Unduly restrictive interpretations of qualified immunity have already gone more than far enough. With the Supreme Court's just-issued decision in *Taylor v. Riojas*, *supra*, signaling that the doctrine's more "onerous" applications may have crested from their "high water mark" and begun a welcome retreat, this Court – which historically put up some of the most stalwart resistance to qualified immunity's erosion of Americans' access to justice – is under no obligation to join the District Court's apparent determination to "turn back the clock," resume qualified immunity's forward march," and push it out past its already overstretched frontiers. A time of dangerously strained civic bonds and fiery political passions is the worst possible moment to further hollow out the liberal principles which allow Americans, even when they disagree fiercely, to live peacefully together. This Court can, and should, say to those who would make qualified immunity even more an "unqualified impunity" for constitutional wrongs: "Hitherto shalt thou come, but no further."[12]

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[12] *Job* 38:11.

IV. THE DISTRICT COURT SHOULD HAVE GRANTED APPELLANTS PARTIAL SUMMARY JUDGMENT, BECAUSE THE FACTS SHOWING RESPONDENTS RETALIATED AGAINST APPELLANTS ON THE BASIS OF MR. RILEY'S PROTECTED SPEECH WERE UNDISPUTED

Since qualified immunity does not shield Respondents' misconduct, partial summary judgment should have been entered against Superintendent Elssaser and Nemer, as requested in Appellants' motion. The following facts were undisputed:

- Mr. Riley commented on his private social media about matters of public concern. [2 ER 27, 3 ER 508-509, 525-526, 531, 562.]
- Upon learning of these "extremely inappropriate and unacceptable tweets" from Nemer, Superintendent Elsasser issued "guidance" "requesting that no CUSD school attend Riley's Farm field trips." [2 ER 188-198, 3 ER 512-513, 526, 548-555, 583.]
- Superintendent Elsasser admitted that the reason for this "guidance" was to "appease" some unspecified number of parents and members of the community who were angered by Mr. Riley's comments. [2 ER 190,199, 3 ER 511, 513, 544.]
- As a matter of law, pecuniary harm such as was caused by the District's cutting off Riley's Farm's business is sufficiently adverse action to "chill a person of ordinary firmness" in his or her exercise of constitutional rights. (*See Velie v. Hill*, 2017 U.S. Dist. LEXIS at *9

(C.D. Cal. 2017); *Ariz. Students Ass'n. v. Ariz. Bd. of Regents*, 824 F.3d 868 (9th Cir. 2016) [citing *Bd. of Cty. Comm'rs v. Umbehr*, *supra*, 518 U.S. 668, 674 (1996)].) [2 ER 175.]

Appellants therefore established, by undisputed evidence, every element of a claim for First Amendment retaliation: (1) constitutionally protected activity; (2) adverse action because of it that would chill a person of ordinary firmness; and (3) a substantial causal relationship between the activity and the adverse action. (*See O'Brien v. Welty*, 818 F.3d 920, 932 (9th Cir. 2016); *Blair v. Bethel School Dist.*, 608 F.3d 540, 543 (9th Cir. 2010); *see also Matal v. Tam*, *supra*, 137 S. Ct. at 1767 ["appeasing" angry public not a legitimate justification for adverse action].) Partial summary judgment should have been entered against Superintendent Elsasser and Nemer, leaving only the contested questions of damages, appropriate injunctive relief, and the liability of the remaining Respondents for trial.

V. THE COURT ERRED IN RULING *SUA SPONTE* ON THE UNRAISED INJUNCTION ISSUE

As set forth above, in response to Appellants' motion for reconsideration, the District Court acknowledged that it should not have applied qualified immunity to Appellants' claim for injunctive relief. Rather than correct its error, however, the District Court proceeded to raise the new issue, which neither party had raised or briefed, of whether Appellants would be entitled to an injunction.

A court may only "grant [a] motion [for summary judgment] on grounds not raised by a party" "[a]fter giving notice and a reasonable time to respond." (FRCP 56(f)(2).) "*Sua sponte* grants of summary judgment are only appropriate if the losing party has 'reasonable notice that the sufficiency of his or her claim will be in issue." (*Greene v. Solano County Jail*, 513 F.3d 982, 990 (9th Cir. 2008) [quoting *Buckingham v. United States*, 998 F.2d 735, 742 (9th Cir. 1993)].) Before summary judgment may be entered *sua sponte* against a party, that party must have "had a full and fair opportunity to ventilate the issues involved in the matter." (*Gospel Missions of Am. v. City of Los Angeles*, 328 F.3d 548, 558 (9th Cir. 2003); *see also Verizon Del., Inc. v. Covad Communs. Co*., 377 F.3d 1081, 1092 (9th Cir. 2004); *Norse v. City of Santa Cruz*, 629 F.3d 966, 972 (9th Cir. 2010) [reasonable notice implies adequate time to develop the facts on which the litigant will depend to oppose summary judgment].)

Respondents' memoranda of points and authorities did not raise the question of whether Appellants could show they are "immediately in danger of sustaining some direct injury as the result of the challenged official conduct." (*See City of Los Angeles v. Lyons*, 461 U.S. 95, 105 (1983); Denial Order p. 4.) The District Court did that all on its own, without affording Appellants an opportunity to address the issue. Rather than correct its erroneous application of qualified immunity to an injunction claim, the District Court went back and cobbled together a completely

new rationalization, unraised by the parties, for summary judgment. It was bad enough for the District Court to throw away its neutral referee's whistle and start throwing blocks for the other team. Depriving Appellants of their right to respond to the District Court's improper advocacy exceeded the District Court's power under Rule 56 to grant summary judgment *sua sponte*.

VI. THE COURT IMPROPERLY VIEWED THE EVIDENCE ON RESPONDENTS' SUMMARY JUDGMENT IN THE LIGHT MOST FAVORABLE TO THE MOVING PARTIES

In determining whether a case presents any questions of material fact under the applicable substantive law, the trial court must view the evidence in the light most favorable to the nonmoving party. (*Citizens for Better Forestry v. United States Dep't of Agric*., 341 F.3d 961, 969 (9th Cir 2003); *see also Tolan v. Cotton,* 572 U.S. 650, 656-657 (2014) [in the qualified immunity context, as is true generally, courts may not resolve genuine disputes of fact in favor of the party seeking summary judgment].) This requires the trial court to believe the evidence of the opposing party, and to draw all reasonable inferences that may be drawn from the facts before the court in favor of the opposing party. (*Anderson v. Liberty Lobby, Inc*. 477 U.S. 242, 255 (1986).)

The District Court did the exact opposite. It indulged every possible inference, and then some impossible ones, in favor of Respondents. It did so in order to reach a counterintuitive conclusion that notwithstanding Superintendent

Elsasser's admitted issuance of written guidance "asking that no CUSD school attend Riley's Farm field trips" [UMF No. 57] "there is no blacklist." [Deny Order, p. 5.]

For instance, during Superintendent Elsasser's deposition, the following exchange took place:

Q: Okay. As far as you're concerned, this guidance requesting that no CUSD school attend Riley's Farm field trips, it's still in place, correct?

MS. FOZI: [Respondents' counsel]: What did he say?

THE WITNESS: The guidance is still in place. We've never revisited it.

[2 ER 513, 554-545.]

Appellants contended that Superintendent Elsasser's answer "The guidance is still in place" was (as it appears on its face) a substantive admission that the guidance was still in place. Indeed, in any event, the logical inference from the following sentence – "We've never revisited it" – is that the guidance, once issued, was never revoked. (Revocation of the guidance would require revisiting it.)

Respondents' counsel, on the other hand, contended that Superintendent Elsasser was simply repeating the question for his counsel's benefit. [2 ER 205.] No evidence (such as a clarifying declaration from Superintendent Elsasser) was offered in support of this contention, only the argument of counsel. [*Ibid*.]

The District Court uncritically accepted Respondents' counsel's "spin" on Superintendent Elsasser's statement. But a "'judge's function' at summary judgment is not 'to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.'" (*Anderson v. Liberty Lobby, Inc.*, *supra*, 477 U.S. at 249.) Not only was it grossly improper for the District Court to weigh the evidence and conclude what Superintendent "must have meant" in the light most favorable to the moving party, its pronouncement that "there is no blacklist" is patently illogical. If a marker is put down, and never picked up, it stays down. If guidance against Riley's Farm field trips is issued, and never withdrawn, it remains in place.

Neither does the Covid-19 epidemic warrant a "no harm, no foul" call by the District Court. Although field trips have been suspended for the duration of the epidemic, there is no evidence that the suspension is permanent. To the contrary, Superintendent Elsasser testified that he hoped to resume field trips in the future. [2 ER 297.] Whenever that occurs, absent effective injunctive relief, Riley's Farm will remain subject to the "never revisited" guidance against District schools attending field trips there.

The District Court's snipe about "blind to the irony" First Amendment plaintiffs seeking an apology as one of four components of their requested injunction does not warrant granting summary judgment as to the other injunctions

sought. Whether a compelled apology is within a court's power to grant injunctive relief is an interesting legal question (*see, e.g.*, Doug Rendleman, *The Defamation Injunction Meets the Prior Restraint Doctrine*, 56 San Diego L. Rev. 615, 666-667 (2019).) However, even if not, that would not warrant granting summary judgment as to Appellants' request for a simple injunction requiring the District to withdraw its guidance asking schools not to attend Riley's Farm field trips based on Mr. Riley's speech.

In summary, even though the issue of whether Respondents' constitutional violation, if proven, would warrant an injunctive remedy was not briefed by the parties on summary judgment, the record demonstrates sufficient facts upon which a trier of fact could find that, contrary to the District Court's improper weighing of the evidence, there is a District blacklist of Riley's Farm which (1) remains in place; and (2) presents a sufficient likelihood of ongoing or future harm to Appellants to warrant injunctive relief. (*See Campbell v. Facebook, Inc.*, 951 F.3d 1106, 1120 (9th Cir. 2020); *Villa v. Maricopa County*, 865 F.3d 1224, 1229 (9th Cir. 2017); *City of Los Angeles v. Lyons*, *supra*, 461 U.S. at 111.)

CONCLUSION

Appellants respectfully request that this Court reverse both the Judgment and the order denying Appellants' motion for partial summary judgment and

remand the matter to the District Court with directions to enter an order granting the latter and proceed to trial on the remaining issues.

Date: January 4, 2021

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STATEMENT OF RELATED CASES

None known.

Date: January 4, 2021

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FOR THE NINTH CIRCUIT

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