No. _____

IN THE

Supreme Court of the United States

RILEY'S AMERICAN HERITAGE FARMS; AND JAMES PATRICK RILEY,

PETITIONERS,

v.

JAMES ELSASSER; STEVEN LLANUSA; HILARY LACONTE; BETH BINGHAM; NANCY TRESER OSGOOD; DAVID S. NEMER; ANN O'CONNOR; BRENDA HAMLETT; AND CLAREMONT UNIFIED SCHOOL DISTRICT,

RESPONDENTS.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The First Amendment prohibits government from abridging the freedom of speech. Government may not retaliate against speech by its employees and contractors absent genuine and substantial concerns about disruption to government's legitimate operational interests. In this case, school district officials cancelled field trip patronage to Riley's Farm, a "living history" educational destination presenting lessons on America's founding and constitutional government, after they found a proprietor's views "offensive." Despite finding no evidence of substantive "disruption," and acknowledging evidence of retaliatory motive, the Ninth Circuit held that the officials were entitled to qualified immunity because it could not locate a previous case involving nearly identical facts. The questions presented are:

1. Whether the doctrine of qualified immunity, as now applied, is workable, logically coherent, useful, lawful, and consistent with due process; and if not, whether it should be reconsidered, modified, or replaced.

2. Whether, in order for a constitutional rule to be "clearly established" or "beyond debate" for purposes of qualified immunity, there must be previous case law with closely analogous facts, including closely comparable parties.

3. Whether summary judgment on qualified immunity is precluded when there exists a triable issue of material fact as to whether public officials' purported concerns of "disruption" allegedly caused by First Amendment protected speech were (1) pretextual and (2) substantial.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The Petitioners in this case are Riley's American Heritage Farms, a California corporation, and James Patrick Riley. Petitioners were the plaintiffs and appellants below.

The Respondents are James Elsasser, Steven Llanusa, Hilary Laconte, Beth Bingham, Nancy Treser Osgood, David S. Nemer, Ann O'Connor; Brenda Hamlett. Respondents were the defendants and respondents below.

Pursuant to this Court's Rule 29.6, undersigned counsel states that Riley's American Heritage Farms has no "parent company," and no publicly held company owns 10% or more of the corporation's stock.

STATEMENT OF RELATED PROCEEDINGS

This case is directly related to following proceedings:

- *Riley's American Heritage Farms et al. v. Elsasser et al.*, No. 20-55999 (9th Cir. 2022).
- *Riley's American Heritage Farms et al. v. Elsasser et al.*, D.C. No. 5:18-cv-02185-JGB-SHK (C.D. Cal.)

There are no other proceedings in state or federal trial or appellate courts, or in this Court, directly related to this case within the meaning of this Court's Rule 14.1(b)(iii).

TABLE OF CONTENTS

Page

TABLE OF APPENDICES

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Constitutional and Statutory Provisions

Other Authorities

PETITION FOR A WRIT OF CERTIORARI

Riley's American Heritage Farms ("Riley's Farm") and James Patrick Riley ("Mr. Riley"; collectively, "Petitioners") respectfully petition for a writ of certiorari to review the judgment of the Ninth Circuit Court of Appeals in this case.

INTRODUCTION

After Mr. Riley posted his views regarding current affairs on social media, officials of the Claremont Unified School District retaliated by cutting off their longstanding, valuable field trip business with Riley's Farm. As the Court of Appeal stated in its opinion below, there were no substantive concerns about disruption of the District's operations that could outweigh Petitioners' First Amendment rights, and Petitioners submitted substantial evidence showing that purported concerns of disruption were pretextual.

Nevertheless, the Ninth Circuit panel held that summary judgment was properly granted to Respondents based on qualified immunity. The panel's original rationale was that "there was no case directly on point that would have clearly established" the unlawfulness of Respondents' actions. After Petitioners petitioned for rehearing and/or hearing en banc, the Ninth Circuit changed its wording from the above to "…no case that placed the constitutional inquiry 'beyond debate.'" The substance of the order remained unchanged. Petitioners could only overcome qualified immunity, the Ninth Circuit declared, if previous case law had specifically held "that a school district could not cease patronizing a company providing historical reenactments and other

events for students because a company's principal shareholder had posted controversial tweets that led to parent complaints."

This holding -- which demands a "case directly on point" in all but the fig leaf of name -- conflicts with this Court's holdings in *al-Kidd*, *Kisela, United States v. Lanier*, 520 U.S. 259 (1997), and *Hope v. Pelzer*, 536 U.S. 730 (2002). Further, by holding that a triable issue of material fact as to pretext in a First Amendment retaliation case does not preclude summary judgment on qualified immunity, the Ninth Circuit joins what is now a 7-2 minority in a circuit split. In fact, the Ninth Circuit's embrace of the minority view so thoroughly rejects evidence of pretext that it conflicts with this Court's holding in *Crawford-El v. Britton*, 523 U.S. 574 (1998).

These errors, by themselves, require correction. However, the fact that such errors keep recurring, no matter how hard courts strive to untangle the "mare's nest" of qualified immunity, suggest intractable problems with the underlying doctrine itself. It is increasingly clear that qualified immunity has done harm to citizens' enjoyment of their constitutional rights, to respect for the law and public institutions, and to the good functioning of the judicial system which is disproportionate to the benefits the doctrine was judicially invented to deliver. This case provides an ideal vehicle to reconsider or modify qualified immunity, in a context that presents minimal risk of the policy concerns that led the majority in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982) ("*Harlow*") to venture beyond the doctrine's legitimate roots in statute and the common law.

OPINIONS BELOW

The opinion of the Ninth Circuit as amended on April 29, 2022 (Pet. App. A) is reported at 32 F.4th 707. The original opinion of the Ninth Circuit issued on March 17, 2022 (Pet. App. B) is reported at 29 F.4th 484. The district court's order issued July 17, 2020 granting summary judgment against Petitioners is reported at 2020 U.S. Dist. LEXIS 126518.

JURISDICTION

The Ninth Circuit entered issued its original opinion on March 17, 2022. On April 29, 2022, in response to Petitioners' timely petition for rehearing and rehearing en banc, the Ninth Circuit issued an amended opinion, and denied the petition for rehearing en banc. On May 9, 2022, the Ninth Circuit issued its mandate and stated that the judgment was effective as of that date. Pet. App. D. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The text of the relevant constitutional provision and statute (U.S. Const. amends. I, XIV; 42 U.S.C. § 1983) is set forth in the appendix to the petition. Pet. App. C.

STATEMENT OF THE CASE

A. Statutory Background

Following the Civil War, Congress proposed and the states ratified the Thirteenth and Fourteenth Amendments to the Constitution. The Fourteenth Amendment provided, "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor…deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws," It also empowered Congress to enforce these provisions by appropriate legislation.

In 1871, responding to a reign of terror by racist militants against recently freed slaves and their Republican supporters, and to the fact that sympathetic local authorities often turned a blind eye to the outrages, Congress enacted the Civil Rights Act of 1871, also known as the Ku Klux Klan Act. Section 1 of the Act, now codified as 42 U.S.C. § 1983 and as amended, currently provides, in relevant part, as follows:

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

Following the selective incorporation of federal constitutional rights against the states during the twentieth century, and after this Court ruled in *Monroe v. Pape*, 365 U.S. 167 (1961) that the existence of state remedies did not foreclose actions for violations of constitutional rights, Section 1983 has become a primary instrument for enforcing citizens' constitutional rights, including (as relevant here) those guaranteed by the Free Speech Clause of the First Amendment.

B. Factual Background

Riley's Farm operates an agritourism business – a "living history farm" – in the rural mountain community of Oak Glen, California. Riley's Farm has been hosting school field trips since 2001. These field trip programs focused on the American Revolution, the Civil War, American colonial farm life, the California Gold Rush, and the pioneer homesteading history of the region. These field trips have been popular in the Southern California community for years, and comprised the largest single category of Riley's Farm's business. Riley's Farm and its predecessor in interest had hosted field trips for schools of the Claremont Unified School District since 2001.

Petitioner James Patrick Riley is the owner of a substantial share of the stock of Riley's Farm. Mr. Riley maintained his own personal social media accounts, including a Facebook account and Twitter account. These accounts are distinct from Riley's Farm's own, separate social media accounts. Mr. Riley used those accounts to keep in touch with a wide circle of family and friends. He also commented on

those accounts on matters of public concern, including matters of politics, religion, and social relations.

Certain of Mr. Riley's "tweets" on the Twitter social media platform offended District officials, exemplified by the following:

"What is this country coming to if a girl [i.e. Ms. Stormy Daniels] *can't even use her bosoms to smack customers and then sue the president for unwanted sexual advances?"*

"*So I'm planning a high school reunion and I just realized we may have been the last generation born with only two genders*."

These comments and others (the "Comments") were made on one of Mr. Riley's personal social media accounts. None of them appeared on any of Riley's Farm's social media accounts or web site, or referenced the District, Riley's Farm, or school field trips.

On September 2, 2018, 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." 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."

On September 4, 2018, Superintendent Elsasser convened a meeting of District school administrators. At this meeting, Superintendent Elsasser informed

the administrators that 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. Some of the principals stated that they had, but Superintendent Elsasser did not determine how many complaints there had actually been. Superintendent Elsasser requested that the principals inquire of their teachers to see if they still wanted to go to Riley's Farm; if not, District schools "could go to a different farm."

Superintendent Elsasser stated in a deposition that his purpose in "looking for other farms" was to "appease our parents." Unless there were teachers who "really want[ed] to go to Riley's Farm," Superintendent Elsasser's intention, as he admitted, was to "find another alternative."

On September 4, 2018, Nemer sent Superintendent Elsasser another e-mail, stating "I think many of our stakeholders would be uncomfortable with these tweets." Nemer invited Superintendent Elsasser to "view the gory details of the tweets."

Superintendent Elsasser then conferred with District principals for the purpose of developing "guidance" with regard to the continuation of field trip business with Riley's Farm. Concluding that "no one feels strongly about going to Riley's," Superintendent Elsasser decided to "switch farms" and instruct the principals "pick one of the other farms." Accordingly, Superintendent Elsasser caused an e-mail (the "Guidance Directive") to the District's principals, which read as follows:

"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."

Both of the field trips by District schools that had already been booked for the 2018-2019 season were cancelled. 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." Riley's Farm has received no District patronage or bookings since the Guidance Directive was issued. The guidance requesting that no CUSD school attend Riley's Farm field trips has never been revisited, and, consequently, is still in place.

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. The letter set forth the legal authorities that demonstrate the unlawfulness of this action, and demanded remedial action.

The District, through its legal counsel, responded by letter on October 2, 2018 (the "October 2 Letter"). The October 2 Letter referenced, quoting verbatim, each of the Comments. 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." That denial was belied by the Guidance Directive, which specifically stated "we are asking that no CUSD school attend Riley's Farm field trips."

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." The letter also asserted that it had "no obligation to expose children to an individual who engages in these crude and tasteless comments." The letter stated that the Comments were "simply offensive to the point where school administrators decided against associating with his organization," and refused to take any remedial action.

C. Proceedings Below

Petitioners filed an action for violation of their civil rights under 42 U.S.C. § 1983, alleging that the District, individual members of the school board, and three school administrators violated Petitioners' First Amendment rights by prohibiting teachers at District schools from patronizing Riley's Farm for school field trips, in retaliation for Mr. Riley's protected private speech. The complaint sought both damages and injunctive relief against the defendants.

Defendants moved to dismiss. The District Court denied the motion as to the individual defendants, but granted it as to the District itself based on the Eleventh Amendment and Ninth Circuit authority

holding that California school districts are "arms of the state" entitled to sovereign immunity.

Petitioners and Respondents filed cross-motions for summary judgment -- the former solely with regard to Petitioners' damages claims against defendants Elsasser and Nemer, and Respondents on all claims. The District Court denied Petitioners' motion for summary judgment, and granted Respondents' motion, based on qualified immunity, as to both damages and injunctive relief.

Petitioners moved for reconsideration, pointing out that qualified immunity does not apply to injunctive relief claims. (See *Pearson v. Callahan*, 555 U.S. 223, 242 (2009). The District Court acknowledged its error, but declared it harmless because (as it found *sua sponte,* without allowing briefing or argument) there was purportedly no evidence that Respondents had a policy prohibiting future field trips to Riley's Farm.

Petitioners appealed the District Court's order. On March 17, 2022, a three-judge panel of the Court of Appeal for the Ninth Circuit (the "Court of Appeal" or "the panel") issued an opinion (the "Original Opinion") reversing the District Court's application of qualified immunity with respect to Petitioners' claim for injunctive relief, but affirming with respect to damages. Pet. App. B at 85-86. The panel held that Petitioners had made a prima facie case of First Amendment retaliation against Respondents, and of retaliatory intent, including "the School defendants' intent to punish the Riley plaintiffs because of Riley's protected conduct." Pet. App. B 66, 68. Applying the balancing test articulated in *Pickering v. Bd. of Ed. of Twp. High Sch. Dist.* 205, 391 U.S. 563 (1968), the

panel also held that "the School defendants have failed to establish that the School District's asserted interests in preventing disruption to their operations and curricular design because of parental complaints were so substantial that they outweighed Riley's free speech interests as a matter of law." The panel noted that the defendants had only "provided the substance of two complaints from parents, only one of which involved a student currently enrolled in the School District," a situation "far afield from cases where the government gave weight to hundreds of parent and student complaints." Pet. App. B at 73 [comparing *Meltzer v. Bd of Educ. of City Sch. Dist. of City of New York*, 336 F.3d 185, 197 (2d Cir. 2003)]. The panel also noted that the defendants "have failed to provide evidence of likely future disruption that would entitle them to summary judgment as a matter of law." Pet. App. B at 73. Finally, the panel stated that there was "no genuine issue of disputed fact that the School defendants would not have cancelled the relationship with the Riley plaintiffs absent Riley's speech." Pet. App. B at 76.

Nevertheless, the panel found that Respondents were entitled to qualified immunity, because "there was no case directly on point that would have clearly established that the School District's reaction to parental complaints and media attention arising from Riley's tweets was unconstitutional." Pet. App. B at 80. Accordingly, it affirmed the grant of summary judgment as to damages.

On March 31, 2022, Petitioners timely filed a petition for panel rehearing or hearing en banc. This petition argued, among other things, that the Original Opinion's demand for a "case directly on point"

conflicts with this Court's holdings in *Ashcroft v. al-Kidd*, 563 U.S. 731 (2011) ("*al-Kidd*") and *Kisela v. Hughes*, 138 S. Ct. 1148 (2018) ("*Kisela*") [both explicitly stating that a "case directly on point" is not required for a right to be "clearly established" for purposes of qualified immunity]. The petition also identified extensive case authority, from the First, Second, Third, Sixth, Ninth, and D.C. Circuits holding that summary judgment based on qualified immunity is improper when there is a genuine issue of disputed material fact as to whether a defendant's claimed desire to avoid "disruption," under the *Pickering* analysis, was a pretext for mere retaliatory animus.

In response, on April 29, 2022, the Court of Appeal issued an "Amended Opinion." It was mostly identical to the Original Opinion, with two main modifications. First, the Original Order's sentence that read "We conclude there was no case directly on point that would have clearly established…" (Pet. App. B at 80) was modified to read, "We conclude that there was no case that placed the constitutional inquiry 'beyond debate'…." Pet. App. A at 37. Second, the Amended Order held that although "it is clearly established that a government employer's pretextual fear of potential disruption…cannot outweigh the First Amendment interests of a government employee or contractor, here the record contains undisputed facts that Riley's tweets gave rise to actual parent and community complaints and media attention." Pet. App. A at 37.

REASONS FOR GRANTING THE PETITION

I. MOST CIRCUITS HOLD THAT WHERE THERE IS EVIDENCE OF PRETEXT, SUMMARY JUDGMENT ON QUALIFIED IMMUNITY MAY NOT BE GRANTED; THE NINTH CIRCUIT WIDENS A CIRCUIT SPLIT.

The Amended Opinion held that the existence of *any* "complaints" or "media attention" entitles officials to qualified immunity. Under this rigid rule, even overwhelming evidence that the purported "disruption" was insubstantial or outright pretextual would not create a triable issue of material fact precluding summary judgment based on qualified immunity. This rogue ruling is inconsistent with the holdings of at least seven other Circuits, with the Ninth Circuit's own previous precedents, and with this Court's own holding in *Crawford-El*. Indeed, after the Amended Opinion, the Ninth Circuit now applies a more extreme position than the one Court of Appeal (the Eleventh) that had previously taken the minority view. This Court should resolve this resulting broadened circuit split by confirming that the majority view is the correct application of qualified immunity doctrine as it currently stands.

The majority view, at least in cases where an official's motive is an element of the underlying claim, is that when there is a factual dispute over whether the actual motive for public employee discipline is retaliation, and claimed concerns of "disruption" are merely pretextual, summary judgment of qualified immunity may not be granted.

For example, in *Reuland v. Hynes*, 460 F.3d 409 (2d Cir. 2006) ("*Reuland*"), the Second Circuit held that "where, as here, 'specific intent is actually an element of the plaintiff's claim as defined by clearly established law, *it can never be objectively reasonable for a government official to act with an intent that is prohibited by law*.'" (*Reuland*, 460 F.3d at 419 (cleaned up; emphasis added).) "[E]ven if the disruption outweighed the employee's speech interest,

'the employee may still carry the day if he can show that the employer's motivation for the discipline was retaliation for the speech itself, rather than for any resulting disruption." (*Id*. at 420.) A jury must decide whether a defendant is (1) motivated in fact by a desire to avoid disruption, rather than retaliation, and (2) whether the concern about disruption was reasonable. (*Id*. at 419.)

"[E]ven if the potential disruption to the [government workplace] outweighs the value of the speech, the employer may fire the employee only because of the potential disruption, and not because of the speech. That is to say, it matters not that the potential disruption outweighs the value of the speech if the employer subjectively makes the speech the basis of his termination: such 'retaliatory' discharge is always unconstitutional." (*Sheppard v. Beerman*, 94 F.3d 823, 827 (2nd Cir. 1996) ("*Sheppard*"). "Upon a motion for summary judgment asserting a qualified immunity defense in an action in which an official's conduct is objectively reasonable but an unconstitutional subjective intent is alleged, the plaintiff must proffer particularized evidence of direct or circumstantial facts…supporting the claim of an improper motive to avoid summary judgment." (*Id*. at 828.) "This standard allows an allegedly offending official sufficient protection against baseless and unsubstantiated claims, but stops short of insulating an official whose objectively reasonable acts are besmirched by a prohibited unconstitutional motive. (*Id*.)

In *Locurto v. Safir*, 264 F.3d 154 (2d. Cir. 2001), the Second Circuit rejected a proposed approach that would (like the Amended Opinion's approach)

"effectively 'immunize all defendants in cases involving motive-based constitutional torts, so long as they could point to objective evidence showing that a reasonable official could have acted on legitimate grounds….[T]his is precisely the approach rejected by the Supreme Court in *Crawford-El* when it declined to adopt a heightened evidentiary standard for intent-based constitutional torts. See 523 U.S. at 593-94 (rejecting 'Justice Scalia's unprecedented proposal to immunize all officials whose conduct is 'objectively valid,' regardless of improper intent)." (*Id*. at 169.)

In *Acevedo-Garcia v. Vera-Monroig*, 204 F.3d 1 (1st Cir. 2000), the First Circuit Court of Appeals held that evidence creating a triable issue of fact as to whether officials' conduct, even though it may have been "objectively reasonable" and legal, was actually driven by an "impermissible motivation." (*Id*. at 11; see also *Roure v. Hernandez Colon*, 824 F.2d 139, 141 (1st Cir. 1987) [factual dispute over whether the "real reason" for rescinding appointments was retaliation against First Amendment activities precluded summary judgment; such a case "raises a classic mixed motive under *Mt. Healthy City School District Board of Education v. Doyle*"].)

In *Kenyatta v. Moore*, 744 F.2d 1179 (5th Cir. 1984), the Fifth Circuit held that "the [*Harlow*] Court did not . . . purge substantive constitutional doctrine of all subjective issues, it did not entirely eliminate subjective inquiry from every qualified immunity analysis: some right…might be violated by actions undertaken for an impermissible purpose but not by the same actions undertaken for permissible purposes.") (*Id*. at 1185; see also *Kinney v. Weaver*, 367 F.3d 337, 373 (5th Cir. 2004) [existence of a

retaliatory motive was a factual issue that precluded summary judgment on qualified immunity in a First Amendment case].)

In *Poe v. Haydon*, 858 F.2d 418 (6th Cir. 1988), the Sixth Circuit held, "[W]e agree with those circuits that have recognized that a government official's motive or intent in carrying out challenged conduct must be considered in the qualified immunity analysis, where unlawful motive or intent is a critical element of the substantive claim." (*Id*. at 431.) "The objective legal reasonableness of the public employer's conduct will turn, necessarily, on whether that conduct was motivated by [unconstitutional] animus or by a legitimate concern for workplace efficiency." (*Id*.) In such a case, a plaintiff may defeat summary judgment by presenting direct evidence that the officials' actions were improperly motivated. (*Id*; see *Crutcher v. Kentucky*, 883 F.2d 502, 504 (6th Cir. 1989) [inferential and circumstantial proof also defeats summary judgment based on qualified immunity].)

In *Elliott v. Thomas*, 937 F.2d 338 (7th Cir. 1991) ("*Elliott*"), the Seventh Circuit held, "When intent is one of the substantive elements of a constitutional wrong, the plaintiff is entitled to an adequate opportunity to establish that the defendant acted with the proscribed intent." (*Id*. at 344.) The defendant can establish this by producing "specific, nonconclusory factual allegations which establish [the necessary mental state]." (*Id*. at 344-345; see also *O'Connor v. Chicago Transit Auth.*, 985 F.2d 1362, 1368 (7th Cir. 1362, 1368) [disputed factual issue as to why plaintiff was dismissed precluded summary judgment of First Amendment claims based on qualified immunity].)

In *Robinson v. York*, 566 F.3d 817 (9th Cir. 2009), the Ninth Circuit held that it was "clearly established" that the "disruption" may not "outweigh the expressive interests of the employee" if it is a "pretext." (*Id*. at 826; see also *Nunez v. Davis*, 169 F.3d 1222 (9th Cir. 1999); *Coszalter v. City of Salem*, 320 F.3d 968, 978-979 (9th Cir. 2002) [summary judgment on qualified immunity should be denied when a dispute of fact exists as to whether defendants' motive was pretextual].)

In *Pueblo Neighborhood Health Centers, Inc. v. Losavio*, 847 F.2d 642 (10th Cir. 1988) ("*Losavio*"), the Tenth Circuit held that "*Harlow* does not preclude an inquiry into subjective factors when the applicable substantive law makes the official's state of mind an essential element of plaintiff's claim." Such cases include First Amendment claims. (*Id*. at 648.) To survive summary judgment based on qualified immunity, "plaintiffs cannot rely on conclusory allegations; they must produce some specific factual support for their claim of unconstitutional motive." (*Id*. at 649.)

In *Kimberlan v. Quinlan*, 199 F.3d 496 (D.C. Cir. 1999), the Court of Appeals for the District of Columbia ruled that "even if appellants provide an objectively valid reason for their actions in this case, the [court] must still inquire into whether there is a disputed issue of fact as to whether appellants were actually motivated by an illegitimate purpose. The opinion for the Court in *Crawford-El* specifically rejected the dissent's proposal to "immunize all officials whose conduct is 'objectively valid,' regardless of improper intent." Id. at 593-94.) (*Id*. at 502-503; see also *Martin v. D.C. Metro. Police Dep't*, 259 U.S. App.

D.C. 31, 812 F.2d 1425 (D.C.Cir. 1987) [when the defendant's intent is an essential element of plaintiff's constitutional claim, the plaintiff must be afforded an opportunity to overcome an asserted immunity with an offer of proof of the defendant's alleged unconstitutional purpose].)

Before the Ninth Circuit panel adopted the minority view, only the Eleventh Circuit diverged from the majority interpretation illustrated above. In *Foy v. Holston*, 94 F.3d 1528 (11th Cir. 1996), the Eleventh Circuit took an absolutist interpretation of *Harlow*, declaring that "when an adequate lawful motive is present, that a discriminatory motive might also exist does not sweep qualified immunity from the field even at the summary judgment stage. Unless it, as a legal matter, is plain under the specific facts and circumstances that the defendant's conduct -- despite him having adequate lawful reasons to support the act -- was the result of his unlawful motive, the defendant is entitled to immunity." (*Id*. at 1534-1535.) Further, where the facts on summary judgment "show mixed motives (lawful and unlawful motivations) and pre-existing law does not dictate that the merits of the case must be decided in plaintiff's favor, the defendant is entitled to immunity." (*Id*. at 1535.) Even if the defendants were motivated "in substantial part" by unlawful motives, as long as the defendants' conduct was "objectively reasonable," they were entitled to summary judgment on qualified immunity. (*Id*. at 1536; see also *Stanley v. City of Dalton, Ga.*, 219 F.3d 1280 (11th Cir. 2000) [defendant entitled to qualified immunity under *Foy* when the record indisputably establishes that the defendant was in fact motivated, at least in part, by lawful considerations; emphasis in

original]; *Bogle v. McClure*, 332 F.3d 1347, 1355-1356 (11th Cir. 2003).)

The Eleventh Circuit's approach in *Foy* (and now, with the issuance of the Amended Opinion, the Ninth Circuit's) are difficult to reconcile with this Court's holding in *Crawford-El v. Britton*, 523 U.S. 574 (1998) ("*Crawford-El*"). In that case, the Court recognized that "a charge that the defendant's conduct was improperly motivated" was "an essential element of some constitutional claims." (*Id.* at 588-589.) Such claims include claims of retaliation for the exercise of free speech. (*Id.* at 585). In those cases, the Court declined to apply *Harlow* to either bar evidence of motive or require an elevated standard of proof as to motive. (*Id.* at 592, 594.) Critically, the Court expressly rejected Justice Scalia's "unprecedented proposal [in his dissent] to immunize all officials whose conduct is 'objectively valid,' regardless of improper intent." (*Id.* at 594.)

The pure "objectively valid" standard Justice Scalia proposed, and the *Crawford-El* majority rejected, echoes and is substantially indistinguishable from the Eleventh Circuit's "objectively reasonable" *Foy* rule, where not even evidence of "substantial" improper motive would preclude summary judgment. The Amended Opinion applies a similar rule to the Eleventh Circuit's, and is if anything even more rigid. Whereas *Foy* left open the possibility that, even if "adequate lawful reasons" were present, a plaintiff might still prevail if it was "plain" as a matter of law that an act was "the result of his unlawful motive" (see *Foy*, supra, at 1534-1535) , the Ninth Circuit's new rule means that defendants will be entitled to summary judgment whenever there are literally *any*

"actual parent and community complaints and media attention" -- irrespective of how trivial, minimal or selectively weighted they might be. It is exactly what Justice Scalia proposed in his *Crawford-El* dissent, and which the majority explicitly rejected.

A rigid, absolutist "objectively valid" rule -- looking *only* at whether officials *could* have had a valid reason to act and ignoring why they *actually* acted -- is a virtually unbounded "license to cheat." Under the logic of such a rule, Petitioners could have submitted live video recordings of Respondents cackling theatrically as they plotted to use a trifling number of "complaints" as pretext for retaliating against Mr. Riley's "inappropriate," "unacceptable," and "obnoxious" speech. Yet as long as any "objectively valid" reason existed upon which the officials could conceivably take adverse action, courts would have to ignore that clear evidence of pretext and unconstitutional motive, and grant summary judgment anyway.

That would be absurd and unjust. "[I]t can never be objectively reasonable for a government official to act with an intent that is prohibited by law.'" (*Reuland*, 460 F.3d at 419.) If "no cheating" is not clearly understood to be so elementary a part of a public servant's basic obligation to the public trust that it goes without saying, we should not be shocked to see respect for the law and our institutions wane.

Here, Petitioners went well beyond "bare allegations of malice," which *Harlow* stated "should not suffice to subject government officials either to the costs of trial or to the burdens of broad-reaching discovery." (*Harlow*, 457 U.S. at 817-818.) As the panel acknowledged, Petitioners provided "specific

factual support" (*Losavio*, 847 F.2d at 649); "specific, nonconclusory factual allegations" (*Elliott*, 937 F.2d at 344-345); and "particularized evidence of direct or circumstantial facts…supporting the claim of an improper motive." (*Sheppard*, 94 F.3d at 828). They submitted substantial evidence that the real reason for Respondents' actions was exactly what their lawyers' letter said it was: Mr. Riley's comments were "simply offensive to the point where school administrators decided against associating with his organization."

Under these circumstances, according to a majority of Courts of Appeal, a jury must decide whether Respondents were motivated *in fact* by a desire to avoid disruption, rather than retaliation, and whether the purported concern about disruption from the *de minimis* "complaints" was reasonable. (See *Reuland*, 460 F.3d at 419.) Summary judgment is improper. The Ninth Circuit has widened an existing circuit split, from 8-1 to 7-2, by adopting an extreme rule that is at odds with this Court's own precedent. This should be corrected.

II. THE NINTH CIRCUIT UNDULY FIXATED ON THE SUPPOSED NEED FOR A "CASE DIRECTLY ON POINT"

By casually swapping out the phrase "*no case directly on point*" and putting in its place the phrase "*no case that placed the constitutional inquiry 'beyond debate*'" -- without altering the substantive holding -- the Ninth Circuit gave the game away: As far as it is concerned, those phrases are basically interchangeable. This Court's repeated admonitions that "clearly established law" does "not require a case directly on point" (*al-Kidd*, 563 U.S. at 741; *District of*

Columbia v. Wesby, 138 S. Ct. 577, 590 (2018), are treated as mere window dressing. Without "fundamentally similar" facts in previous case law, the Ninth Circuit holds, public officials can effectively never have "fair warning" that their conduct violates the Constitution.

Demanding an "extreme level of factual specificity" in this case, (cf. *United States v. Lanier*, 520 U.S. 259, 267 (1997) ("*Lanier*"), the Ninth Circuit sliced the salami almost comically thin. It held that the constitutional principle at issue could only be clearly established by a case holding "that a school district could not cease patronizing a company providing historical reenactments and other events for students because a company's principal shareholder had posted controversial tweets that led to parent complaints." Pet. App. B at 79; Pet. App. A at 36.

This demand fixates improperly on the external factual incidents, not on a properly particularized analysis of the applicable legal and constitutional rules. It is hard to distinguish what the Ninth Circuit is demanding from a case in which "the very action in question [was] previously…held unlawful." (See *Anderson v. Creighton*, 483 U.S. 635, 640 (1987) ("*Anderson*".) What, exactly, is essential to the clarity of the First Amendment principles at stake here that the defendants were associated with a school district and not a mosquito abatement district? Or that Petitioners' company "provid[ed] historical reenactments," as opposed to nature tours or other kinds of field trips? Or that controversial comments were expressed as "tweets" as opposed to Facebook

posts, letters to a newspaper editor, or in a broadcast interview?

Indeed, a court might demand even further specificity, taking into account the political sentiments of the surrounding community, whether the comments were made by a gray-haired Stanford graduate or someone else, or a minority shareholder rather than its "principal" one, or the precise nature of and temperature of the "complaints." Once the external incidents of a particular case's facts come into play, there is literally no end to their potential diversity. If the outward incidents are dispositive, there will always be differences a court can fixate upon, depending on the whim of the judge who makes the call. That guarantees that unacceptably often, the qualified immunity decision will be made arbitrarily, indiscriminately, and capriciously.

This Court has held that "officials can still be on notice that their conduct violates established law even in novel factual circumstances," and that the outward attributes of a case do not have to be "fundamentally similar" or "materially similar" to those in previous precedents. (*Hope v. Pelzer*, 536 U.S. 730, 739, 741 (2002) ("*Hope*").) Although the right in question must be "clearly established" in a "particularized" sense (*Anderson*, 483 U.S. at, 640), even "notable factual distinctions" can be present. (*Lanier*, 520 U.S. 259 at 270.) What matters is that the "*statutory or constitutional question* [is] beyond debate." (*al-Kidd*, 563 U.S. at 741; emphasis added.)

Although the qualified immunity 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)), a "rigid

overreliance on factual similarity" is improper. (*Hope*, 536 U.S. at 742.) Qualified immunity does not 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); see also *Hyland v. Wonder,* 117 F.3d 405, 411-12 (9th Cir. 1997) [rejecting the argument that the district court should have granted qualified immunity because no previous case involved a comparable plaintiff; the "Supreme Court and our case law do not require that degree of specificity").] 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.

This Court's recent decision in *Taylor v. Riojas*, 141 S. Ct. 52 (2020) was a reminder that *Lanier* and *Hope* (which *Taylor* cited) are still good law, and that there does not have to be case authority "directly on point" for a civil rights plaintiff to prevail. Prior precedent need not specify the precise number of hours a man can be confined ankle-deep in human waste before it becomes a constitutional problem. (See *Taylor v. Riojas*, 141 S. Ct. at 53.)

There is a world of daylight between the "the broad general proposition" (*Brosseau*, 534 U.S. at 201) that the First Amendment prohibits official retaliation against protected speech, and the much more particularized "doctrinal tests and standards" (see *Brewster v. Bd. of Educ.*, 149 F.3d 971 (9th Cir. 1998) applicable to First Amendment retaliation claims under which, in this case, reasonable officials

should easily have known that retaliatory action against Petitioners was unlawful.

At the time Respondents took their actions, it was clearly established that when a person has a pre-existing commercial relationship with a public agency, business patronage pursuant to that relationship may not be withdrawn based upon that person's First Amendment protected speech. (See *Perry v. Sindermann*, 408 U.S. 593 (1972); *Bd. of Cnty. Comm'rs, Waubansee County, Kan. v. Umbehr*, 518 U.S. 668, 674 (1996); *O'Hare Truck Serv., Inc. v. City of Northlake*, 518 U.S. 712, 714-15, 721 (1996). It was clearly established that a public agency's interest in promoting the efficiency of its services must be balanced with citizens' interest public comment, and that a stronger showing of disruption is necessary the more substantially a public employee or contractor's speech involved matters of public concern. (*Pickering*, 391 U.S. at 568; *Connick v. Myers*, 461 U.S. 138, 152 (1983).

It was also clearly established that to justify abridging the freedom of speech, the "disruption" purported to be feared must be substantial. (*Rankin v. McPherson*, 483 U.S. 378, 391 (1987) ("*Rankin*"); *Waters v. Churchill*, 511 U.S. 661, 674 (2011); *Clairmont v. Sound Mental Health*, 632 F.3d 1091, 1110 (9th Cir. 2011); *Gilbrook v. City of Westminster*, 177 F.3d 839, 866-867 (9th Cir. 1999) [a "nominal showing of potential disruption is plainly inadequate to outweigh" employees' interest in commenting on a matter "at the core of speech on matters of public concern]. The "disruption" must also be the actual, non-pretextual reason for an adverse action directed in response to speech. (*Rankin*, 483 U.S. at 384;

Waters, 511 U.S. at 677, 682; *Robinson*, 566 F.3d at 824-825; see generally the cases cited in Section I, above).

As the Amended Order acknowledged, receiving requests from one or at most a small handful of parents of students (out of a District student body numbering in the thousands) to be excused from a single field trip does not rise to the requisite level of a "material and substantial" disruption that can warrant sacrificing freedom of speech. Pet. App. A at 75 ["The record as currently developed, viewed in the light most favorable to the Riley plaintiffs…does not justify the School defendants' adverse action"]; see also 69 ["Nor has the school demonstrated any actual disruption to its operations arising from Riley's speech"] and 70 ["Likewise, the School defendants have failed to provide evidence of likely future disruption that would entitle them to summary judgment as a matter of law."]

Respondents had fair warning under extensive case law that only genuine, material and substantial disruption, or reasonable predictions of such, could justify retaliation against protected speech. Based on the record available at summary judgment, they had neither justification. There was no evidence of substantial disruption or likely future disruption. In those particularized circumstances, a reasonably competent official should have known that retaliating against Petitioners' speech violated the First Amendment. (See *Harlow*, 457 U.S. at 818-819.) The Ninth Circuit's "rigid gloss on the qualified immunity standard…is not consistent with [this Court's] cases." (See *Hope*, 536 U.S. at 739.)

III. QUALIFIED IMMUNITY CREATES CONFUSION, ALLOWS INJUSTICE, FAILS TO ACCOMPLISH ITS STATED PURPOSES, AND SHOULD BE REVISITED.

The Ninth Circuit's increasingly myopic hunts for precedents directly on point in all but name is exactly the standard this Court warned would "lead trial judges to demand a degree of certainty at once unnecessarily high and likely to beget much wrangling." (*Lanier*, 520 U.S. at 270.) It is, and it has.

Why has the Ninth Circuit joined the Eleventh in demanding such a "rigid overreliance on factual similarity"? It may be that the Ninth Circuit has overreacted to this Court's previous chiding of "courts -- and the Ninth Circuit in particular -- not to define clearly established law at a high level of generality." (*al-Kidd*, 563 U.S. at 742; cleaned up.) There may be a parallel with the eager-to-redeem-himself, trigger-happy deputy in *Mullenix v. Luna*, 577 U.S. 7, 25 (2015) ("How's that for proactive?" he said to a previously critical supervisor after unloading his rifle into a suspect's windshield.) Rebuked for defining rights " "at [too] high [a] level of generality" (*al-Kidd,* 563 U.S. at 742), it overcompensated in the opposite direction, and now demands "[too] extreme [a] level of factual specificity." (*Lanier*, 520 U.S at 267.) For all practical purposes, it requires a case "directly on point," right down to the particular type of school field trip. Pet. App. A at 79. It steered so wide of Scylla it has now run hard against Charybdis.[1]

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

The Panel's insistence that Appellants identify a previous case with so close a factual resemblance to this one—a virtual identical twin—presents Appellants with an insuperable burden. It cannot be gainsaid that a case with facts so microscopically precise would necessarily need to be a case of first impression in order to qualify as precedent and that the odds of such a precedent so factually granulated are unlikely ever to be repeated. Plaintiffs are thus faced with a Catch-22. In order for a case of first impression to become precedent, it must itself go beyond existing precedents to become established law. As one commentator has observed:

> The narrower the category of cases that count, the harder it is to find a clearly established right. Thus, a restrictive approach to relevant precedent beefs up qualified immunity and makes its protections more difficult to penetrate…. When a narrow view of relevant precedent is added to the demand for extreme factual specificity in the guidance those precedents must provide, the search for "clearly established" law becomes increasingly unlikely to succeed, and "qualified" immunity becomes nearly absolute.

(John C. Jeffries, Jr., *What's Wrong with Qualified Immunity*?, 62 Fla. L. Rev. 851, 859 ("Jeffries") (citations omitted).)

Although the Ninth Circuit has struggled perhaps more than other Circuits to get qualified immunity right, the fault is not entirely its own. "Wading through the doctrine of qualified immunity is one of the most morally and conceptually challenging tasks federal appellate court judges routinely face."

(Charles R. Wilson, *"Location, Location, Location": Recent Developments in the Qualified Immunity Defense*, 57 N.Y.U. Ann. Surv. Am. L. 445, 447 (2000) ("Wilson").) Far from being an easy matter, determining whether a government official violated "clearly established" law "has proved to be a mare's nest of complexity and confusion." (Jeffries at 852.) The "conflicting signals" sent by Supreme Court decisions over the years have yielded widely varying approaches among the circuits. (*Id.*)

In particular, the "clearly established" standard has been called "unworkable, unduly burdensome, and out of step with reality" (Bailey D. Barnes, *A Reasonable Person Standard for Qualified Immunity*, 55 Creighton L. Rev. 33, 35 (2021) and a "moving target and insufficiently defined." (Natalie T. Frandsen, *Bulletproof Vests & Lawsuit Threats: The Need for Renovation of Law Enforcement Qualified Immunity*, 48 Ohio N.U. L. Rev. 341, 356 (2022).) "The choice…to identify (but not really address) the proper level of generality at which a clearly established right is stated [has] had serious effects on the doctrine's administrability." (Alan K. Chen, *The Intractability of Qualified Immunity*, 93 Notre Dame L. Rev. 1937, 1942 (2018) ("Chen").) The result has been, "as Winston Churchill once famously said of Russia, 'a riddle wrapped in a mystery inside an enigma." (*Id.*)

Indeed, the Ninth Circuit's response to the Supreme Court's limited and imprecise guidance over the years as to what "clearly established" means, recalls a child's game of "hot and cold. Judges grope around the legal landscape to shouts of "Colder! More particularity!" and "Hotter! Less extreme specificity!" "The instability has been so persistent and so

pronounced that one expert describes qualified immunity as existing 'in a perpetual state of crisis.'" (Jeffries at 852, quoting Wilson at 447.)

Harlow justified its departures from qualified immunity's common law roots (including the requirement of good faith) largely on policy grounds, chiefly the costs of litigation that would supposedly be avoided by adopting an objective "clearly established" standard, and a desire to avoid the "burdens of broad-reaching discovery (*Harlow*, 457 U.S. at 814, 816-817; see also *Pearson v. Callahan*, 555 U.S. 223, 231 (2009).) The results of the forty-year experiment are in, and it has been persuasively argued that the doctrine fails to achieve those policy goals. (Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 Notre Dame L. Rev. 1797, 1799-1800 (2018) ("Schwartz").)

"Justices have been raising concerns about qualified immunity for decades." (Schwartz, at 1798-99 (2018). Justice Kennedy criticized the doctrine's departure from the common law in his concurrence in *Wyatt v. Cole*, 504 U.S. 158 (1992). "Our immunity doctrine is rooted in historical analogy, based on the existence of common-law rules in 1871, rather than in 'freewheeling policy choices…In the context of qualified immunity, however, we have diverged to a substantial degree from the historical standards." (*Id.* at 171 (Kennedy, J., concurring in judgment).)

More recently, in *Ziglar v. Abbasi*, 137 S. Ct. 1843 (2017), Justice Thomas "[wrote] separately…to note [his] growing concern with [the Court's] qualified immunity jurisprudence." (*Id.* at 1870 (Thomas, J., concurring in part and concurring in the judgment.) "[W]e are no longer engaged in 'interpret[ing] the

intent of Congress in enacting" Section 1983." (*Id*. at 1871.) "Our qualified immunity precedents instead represent precisely the sort of 'freewheeling policy choice[s]' that we have previously disclaimed the power to make." (*Id*.) "The Constitution assigns this kind of balancing to Congress, not the Courts." (*Id*. at 1872.) Accordingly, Justice Thomas asserted that "[i]n an appropriate case, [the Court] should reconsider [its] qualified immunity jurisprudence." (*Id*.; see also *Baxter v. Bracey*, 140 S. Ct. 1862, 1864 (2020) (Thomas J., dissenting from the denial of certiorari ["clearly established" test cannot be located in Section 1983's text and may have little basis in history].)

In the Court's recent landmark decision in *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2272 (2022), this Court emphasized the importance of rooting constitutional rulings in "text, history or precedent," and expressed disfavor for judicial lawmaking that "imposed…a detailed set of rules like those that one might expect to find in a statute or regulation." (*Id*. at 2266, 2272.) *Dobbs* signifies a growing determination at this Court to "let the original public meaning of the text be applied, though the heavens fall!" That same interpretive rigor should apply to a fair reconsideration of qualified immunity's unsteady legal origins.

Justice Sotomayor has lamented that the "clearly established" analysis is becoming ever more "onerous." (See *Kisela*, 138 S. Ct. at 1158 (2018) (Sotomayor, J., joined by Ginsburg, J., dissenting); see also *Mullenix v. Luna*, 577 U.S. 26 (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.) "Such a one-sided approach to qualified immunity transforms the doctrine into an absolute shield for law enforcement officers, gutting the deterrent effect of the Fourth Amendment." (*Id.*)

Appellate and district court judges increasingly share these Justices' concerns. "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….Even in this hyperpartisan age, there is a growing, cross-ideological chorus of jurists and scholars urging recalibration." (*Zadeh v. Robinson*, 928 F.3d 457, 480 (5th Cir. 2019) (Willett, J., concurring in part and dissenting in part.) "[T]here is increasing consensus that qualified immunity poses a major problem to our system of justice." (*Jamison v. McClendon*, 2020 U.S. Dist. LEXIS 139327 at *59 (S.D. Miss. 2020).)

If modern qualified immunity doctrine stands on rickety legal and historical foundations, fails to accomplish the policy goals advanced to justify its judicial invention, leaves citizens oppressed by unremedied violations of their constitutional rights, and creates a tangled "nightmare for litigators and judges" (Chen at 1951) -- why is it still here?

IV. THE QUESTIONS PRESENTED ARE IMPORTANT AND RECURRING, AND THIS CASE PRESENTS AN IDEAL VEHICLE TO ADDRESS THEM.

Beyond just resolving the circuit split that the Ninth Circuit's refusal to consider evidence of pretext

has reinforced, as set forth in Section I, supra, and the conflict with this Court's precedents created by the Ninth Circuit's fixation on a supposed need for closely analogous case law, this matter is "an appropriate case [for the Court to] reconsider [its] qualified immunity jurisprudence."

Dissenting from the denial of certiorari in *Hoggard v. Rhodes*, 141 S. Ct. 2421 (2021), Justice Thomas asked:

> But why should university officers, who have time to make calculated choices about enacting or enforcing unconstitutional policies, receive the same protection as a police officer who makes a split-second decision to use force in a dangerous setting? We have never offered a satisfactory explanation to this question.

(*Id.* at 2422 (Thomas, J., dissenting from the denial of certiorari.)

Because no satisfactory answer to that question readily appears, the long-overdue reappraisal of the qualified immunity experiment should begin with a case like this, where the responsible officials had time to reflect on their options in serene air-conditioned offices, consulting legal counsel -- and still got the answer inexcusably, unreasonably wrong.

This is not the kind of case where a police officer "must choose between being charged with dereliction of duty if he does not arrest when he has probable cause, and being mulcted in damages if he does." (See *Anderson*, 483 U.S. at 664.) Respondents had no "duty" to retaliate against Petitioners. Their purely

optional choice was whether or not to join an activist's cancel-culture crusade when there was no evidence or reasonable prospect of disruption. Officials who rashly risk violating the Constitution in circumstances like this -- and whose own comments betray their true, unlawful retaliatory motives -- neither need nor deserve the extraordinary protections of extra-statutory, judicially created immunities.

It has been suggested that "the next time the Court addresses [qualified immunity]…it may be more feasible to start in the K-12 public school context than in the law enforcement context…Abolishing qualified immunity for K-12 school officials could be a starting point for the Court to see how public officials may react to not having the affirmative defense of qualified immunity in their back pockets." (Sarah Smith, *The Problem of Qualified Immunity in K-12 Schools*, 74 Ark. L. Rev. 805 (2022).) This would allow a "field test" of a recalibrated Section 1983 immunity jurisprudence in a limited, controlled environment less subject to policy concerns about effective law enforcement and government's ability to fulfill its core functions -- the concerns that the *Harlow* court felt warranted cutting the tie between qualified immunity and its common law roots.

As set forth above, one of the thorniest issues in qualified immunity jurisprudence is the degree of specificity required to place a constitutional rule "beyond debate." This Court has held:

> [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. Precedent involving similar facts can help move a case beyond the otherwise "hazy border between excessive and acceptable force" and thereby provide an officer notice that a specific use of force is unlawful.

(*Kisela*, 138 S. Ct. at 1152-1153, citing *Mullenix*, 577 U.S. at 205.) Uniquely in these cases, courts must "slosh [their] way through the fact-bound morass of 'reasonableness.'" (*Scott v. Harris*, 550 U.S. 372, 383 (2007).)

Outside the fraught "morass" of excessive force and similar Fourth Amendment cases, the same highly fact-sensitive considerations are less likely to be present. It should be easier for school officials, given ample time to reflect and make reasoned judgments, to determine whether potential disruption from protected speech is substantial, than it may be for a police officer to make a split-second decision as to whether and how much to use force on a potentially dangerous suspect approaching in a dark alley.

This case, therefore, presents an ideal vehicle for this Court to address the incoherence, policy failings, and constitutional and legal shakiness of qualified immunity. It should do so.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: August 8, 2022.

APPENDIX

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RILEY'S AMERICAN HERITAGE FARMS, a California corporation; JAMES PATRICK RILEY, an individual, *Plaintiffs-Appellants*, v. JAMES ELSASSER; STEVEN LLANUSA; HILARY LACONTE; BETH BINGHAM; NANCY TRESER OSGOOD; DAVID S. NEMER; ANN O'CONNOR; BRENDA HAMLETT, *Defendants-Appellees*, and CLAREMONT UNIFIED SCHOOL DISTRICT, *Defendant*.	No. 20-55999 D.C. No. 5:18-cv-02185-JGB-SHK ORDER AND AMENDED OPINION

Appeal from the United States District Court
for the Central District of California
Jesus G. Bernal, District Judge, Presiding

Argued and Submitted August 31, 2021
Pasadena, California

Filed March 17, 2022
Amended April 29, 2022

Before: Sandra S. Ikuta, Mark J. Bennett, and Ryan D. Nelson, Circuit Judges.

Order;
Opinion by Judge Ikuta

SUMMARY[1]

Civil Rights

The panel (1) amended its opinion affirming in part and reversing in part the district court's summary judgment for public school defendants in a 42 U.S.C. § 1983 action alleging First Amendment violations, (2) denied a petition for rehearing, (3) denied a petition for rehearing en banc on behalf of the court, and (4) ordered that no further petitions shall be entertained.

Plaintiff James Patrick Riley is one of the principal shareholders of Riley's American Heritage Farms ("Riley's Farm"), which provides historical reenactments of American events and hosts apple picking. Between 2001 and 2017, schools within the

[1]This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

Claremont Unified School District booked and attended field trips to Riley's Farm. In 2018, Riley used his personal Twitter account to comment on a range of controversial social and political topics. After some parents complained and a local newspaper published an article about Riley and his Twitter postings, the School District severed its business relationship with Riley's Farm. Patrick Riley and Riley's Farm brought suit against the School District, individual members of the school board, and three school administrators (the "School defendants"), alleging retaliation for protected speech.

In partially affirming the district court's summary judgment in favor of the School defendants, the panel held that although there was a genuine issue of material fact on the issue of whether the Riley plaintiffs' First Amendment rights had been violated, the individual School defendants were entitled to qualified immunity as to the damages claims because the right at issue was not clearly established when the conduct took place.

In reaching this conclusion, the panel first determined that the relationship between the Riley plaintiffs and the School District was analogous to those between the government and a government contractor and that the character of the services provided by the Riley plaintiffs justified the application of the framework established in *Pickering v. Bd. of Ed. of Twp. High Sch. Dist. 205*, 391 U.S. 563, 568 (1968). Applying the two-step burden-shifting approach for government contractors alleging retaliation, the panel held that the plaintiffs had established a prima facie case of retaliation against

the School defendants that could survive summary judgment. The panel held that there was no dispute that Riley engaged in expressive conduct, that some of the School defendants took an adverse action against Riley's Farm that caused it to lose a valuable government benefit and that those defendants were motivated to cancel the business relationship because of Riley's expressive conduct. The panel also held that there was sufficient evidence that the Board members had the requisite mental state to be liable for damages for the ongoing constitutional violation.

Because the Riley plaintiffs had carried their burden of making a prima facie case of retaliation, the burden shifted to the School defendants. The panel held that taking the evidence in the light most favorable to the Riley plaintiffs, the School defendants failed to establish that the School District's asserted interests in preventing disruption to their operations and curricular design because of parental complaints were so substantial that they outweighed Riley's free speech interests as a matter of law.

The panel rejected the School defendants' argument that they could not be held liable for unconstitutional retaliation because their actions were protected government speech. Even assuming that the selection of a field trip venue was protected government speech, the pedagogical concerns underlying the government-speech doctrine did not exist here because Riley was not speaking for, or on behalf of, the School District.

The panel held that although there existed a genuine issue of material fact as to whether the School defendants violated the Riley plaintiffs' First Amendment rights, there was no case that placed the constitutional inquiry here beyond debate and therefore it was not clearly established that the School defendants' reaction to parental complaints and media attention arising from Riley's tweets was unconstitutional. Rather, the School defendants had a heightened interest in taking action in response to the Riley plaintiffs' speech to prevent interruption to the school's operations. The record contained undisputed facts that Riley's tweets gave rise to actual parent and community complaints and media attention. The School defendants were therefore entitled to qualified immunity on the damages claim.

The panel held that the district court erred in dismissing the claims for injunctive relief which sought to enjoin the School District's alleged ongoing policy barring future field trips to Riley's Farm. The panel held that the testimony of the School District's superintendent was sufficient to create a genuine issue of material fact as to whether the Riley plaintiffs continue to suffer from an ongoing constitutional violation.

COUNSEL

Thomas J. Eastmond (argued) and David A. Robinson, Holland & Knight LLP, Irvine, California; William J. Becker, Jr. and Jeremiah D. Graham, Freedom X, Los Angeles, California; for Plaintiffs-Appellants.

Daniel S. Modafferi (argued) and Golnar J. Fozi, Meyers Fozi & Dwork, LLP, Carlsbad, California, for Defendants-Appellees.

ORDER

The opinion filed on March 17, 2022, and published at 29 F.4th 484 (9th Cir. 2022), is amended by the opinion filed concurrently with this order.

With these amendments, appellants' petition for rehearing, filed March 31, 2022, is **DENIED**. The petition for rehearing en banc was circulated to the judges of the court, and no judge requested a vote for en banc consideration. The petition for rehearing and petition for rehearing en banc are **DENIED**. No further petitions for rehearing or rehearing en banc will be entertained.

OPINION

IKUTA, Circuit Judge:

This case involves a school district that severed its longstanding business relationship with a company that provides field trip venues for public school children. The school district took this step after the principal shareholder of the field trip vendor made controversial tweets on his personal social media account, and some parents complained. In response to the school district's adverse action, the field trip vendor and its shareholder sued the responsible public school officials under 42 U.S.C. §

1983 for violating their First Amendment rights. We conclude that there is a genuine issue of material fact whether the plaintiffs' First Amendment rights have been violated, but the school officials are entitled to qualified immunity as to the plaintiffs' damages claims because the right at issue was not clearly established when the conduct took place. However, the district court erred in granting summary judgment to the school officials on the plaintiffs' claim for injunctive relief, because there is a genuine issue of material fact whether the school officials are maintaining an unconstitutional, retaliatory policy barring future patronage to the vendor.

I

James Patrick Riley is one of the principal shareholders of Riley's American Heritage Farms ("Riley's Farm").[2] Riley's Farm provides historical reenactments of events such as the American Revolution, the Civil War, and American colonial farm life for students on school field trips, and also hosts events like apple picking. During each year between 2001 and 2017, one or more schools within the Claremont Unified School District (referred to as CUSD or the "School District") booked and attended a field trip to Riley's Farm. The School District is governed by a publicly-elected, five-member Board of Education (the "Board"), and is managed on a day-to-day basis by its administrators.

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[2] We refer to Riley and Riley's Farm individually where appropriate, and collectively as the "Riley plaintiffs."

As of August 2018, Riley and Riley's Farm maintained separate social media accounts, including accounts on Twitter. Riley used his personal Twitter account to comment on a range of controversial topics, including President Donald Trump's alleged relationship with Stormy Daniels, President Barack Obama's production deal with Netflix, Senator Elizabeth Warren's heritage, and Riley's opinions on gender identity. Some of Riley's controversial tweets included the following:

- When #ElizabethWarren 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. #ScotusPick

- A friend saw an ice sculpture of Kirsten Gillibrand at a Democratic fundraiser. She actually looked more human that way - a bit more color in her cheeks.

- So I'm planning a high school reunion and I just realized we may have been the last generation born with only two genders.

- #NameThatObamaNetflixShow "Missing ISIS" Heartwarming story of a former Jihad fighter, now readjusting to life as a BLM protester.

Riley's tweets did not appear on any of Riley's Farm's social media accounts or web site. Nor did Riley's tweets reference Riley's Farm or anything

related to the School District or school field trips in general.

In August 2018, a parent of a kindergarten student at Chaparral Elementary School (one of the schools within the School District) sent an email to her child's teacher, Michelle Wayson, regarding an upcoming field trip at Riley's Farm. The parent's email included screen shots of Riley's tweets, and stated "I do NOT feel comfortable with my son patronizing an establishment whose owner (and/or family/employees) might be inclined to direct bigoted opinions towards my child or other vulnerable children in the group." Wayson forwarded the parent's email to the school principal, Ann O'Connor. Because all four of Chaparral's kindergarten classes were scheduled to attend an apple-picking tour at Riley's Farm in October 2018, O'Connor asked Wayson to discuss the parent's concern with the other three Chaparral kindergarten teachers and to determine whether alternative field trip venues would be more appropriate. Brenda Hamlett, the principal of Sumner Danbury Elementary School (also in the School District), reported that multiple parents subsequently asked her to excuse their children from attending field trips at Riley's Farm or choose an alternative field trip venue.

Around the same time, Lee Kane, a parent whose children had attended schools in CUSD, saw a Facebook post discussing Riley's tweets. In September 2018, Kane sent a copy of the Facebook post to David Nemer, one of the School District's board members, and expressed concern about the School District sending field trips to Riley's Farm "in

light of a public controversy surrounding tweets" made by Riley.[3]

The same day, Nemer forwarded Kane's complaint to James Elsasser, the superintendent of the School District. Nemer told Elsasser: "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." In that same email, Nemer further described Riley's tweets as "obnoxious" and "bigoted." Nemer followed up his email to Elsasser with a second email stating, "I think many of our stakeholders would be uncomfortable with these tweets."[4]

Two days later, Elsasser and School District administrators met to discuss parent concerns regarding field trips to Riley's Farm. Elsasser asked the administrators to speak with the teachers at their schools to determine whether any of them wanted to continue patronizing Riley's Farm. O'Connor then emailed the Chaparral kindergarten teachers and instructed them to "find another alternative" for the field trip that would not give rise to parental complaints.

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[3] Nemer says he also recalled "that other Claremont Unified School District residents and/or parents, whose names I do not recall, commented on that post, expressing similar concerns," though it is not clear whether they communicated directly with Nemer.

[4] At his deposition in this case, Elsasser later agreed that he considered some of Riley's comments to be "racist, sexist, or homophobic."

The following day, the *Redlands Daily Facts* (a local newspaper) published a news article about Riley and his Twitter posts. The article was titled: "These tweets sparked social media outcry against owner of Riley's Farm in Oak Glen." The article noted that some community members were disgusted by Riley's alleged white supremacist views espoused in his tweets, and that Riley's tweets had been shared over 1,300 times on Twitter.

Because no administrator, teacher, or staff member expressed a desire to continue going to Riley's Farm, Julie Olesniewicz, the Assistant Superintendent for Educational Services, sent an email to the principals of each of the School District's elementary schools "asking that no CUSD school attend Riley's Farm field trips" and offering alternative options for the field trips. The parties dispute whether Olesniewicz's guidance is still in place."[5]

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[5] The Riley plaintiffs' assertion that Olesniewicz's guidance is still in place is based on Elsasser's testimony at his deposition:

> Riley plaintiffs' counsel: "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?"
>
> Defendants' counsel: "What did he say? "
>
> Elsasser: "The guidance is still in place. We've never revisited it."

In opposing the Riley plaintiffs' motion for partial summary judgment, defendants' counsel argued that Elsasser was merely clarifying opposing counsel's statement.

After Olesniewicz sent her email to the elementary school principals, Nemer sent an email to Elsasser asking, "Is there any followup information I can convey about the Rileys Farm issue?" Elsasser responded by email that "[a]ll schools that were scheduled to go to Riley's Farm that are operated by John Riley have been canceled."

About a week later, on September 24, 2018, counsel for Riley's Farm (Thomas Eastmond) sent a letter to Elsasser and the individual board members, alleging that the School District had issued a policy forbidding teachers from taking field trips to Riley's Farm in retaliation for Riley's political posts. Alleging that this policy violated Riley's Farm's First Amendment rights, Eastmond's letter proposed terms of settlement. In a letter dated October 2, 2018, the District's general counsel denied that the District had issued a policy forbidding teachers from taking field trips to Riley's Farm. She asserted 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." The general counsel also stated that "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." Therefore, the general counsel rejected Eastmond's settlement proposals.[6]

On October 12, 2018, Riley and Riley's Farm filed an action for violation of their civil rights under 42 U.S.C. § 1983, alleging that the School District, individual members of the school board (Steven Llanusa, Hilary LaConte, Beth Bingham, Nancy Treser Osgood, and David Nemer), and three school administrators (Elsasser, O'Connor, and Hamlett) violated the Riley plaintiffs' First Amendment rights by prohibiting teachers at Chaparral and Sumner Danbury Elementary Schools from patronizing Riley's Farm for school field trips, in retaliation for Riley's protected speech. The complaint sought both damages and injunctive relief against the defendants.

The district court dismissed the School District from the suit based on sovereign immunity.[7] The Riley plaintiffs moved for partial summary judgment on their claims against Elsasser and Nemer for damages. The School defendants moved for summary judgment as to all claims. The district court denied the Riley plaintiffs' motion for partial summary judgment and granted the School defendants' motions for summary judgment on the ground that they were entitled to qualified immunity. The Riley plaintiffs subsequently moved for reconsideration. *See* Fed. R. Civ. P. 59 and 60. In denying the motion, the court

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[6] The CUSD board members did not take part in the District's consideration of, or response to Eastmond's September 24, 2018 letter.

[7] We refer to the remaining defendants individually where appropriate, and collectively as the "School defendants."

acknowledged that it erred in dismissing the claim for injunctive relief on the basis of qualified immunity, *see Pearson v. Callahan*, 555 U.S. 223, 242 (2009), but held the error was harmless because there was no evidence that the School defendants had a policy prohibiting future field trips to Riley's Farm.

II

The Riley plaintiffs appeal the district court's order granting summary judgment in favor of the School defendants and its order denying their motion for partial summary judgment on their claims against Elsasser and Nemer for damages. We review a district court's decision on summary judgment de novo. *See L. F. v. Lake Wash. Sch. Dist. #414*, 947 F.3d 621, 625 (9th Cir. 2020). We may consider the district court's denial of the Riley plaintiffs' motion for partial summary judgment because it was "accompanied by a final order disposing of all issues before the district court" and "the record has been sufficiently developed to support meaningful review of the denied motion." *Brodheim v. Cry*, 584 F.3d 1262, 1274 (9th Cir. 2009) (quoting *Jones–Hamilton Co. v. Beazer Materials & Services, Inc.*, 973 F.2d 688, 694 n.2 (9th Cir. 1992)). In considering the appeal of a district court's disposition of cross motions for summary judgment, we view the evidence for each of the motions "in the light most favorable to the nonmoving party" for that motion and determine "whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law." *Lake Wash. Sch. Dist.*, 947 F.3d at 625 (quoting *Wallis v. Princess Cruises, Inc.*, 306 F.3d 827, 832 (9th Cir. 2002)).

III

We first consider the district court's grant of summary judgment in favor of the School defendants on the damages claim.

A government official is entitled to qualified immunity from a claim for damages unless the plaintiff raises a genuine issue of fact showing (1) "a violation of a constitutional right," and (2) that the right was "clearly established at the time of [the] defendant's alleged misconduct." *Pearson*, 555 U.S. at 232 (internal quotation marks omitted). We may address these prongs in either order. *See id.* at 236. We begin with the first prong, and determine whether the Riley plaintiffs raised a genuine issue of material fact that their First Amendment rights were violated.[8]

A

The Riley plaintiffs claim that the School defendants retaliated against Riley and his company because he engaged in protected speech on his Twitter account. "'[A]s a general matter the First Amendment prohibits government officials from subjecting an individual to retaliatory actions' for engaging in protected speech." *Nieves v. Bartlett*, 139 S. Ct. 1715, 1722 (2019) (quoting *Hartman v. Moore*, 547 U.S. 250, 256 (2006)). "If an official takes adverse action against

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[8] Because we must consider the merits of the Riley plaintiffs' constitutional claim in light of their request for injunctive relief, see infra at Section IV, judicial efficiency counsels us to begin with the first prong of the qualified immunity framework, see Pearson, 555 U.S. at 242.

someone based on that forbidden motive, and non-retaliatory grounds are in fact insufficient to provoke the adverse consequences, the injured person may generally seek relief by bringing a First Amendment claim." *Id.* (internal quotation marks omitted).

Despite this general rule, the Supreme Court has recognized that the government may impose "certain restraints on the speech of its employees" that would be "unconstitutional if applied to the general public." *City of San Diego v. Roe*, 543 U.S. 77, 80 (2004) (per curiam). As the Court explained, the government has "interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general." *Pickering v. Bd. of Ed. of Twp. High Sch. Dist. 205*, 391 U.S. 563, 568 (1968). "[T]he government's interest in achieving its goals as effectively and efficiently as possible is elevated from a relatively subordinate interest when it acts as sovereign to a significant one when it acts as employer." *Bd. of Cty. Comm'rs, Wabaunsee Cty., Kan. v. Umbehr*, 518 U.S. 668, 676 (1996) (quoting *Waters v. Churchill*, 511 U.S. 661, 675 (1994) (plurality opinion)). The government's power to impose such restrictions, however, is not unbridled. Government employees cannot "constitutionally be compelled to relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest." *Pickering*, 391 U.S. at 568.

In *Pickering*, the Court set out a framework to balance the competing interests between the government employer and employee. This framework

(sometimes referred to as the *Pickering* balancing test) "requires a fact-sensitive and deferential weighing of the government's legitimate interests" as employer against the First Amendment rights of the employee. *Umbehr*, 518 U.S. at 677. Although the Court first applied this framework to government employees, it extended its application to retaliation cases brought by government contractors because "the similarities between government employees and government contractors with respect to this issue are obvious." *Id.* at 674; *see also O'Hare Truck Serv., Inc. v. City of Northlake*, 518 U.S. 712, 721 (1996) (extending the *Pickering* framework to government contractors who had reason to believe their business with the government would continue "based on longstanding practice").

We have further extended the *Pickering* framework to a range of situations where "the relationship between the parties is analogous to that between an employer and employee" and "the rationale for balancing the government's interests in efficient performance of public services against public employees' speech rights applies." *Clairmont v. Sound Mental Health*, 632 F.3d 1091, 1101 (9th Cir. 2011). In this vein, we have held that the *Pickering* framework applied to a retaliation claim brought by a business vendor operating under a contract with the government for weatherization services, *Alpha Energy Savers v. Hansen*, 381 F.3d 917, 923 (9th Cir. 2004), to a claim by a domestic violence counselor employed by a private company that performed counseling services for a municipal court, *see Clairmont*, 632 F.3d at 1101–02, and to a claim by a

volunteer probation officer, *Hyland v. Wonder*, 117 F.3d 405, 411 (9th Cir. 1997), *opinion amended on denial of reh'g*, 127 F.3d 1135 (9th Cir. 1997). By contrast, we have declined to apply the *Pickering* framework to retaliation claims brought by regulated entities, where the relationship between the plaintiff and the government was akin to that of a licensee-licensor and bore no indicia of a typical employee-employer relationship. *See CarePartners, LLC v. Lashway*, 545 F.3d 867, 881–82 (9th Cir. 2008) (plaintiffs were owners and operators of state-licensed boarding homes); *Soranno's Gasco, Inc. v. Morgan*, 874 F.2d 1310, 1314–15 (9th Cir. 1989) (plaintiffs were sellers and distributors of petroleum operating under city permits).

If a plaintiff's retaliation claim is subject to the *Pickering* framework, a court applies a two-step, burden-shifting approach. *See Alpha Energy Savers*, 381 F.3d at 923. First, a plaintiff must establish a prima facie case of retaliation. This requires the plaintiff to show that "(1) it engaged in expressive conduct that addressed a matter of public concern; (2) the government officials took an adverse action against it; and (3) its expressive conduct was a substantial or motivating factor for the adverse action." *Id.* This final element of the prima facie case requires the plaintiff to show causation and the defendant's intent. Because § 1983 itself contains no intent requirement, we look to the underlying constitutional violation alleged. *See Daniels v. Williams*, 474 U.S. 327, 330 (1986). Where, as here, a plaintiff alleges First Amendment retaliation, the plaintiff must show that the government defendant

"acted with a retaliatory motive." *Nieves*, 139 S. Ct. at 1722; *see also Heffernan v. City of Paterson*, 578 U.S. 266, 272 (2016) ("To win [a retaliation claim], the employee must prove an improper employer motive."). Put another way, a plaintiff must establish that the defendant was motivated (or intended) to take the adverse action because of the plaintiff's expressive conduct. *See Nieves*, 139 S. Ct. at 1722.

If the plaintiff carries its burden of showing these three elements, the burden shifts to the government. *Alpha Energy Savers*, 381 F.3d at 923. The government can avoid liability in one of two ways. First, the government can demonstrate that its "legitimate administrative interests in promoting efficient service-delivery and avoiding workplace disruption" outweigh the plaintiff's First Amendment interests. *Id.* (citing *Pickering*, 391 U.S. at 568). Second, the government can show that it would have taken the same actions in the absence of the plaintiff's expressive conduct. *Id.* (citing *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977)). A plaintiff cannot establish unconstitutional retaliation "if the same decision would have been reached" absent the protected conduct, even if "protected conduct played a part, substantial or otherwise," in motivating the government's action. *Mt. Healthy*, 429 U.S. at 285 (internal quotations omitted).

B

We now turn to the question whether the Riley plaintiffs raised a genuine issue of material fact that their First Amendment rights were violated, and

therefore the district court erred in granting summary judgment to the School defendants. We consider the facts in the light most favorable to the Riley plaintiffs. *See Lake Wash. Sch. Dist.*, 947 F.3d at 625.

1

To answer this question, we must first determine whether the *Pickering* framework applies to the Riley plaintiffs' claim of retaliation.[9] The Riley plaintiffs assert that the framework does not apply because their relationship to the School District was more akin to that of a private citizen than a government contractor. We disagree.

First, courts have frequently concluded that when a governmental entity outsources government services for performance by a private company, the relationship between the parties is analogous to that between the government and a government contractor. *See Clairmont*, 632 F.3d at 1101–02; *see also Umbehr*, 518 U.S. at 679; *O'Hare*, 518 U.S. at 714–15. As in *Clairmont*, where a municipal court relied on a private company to provide counseling services to probationers, *see* 632 F.3d at 1101–02, the School District here relied on Riley's Farm to provide

[9] We reject the Riley plaintiffs' argument that, because the School defendants did not file a protective cross appeal on the district court's holding, we are bound by the district court's finding that the Pickering framework does not apply to their First Amendment claim. An appellee may raise arguments that were rejected below without filing a cross-appeal. *See Rivero v. City and County of San Francisco*, 316 F.3d 857, 862 (9th Cir. 2002).

educational services for public school students. Therefore, even though the record does not demonstrate that the Riley plaintiffs were categorized under California law as an "independent contractor," or that they had a written contract for services with the School District, the relationship between the Riley plaintiffs and the School defendants is analogous to those we have recognized between the government and a government contractor. *See, e.g.*, *id.*; *Alpha Energy Savers*, 381 F.3d at 923.

Second, the rationale for balancing the government's interest in efficient performance of public service against the contractor's free speech rights is applicable here. *See Clairmont*, 632 F.3d at 1101–02. Because the Riley plaintiffs hosted field trips for students, the School District had an interest in ensuring that the services performed by Riley's Farm "were properly provided." *Id.* at 1102. Those interests included ensuring the students' safety and maintaining the School District's intended curricular design for the trips. We conclude that the character of the services provided by the Riley plaintiffs to the School District implicate the type of heightened government interests that the Court and our circuit have determined justify the application of the *Pickering* framework to a retaliation claim. *See Umbehr*, 518 U.S. at 674; *Clairmont*, 632 F.3d at 1101–02. The district court erred in holding to the contrary.

Having determined that the *Pickering* framework applies to the Riley plaintiffs' First Amendment claim, we now apply the two-step, burden-shifting approach for government contractors

alleging retaliation. *See Umbehr*, 518 U.S. at 673; *Alpha Energy Savers*, 381 F.3d at 923.

We first consider whether the Riley plaintiffs have established a prima facie case of retaliation that can survive summary judgment. The first element of the prima facie case requires that the contractor engaged in expressive conduct that addressed a matter of public concern, a category of conduct that "lies at the heart of the First Amendment." *Lane v. Franks*, 573 U.S. 228, 235 (2014). There is no genuine issue of disputed fact that Riley engaged in such expressive conduct. Riley's tweets discussed matters that fall within the core of protected First Amendment activity including politics, religion, and issues of social relations. *See Janus v. Am. Fed'n of State, Cty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2476 (2018).

Nor is there a genuine issue of disputed fact that some of the School defendants took an adverse action against Riley's Farm. A plaintiff establishes the adverse action element of the prima facie case by demonstrating that the government action threatened or caused pecuniary harm, or deprived a plaintiff of some valuable government benefit. *Umbehr*, 518 U.S. at 674. This element is satisfied when the government cancels a for-profit contract with a contractor. *See Rivero*, 316 F.3d at 864. The cancellation of the field trips and prohibition of future field trips caused Riley's Farm to lose a valuable government benefit in the form of an expected pecuniary gain and an established business relationship with the School District. *See id.* at 865.

Finally, there is no genuine issue of disputed fact that some of the School defendants were motivated to cancel the longstanding business relationship with the Riley plaintiffs because of Riley's expressive conduct. The field trips and the longstanding business relationship were cancelled only after Nemer and CUSD parents raised concerns about the content of Riley's tweets to Elsasser, Hamlett, and O'Connor. In his deposition, Elsasser admitted that the decision was made to appease parents based on their concern about the content of Riley's speech. When coupled with the temporal relationship between the expressive conduct and the defendants' collective opposition to and adverse action against the Riley plaintiffs, Elsasser's admission is sufficient to raise a prima facie showing of retaliatory intent. *See Alpha Energy Savers*, 381 F.3d at 929. And Nemer and Elsasser's description of Riley's speech ("inappropriate," "unacceptable, "obnoxious", "bigoted," "homophobic", and "racist") further demonstrates the School defendants' intent to punish the Riley plaintiffs because of Riley's protected conduct. *See id.* Thus, the Riley plaintiffs have made a prima facie case of First Amendment retaliation against Elsasser, Hamlett, O'Connor, and Nemer.

The School defendants argue that the Riley plaintiffs cannot satisfy the third element of the prima facie case because they have not shown that the defendants intended *to chill* Riley's speech. We disagree. A plaintiff need only show that the government intended "to retaliate against, obstruct, *or* chill the plaintiff's First Amendment rights." *Az. Students' Ass'n v. Az. Bd. of Regents*, 824 F.3d 858,

867 (9th Cir. 2016) (emphasis added). Such reprisal could include terminating the government's relationship with the plaintiff entirely, rather than merely chilling the plaintiff's speech in the future. *See, e.g.*, *Alpha Energy Savers*, 381 F.3d at 922 (County's retaliatory acts included "'fixing it' so that [the plaintiff] would not receive further work from the County"); *Clairmont*, 632 F.3d at 1106 (evidence supported a finding that the municipal court pressured its contractor to fire the plaintiff because of his speech); *see also O'Brien v. Welty*, 818 F.3d 920, 932 (9th Cir. 2016); *Eng v. Cooley*, 552 F.3d 1062, 1074 (9th Cir. 2009) (holding that an employer's retaliation against an employee by "systematic investigations, prosecution, suspensions, and demotion" after the employee's protected conduct demonstrated that the conduct was a "substantial or motivating factor in the adverse employment action") (internal quotation marks omitted).

The prima facie case against Board members Llanusa, LaConte, Bingham, and Treser Osgood requires a different analysis. The Riley plaintiffs do not allege that these Board members took part in the cancellation of the field trips or the School District's severance of its relationship with the Riley plaintiffs. Nevertheless, because the Board members govern the School District, and have supervisory authority to stop the adverse actions against the Riley plaintiffs, they may incur liability due to their knowledge and acquiescence in a constitutional violation. *See OSU Student All. v. Ray*, 699 F.3d 1053, 1075 (9th Cir. 2012). In *OSU Student Alliance*, the publisher of a conservative school newspaper sued university

officials under § 1983 on the ground that the school retaliated against it by limiting the distribution of its newspaper on campus, pursuant to an unwritten policy. *See id.* at 1058–60. In addition to suing the director of facilities services, who had actually applied the policy to the newspaper, the plaintiff also sued the president and vice president of the university who had not been directly involved in enforcement of the policy, but had been informed about the application of the policy and done nothing to stop it. *See id.* at 1070–71. We held that "allegations of facts that demonstrate an immediate supervisor knew about the subordinate violating another's federal constitutional right to free speech, and acquiescence in that violation, suffice to state free speech violations under the First and Fourteenth Amendments." *Id.* at 1075. Therefore, the president and vice president of the university could be held liable under § 1983 for the continued enforcement of the retaliatory policy. *Id.* By contrast, the vice provost for student affairs, who merely received the "first email message complaining" about the policy, *id.* at 1078, and neither knew nor acquiesced in the decision to continue applying the policy to the paper, could not be held liable, *see id.* at 1078–79.

Here, taking the evidence in the light most favorable to the Riley plaintiffs, the Board members were made aware of the ongoing violation through Eastmond's demand letter, and then failed to remedy the policy. *See id.*[10] Under *OSU Student Alliance*, this

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[10] We reject the Riley plaintiffs' argument that they need not establish the wrongdoer's retaliatory intent. The Court has repeatedly held that liability for retaliatory conduct requires

is sufficient to create a prima facie case that the Board members had the requisite mental state to be held liable for damages resulting from the ongoing constitutional violation (i.e., the ongoing policy prohibiting future trips to Riley's Farm). *See id.* at 1075.

2

Because the Riley plaintiffs have carried their burden of making a prima facie case of retaliation, the burden shifts to the School defendants to demonstrate that they took the adverse action because they had "legitimate countervailing government interests [that were] sufficiently strong" under the *Pickering* balancing test to "outweigh the free speech interests at stake." *Umbehr*, 518 U.S. at 675, 685.[11]

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proof of the defendant's retaliatory intent. *See Nieves*, 139 S. Ct. at 1722*; Heffernan*, 578 U.S. at 272. *O'Brien*, 818 F.3d at 932, cited by the Riley plaintiffs, required a plaintiff to prove that a defendant intended to (or was motivated to) take adverse action because of a plaintiff's protected conduct. *Blair v. Bethel School Dist*., also cited by the Riley plaintiffs, is inapposite, because that case involved an elected official who was not shielded by the First Amendment from the ordinary "give-and-take of the political process." 608 F.3d 540, 543 (9th Cir. 2010).

[11] The question whether the government has met its burden of justifying its adverse action under Pickering is a question of law, but may raise "underlying factual disputes that need to be resolved by a fact-finder." *Moser v. Las Vegas Metro. Police Dep't*, 984 F.3d 900, 911 (9th Cir. 2021). A fact-finder's role in the Pickering analysis is limited to resolving those genuine disputes of historical fact necessary for the court to make its legal determination under *Pickering*. See id. Thus, a district court has discretion in "fashioning the most efficient way to resolve these

The government may demonstrate such legitimate countervailing interests by providing evidence that a contractor's expressive conduct disrupted the government workplace through, for example, interfering with the government services or operations provided by the contractor. *See Alpha Energy Savers*, 381 F.3d at 923. When asserting such an interest, the government "must demonstrate actual, material and substantial disruption, or reasonable predictions of disruption in the workplace." *Robinson v. York*, 566 F.3d 817, 824 (9th Cir. 2009) (internal quotation marks omitted). Evidence that actual disruption has already occurred in the workplace "will weigh more heavily against free speech." *Keyser v. Sacramento City Unified Sch. Dist.*, 265 F.3d 741, 749 n.2 (9th Cir. 2001). But "[t]he employer need not establish that the employee's conduct *actually* disrupted the workplace—'reasonable predictions of disruption' are sufficient." *Nichols v. Dancer*, 657 F.3d 929, 933 (9th Cir. 2011) (citation omitted). The government is more likely to meet its burden when an employee's disruptive conduct takes place in the workplace, compared to when the same conduct occurs "during the employee's free time away from the office." *Clairmont*, 632 F.3d at 1107 (citing *Connick v. Myers*, 461 U.S. 138, 153 (1983)); *see also Melzer v. Bd. of Educ. of City Sch. Dist. of City of New York*, 336 F.3d 185, 197 (2d Cir. 2003). While it "may rely on the possibility of future disruption," the government must support its claim that it reasonably predicted disruption "by some

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factual disputes" prior to its Pickering ruling (e.g., a special jury verdict form). *Id.*

evidence, not rank speculation or bald allegation." *Nichols*, 657 F.3d at 934.

Where public school officials assert that their interest in taking adverse action against a plaintiff was to avoid disruption to the school's operations and curricular design, courts consider whether students and parents have expressed concern that the plaintiff's conduct has disrupted the school's normal operations, or has eroded the public trust between the school and members of its community. *See Munroe v. Cent. Bucks Sch. Dist.*, 805 F.3d 454, 475–76 (3d Cir. 2015). Because schools act *in loco parentis* for students, *see Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 655 (1995), school officials can reasonably predict that parents and students will fear the influence of controversial conduct on the learning environment, *see Melzer*, 336 F.3d at 199. The disruption "created by parents can be fairly characterized as internal disruption to the operation of the school, a factor which may be accounted for in the balancing test and which may outweigh a public employee's rights." *Id.*

The government's evidence of disruption may be deemed substantial if parents are so concerned with controversial conduct that they choose (or threaten) to "remove their children from the school, thereby interrupting the children's education, impairing the school's reputation, and impairing educationally desirable interdependency and cooperation among parents, teachers, and administrators." *Id.* In this context, the Second Circuit held there was substantial disruption justifying the government's adverse action against a

public school teacher who was active in a pedophile association, where nearly 60 parents expressed concern that the teacher's controversial beliefs implicated the safety and well-being of the young students, and hundreds of students staged an assembly to share their views on the controversy. *See id.* at 191, 198–99. In particular, the court credited the school's claim that substantial disruption to its operations and its relationship with the parents arose from the parents' threats to remove children from school. *See id.* at 199. Despite explaining that the teacher's First Amendment interest in advocating for controversial political change was of the "highest value," *id.* at 198, the court held that the school's evidence of disruption justified its actions under the *Pickering* balancing test, *see id.* at 198–99. Likewise, the Third Circuit held that where a school received complaints from hundreds of parents about a teacher's blog that criticized her students, the school's assessment that the teacher's expression of disgust towards her students would disrupt her teaching duties and erode the trust between herself and her students (and their parents) counted as substantial disruption to justify terminating her. *See Munroe*, 805 F.3d at 473–74; *see also Craig v. Rich Twp. High Sch. Dist. 227*, 736 F.3d 1110, 1119–20 (7th Cir. 2013) (holding that the government had a legitimate interest in preventing disruption arising from parent complaints about a school guidance counselor who wrote a hyper-sexualized advice book for women and dedicated the book to his students.).

Applying this framework here, and taking the evidence in the light most favorable to the Riley

plaintiffs, the School defendants have failed to establish that the School District's asserted interests in preventing disruption to their operations and curricular design because of parental complaints were so substantial that they outweighed Riley's free speech interests as a matter of law.

First, we give less weight to the government's concerns about the disruptive impact of speech outside the workplace context. *See Rankin v. McPherson*, 483 U.S. 378, 388–89 (1987); *Clairmont*, 632 F.3d at 1107. Riley's controversial tweets were made on his personal Twitter account, and did not mention or reference the School District or field trips to Riley's Farm in general. There are no allegations that Riley made (or planned to make) any controversial statements during a school field trip; indeed, there are no allegations that he interacted at all with the students during the field trips. Although Riley's tweets became associated with the School District due to some local media attention and posts on Facebook, taking the evidence in the light most favorable to the Riley plaintiffs, the attenuated relationship between Riley's controversial speech and the field trips themselves weighs against the School District's asserted interest in preventing disruption to its operations and curricular design.

Nor has the school demonstrated any actual disruption to its operations arising from Riley's speech. *See Keyser*, 265 F.3d at 749. The School defendants have provided the substance of two complaints from parents, only one of which involved a

student currently enrolled in the School District.[12] While Hamlett asserted that multiple parents asked the Sumner Danbury principal to either excuse their children from the field trips or choose an alternative venue, there is no evidence regarding the number of parents or the nature of those complaints. This is far afield from cases where the government gave weight to hundreds of parent and student complaints. *See Melzer*, 336 F.3d at 190–91 (record showed that nearly 60 parents and hundreds of students complained about the teacher's proximity to students); *Munroe*, 805 F.3d at 473–74 (school received complaints about teacher from hundreds of parents).

Likewise, the School defendants have failed to provide evidence of likely future disruption that would entitle them to summary judgment as a matter of law. *See Nichols*, 657 F.3d at 935. Unlike the evidence in *Meltzer*, where hundreds of parents threatened to remove their children from school, the record here shows only a handful of parent requests that a child be excused from a single field trip. Such requests do not evidence the substantial disruption that may arise from a large number of parents threatening to remove their children from school.

Although evidence that the media or broader community has taken an interest in the plaintiff's conduct may also weigh in favor of the government's

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[12] Moreover, there is a dispute whether that child was even scheduled to attend a field trip to Riley's Farm, or whether the parent had confused Riley's Farm with another, unrelated apple-picking venue with a similar name.

assertion of disruption, *see Moser*, 984 F.3d at 909–10, the sparse media attention to Riley's tweets demonstrated in the record does not weigh in favor of the School defendants. The *Redlands Daily Facts*'s article about Riley's tweets noted that there was a "social media outcry" against Riley's Farm, and reported that Riley's tweets had been shared some 1,300 times. But there is no evidence in the record that Riley's tweets were covered by any other newspapers or media, and no indication that the tweets received nationwide attention. *Compare Munroe*, 805 F.3d at 462–63 (noting that the teacher's controversial blog post was reported by the Huffington Post, and the teacher "appeared on ABC, CBS, NBC, CNN, Fox News, and other television stations," and was interviewed by "several print news sources, including the Associated Press, Reuters, *Time Magazine*, and the *Philadelphia Inquirer*"). Although the School defendants presented evidence that a number of district residents or parents commented on the Facebook post discussing Riley's tweets, this evidence provides little support, as the School defendants did not specify the nature or number of those comments. The attenuated relationship between the content of the tweets and Riley's lack of involvement on the curricular aspects of the field trip diminish the impact of the media coverage on the School District's asserted interests.

We balance these minor occurrences against Riley's interest in engaging in controversial, unique political discourse on his personal Twitter account. Those tweets are "entitled to special protection" given

their contribution to the public political discourse. *Snyder v. Phelps*, 562 U.S. 443, 452 (2011).

In light of these considerations, the School defendants fall short of justifying their adverse actions against the Riley plaintiffs as a matter of law at summary judgment. While there is a genuine issue of historical fact about the degree of controversy arising from the speech (i.e., the extent of actual and predicted disruption in the learning environment), the record as currently developed, viewed in the light most favorable to the Riley plaintiffs, *see Lake Wash. Sch. Dist.*, 947 F.3d at 625, does not justify the School defendants' adverse action.

On the other hand, these same considerations lead us to reject the Riley plaintiffs' argument that they are entitled to partial summary judgment on their claims against Elsasser and Nemer for damages. Taking the facts in the light most favorable to those defendants, *see id.*, there remains a genuine issue of material fact as to the amount of disruption to the School District arising from Riley's tweets.

Finally, we consider whether the School defendants can avoid liability by demonstrating that they would have taken the same adverse actions against the Riley plaintiffs absent Riley's tweets. *See Mt. Healthy*, 429 U.S. at 287. The School defendants have not done so. To the contrary, they have admitted that they took the action directly in response to parent concerns about Riley's speech. There is no genuine issue of disputed fact that the School defendants would not have cancelled the relationship with the Riley plaintiffs absent Riley's speech.

In light of this conclusion, we hold that the Riley plaintiffs have established that there is a genuine issue of material fact regarding whether the School defendants violated the Riley plaintiffs' First Amendment rights.

3

Independent from their argument that they were entitled to take adverse action against the Riley plaintiffs to avoid disruption pursuant to the *Pickering* balancing test, the School defendants raise the separate argument that they cannot be held liable for unconstitutional retaliation because their actions were protected government speech. We disagree. The government has broader authority to regulate its own speech, or speech that a reasonable observer may view as the government's own, *see, e.g.*, *Downs v. Los Angeles Unified Sch. Dist.*, 228 F.3d 1003, 1013–14 (9th Cir. 2000); *Johnson v. Poway Unified Sch. Dist.*, 658 F.3d 954, 969–70 (9th Cir. 2011), but not speech that cannot be reasonably viewed as coming from the government, *see Downs*, 228 F.3d at 1013, 1017.

To determine whether speech can be reasonably viewed as coming from the government, we look to non-exhaustive factors, including (i) who was directly responsible for the speech, (ii) who had access to the forum in which the speech occurred, (iii) who maintained editorial control over that forum, and (iv) the purpose of the forum. *See Downs*, 228 F.3d at 1011–12. Applying this framework, we have held that a school district did not violate a teacher's First Amendment right by preventing the teacher from posting alternative views on homosexuality on a

school-sponsored and school-maintained bulletin board. *See id.* at 1017. Nor did a school district violate the First Amendment by requiring a teacher to remove banners from his classroom that advocated the teacher's religion. *See Johnson*, 658 F.3d at 970; *see also Planned Parenthood v. Clark County School District*, 941 F.2d 817, 819, 829 (9th Cir. 1991) (en banc) (holding that a school district could decline to accept advertisements regarding abortion services in school publications because the school officials reasonably believed the advertisements may "put the school's imprimatur on one side of a controversial issue").

These principles are not implicated here. Although the information and speech Riley's Farm presents to school children may be deemed to be part of the school's curriculum and thus School District speech, the School defendants do not assert that the allegedly offensive tweets were made by or at Riley's Farm. All of the speech deemed offensive by the School District was made by Riley on his personal Twitter account. His tweets did not mention the School District or the field trips. There is no evidence here that a reasonable observer would view Riley's speech as the School District's speech. *See Planned Parenthood*, 941 F.2d at 829. Thus, even assuming the School District is correct that the selection of a field trip venue is protected government speech, the pedagogical concerns underlying the government-speech doctrine do not exist here because Riley was not speaking for, or on behalf of, the School District. *See Downs*, 228 F.3d at 1011–12.

C

Because there is a genuine issue of material fact regarding whether the School defendants violated the Riley plaintiffs' First Amendment rights (the first prong of the qualified immunity inquiry), we now turn to the second prong, whether the defendants violated a constitutional right that was clearly established at the time of the alleged violation. *See Brosseau v. Haugen*, 543 U.S. 194, 198 (2004). A government official "violates clearly established law when, at the time of the challenged conduct, the contours of a right are sufficiently clear that every reasonable official would have understood that what he is doing violates that right." *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011) (cleaned up). The "existing precedent must have placed the statutory or constitutional question beyond debate." *Kisela v. Hughes*, 138 S. Ct. 1148, 1152 (2018) (internal quotation marks omitted).

The right to be free from First Amendment retaliation cannot be framed as "the general right to be free from retaliation for one's speech." *Reichle v. Howards*, 566 U.S. 658, 665 (2012). Rather, the right must be defined at a more specific level tied to the factual and legal context of a given case. *See id.* The question whether a public employee or contractor "enjoyed a clearly established right to speak" depends on "whether the outcome of the *Pickering* balance so clearly favored [the plaintiff] that it would have been patently unreasonable for the [government] to conclude that the First Amendment did not protect his speech." *Brewster v. Bd. of Educ. of Lynwood Unified Sch. Dist.*, 149 F.3d 971, 980 (9th Cir. 1998). Not surprisingly, there will rarely be a case that

clearly establishes that the plaintiff is entitled to prevail under the fact-sensitive, context-specific balancing required by *Pickering*. *See id.* at 979–80.

Applying these principles here, and taking the facts in the light most favorable to the Riley plaintiffs, we ask whether in September 2018, when these events occurred, it was clearly established that a school district could not cease patronizing a company providing historical reenactments and other events for students because the company's principal shareholder had posted controversial tweets that led to parental complaints.[13] We conclude that there was no case that placed the constitutional inquiry here "beyond debate," *Kisela*, 138 S. Ct. at 1152, and therefore it was not clearly established that the School District's reaction to parental complaints and media attention arising from Riley's tweets was unconstitutional. Rather, the School defendants had a heightened interest, and thus more leeway, in taking action in response to the Riley plaintiffs' speech to prevent interruption to the school's

[13] We reject the Riley plaintiffs' framing of this question, as whether it is clearly established that "[w]hen a person has a pre-existing commercial relationship with a public agency," the "business patronage pursuant to that relationship [is] a 'valuable government benefit' which the agency may not take away based on the person's First Amendment [] protected speech." This framing is at too high a level of generality, and is not adequately adjusted to account for the School District's interests in avoiding disruption to its operations under the *Pickering* test. Although we agree that the facts of a prior case do not have to be identical to establish clearly established law, *see al-Kidd*, 563 U.S. at 741, "the clearly established law must be particularized to the facts of the case" at hand, *White v. Pauly*, 137 S. Ct. 548, 552 (2017) (internal quotation marks omitted).

operations. *See Pickering*, 391 U.S. at 570–73. Although it is clearly established that a government employer's pretextual fear of a potential disruption, *see Robinson*, 566 F.3d at 826, or a claim of imagined workplace disruption for which "there is no support," *Clairmont*, 632 F.3d at 1110, cannot outweigh the First Amendment interests of a government employee or contractor, here the record contains undisputed facts that Riley's tweets gave rise to actual parent and community complaints and media attention.

Because the right at issue was not clearly established, the School defendants are entitled to qualified immunity on the Riley plaintiffs' damages claims. We therefore affirm the district court's grant of summary judgment to all School defendants on the Riley plaintiffs' claim for damages.[14]

IV

We next turn to the Riley plaintiffs' claim for injunctive relief against the School defendants, which seeks to enjoin the School District's alleged ongoing policy barring future field trips to Riley's Farm. The Riley plaintiffs assert that the district court erred in granting summary judgment to the School defendants on this claim because there is a genuine issue of fact whether the School District maintains such policy.

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[14] We likewise affirm the dismissal of the Riley plaintiffs' request for punitive damages, because a court may not award punitive damages where compensatory damages cannot be awarded. *See Deland v. Old Republic Life Ins. Co.*, 758 F.2d 1331, 1339 n.4 (9th Cir. 1985).

"Although sovereign immunity bars money damages and other retrospective relief against a state or instrumentality of a state, it does not bar claims seeking prospective injunctive relief against state officials to remedy a state's ongoing violation of federal law." *Az. Students' Ass'n*, 824 F.3d at 865 (citing *Ex Parte Young*, 209 U.S. 123, 149–56 (1908)). To bring a claim for prospective injunctive relief, a plaintiff "must identify a practice, policy, or procedure that animates the constitutional violation at issue." *Id.* (citing *Hafer v. Melo*, 502 U.S. 21, 25 (1991)); *see also Monell v. N.Y.C. Dep't of Soc. Servs.*, 436 U.S. 658, 690 & n. 55 (1978).

To obtain injunctive relief for a violation of § 1983, a plaintiff must establish: "(1) actual success on the merits; (2) that it has suffered an irreparable injury; (3) that remedies available at law are inadequate; (4) that the balance of hardships justify a remedy in equity; and (5) that the public interest would not be disserved by a permanent injunction." *Edmo v. Corizon, Inc.*, 935 F.3d 757, 784 (9th Cir. 2019), *cert. denied*, 141 S. Ct. 610 (2020) (internal quotation marks omitted).

"[T]he deprivation of constitutional rights 'unquestionably constitutes irreparable injury.'" *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)). Thus, evidence of an ongoing constitutional violation (i.e., a policy or practice) satisfies the second element of the injunctive relief test. *See id.* Finally, "it is always in the public interest to prevent the violation of a party's constitutional rights." *Id.*

(quoting *Sammartano v. First Judicial District Court*, 303 F.3d 959, 974 (9th Cir. 2002)).

Applying this framework here, we conclude that the district court erred in dismissing the Riley plaintiffs' claim for injunctive relief. Because we have already concluded that there is genuine issue of material fact regarding whether the Riley plaintiffs have established a First Amendment violation, *see supra* at Section III.B.2, we must determine whether there is a genuine issue of material fact that the violation is ongoing, *see Az. Students' Ass'n*, 824 F.3d at 865.

The district court held that there was no ongoing constitutional violation as a matter of law because the School District had no "standing, future-looking prohibition" against future field trips to Riley's Farm. We disagree. Elsasser's testimony that the "guidance [requesting that no CUSD school attend Riley's Farm field trips] is still in place," is sufficient to create a genuine issue of material fact as to whether the Riley plaintiffs continue to suffer from an ongoing constitutional violation. The district court's statement that "[i]t would be improper . . . to reverse a policy which does not exist" failed to view the plain text of Elsasser's testimony in the light most favorable to the Riley plaintiffs.[15] Although the

[15] Moreover, the district court erred to the extent it held that the Riley plaintiffs did not have standing to seek injunctive relief because they were not in immediate danger of sustaining a future injury. *See City of Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983). Because there is a genuine dispute of material fact regarding whether the School defendants maintain an ongoing policy in violation of the Riley plaintiffs' First Amendment

School defendants dispute the existence of an ongoing unconstitutional policy, we have held that equity favors injunctive relief under such circumstances because a defendant "cannot be harmed by an order enjoining an action" it purportedly will not take. *Melendres*, 695 F.3d at 1002. And although the School defendants argue that "no District school has expressed a desire to attend Riley's Farm," and therefore "no further consideration of this issue has been necessary," that assertion does not contradict Elsasser's statement that the guidance remains in place.

The School defendants' argument that injunctive relief is not appropriate because parents have considerable influence on the School's choice of field trips, and therefore a different group of parents could decide to revisit the decision to continue patronizing Riley's Farm, does not alter our conclusion. If there is a policy preventing the School District from future patronage to Riley's Farm, the influence of parents on the decision-making process is beside the point. The policy would still be in place, and the Riley plaintiffs would continue to be subjected to it. Likewise, the fact that Elsasser testified that the School District is not currently booking field trips because of COVID-related concerns does not alter the conclusion that, once field trips resume, the School District would bar patronage to the Farm pursuant to the policy. Therefore, the district court erred in

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rights, and the "deprivation of constitutional rights unquestionably constitutes irreparable injury," *Melendres*, 695 F.3d at 1002 (internal quotation marks omitted), the Riley plaintiffs have standing to seek injunctive relief.

granting summary judgment in favor of the School defendants on the Riley plaintiffs' injunctive relief claim.

V

Finally, we address the School defendants' argument that the individual Board members are improper defendants in this suit because they played no part in the alleged constitutional violation, and therefore cannot be held liable as supervisors. Because the individual Board defendants are entitled to qualified immunity from the damages claim, *see supra* at Section III.C, we need only address whether those individuals are properly named defendants on the claim for injunctive relief.

A plaintiff seeking injunctive relief in a § 1983 action against the government "is not required to allege a named official's personal involvement in the acts or omissions constituting the alleged constitutional violation." *Colwell v. Bannister*, 763 F.3d 1060, 1070 (9th Cir. 2014) (citation omitted). Instead, "a plaintiff need only identify the law or policy challenged as a constitutional violation and name the official within the entity who can appropriately respond to injunctive relief." *Hartmann v. California Dep't of Corr. & Rehab.*, 707 F.3d 1114, 1127 (9th Cir. 2013) (citing *L.A. Cnty. v. Humphries*, 131 S. Ct. 447, 452, 454 (2010)). Thus, a plaintiff seeking injunctive relief for an ongoing First Amendment violation (e.g., a retaliatory policy) may sue individual board members of a public school system in their official capacities to correct the violation. *See Az. Students' Ass'n*, 824 F.3d at 865;

Freedom From Religion Found., Inc. v. Chino Valley Unified Sch. Dist. Bd. of Educ., 896 F.3d 1132, 1138 (9th Cir. 2018) (noting that California school boards are the governing body for the school district).

The Riley plaintiffs have done just that. They have sued the individual Board defendants in their official capacity, requesting prospective injunctive relief to remedy the School District's ongoing retaliatory policy. The parties agree that the Board members govern the School District. This is consistent with the authority granted to the Board under the California Education Code, which vests it with the authority to "prescribe and enforce rules not inconsistent with law." Cal. Educ. Code § 35010(a), (b); *see also Freedom From Religion Found., Inc.*, 896 F.3d at 1138. Should the Riley plaintiffs prevail on their First Amendment claim for injunctive relief, the Board defendants are proper individuals to remedy a policy that continues to animate the School District's ongoing constitutional violation. *See Az. Students' Ass'n*, 824 F.3d at 865.[16]

In sum, we affirm the district court's grant of qualified immunity on the Riley plaintiffs' claim for

[16] Defendant Bingham is no longer a CUSD Board member, and therefore has no legal authority to remedy any ongoing violation of law. We therefore order her dismissed from the claim for injunctive relief. The record does not indicate whether any other defendants have likewise ceased serving in an official capacity for the School District, and therefore should also be dismissed from the claim for injunctive relief. The district court may make this determination on remand.

damages, and reverse the court's grant of summary judgment on the claim for injunctive relief.[17]

AFFIRMED IN PART, REVERSED IN PART, and REMANDED.[18]

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[17] The Riley plaintiffs also appeal the district court's denial of their motion for reconsideration. We dismiss their appeal as moot with respect to the district court's grant of summary judgment on their injunctive relief claim. *See Ortiz v. City of Imperial*, 884 F.2d 1312, 1314 n.1 (9th Cir. 1989). We affirm the district court's denial of the Riley plaintiffs' motion to reconsider with respect to the district court's grant of summary judgment on the Riley plaintiffs' damages claims. *See id.*

[18] Each party shall bear its own costs on appeal.

APPENDIX B

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RILEY'S AMERICAN HERITAGE FARMS, a California corporation; JAMES PATRICK RILEY, an individual, *Plaintiffs-Appellants*, v. JAMES ELSASSER; STEVEN LLANUSA; HILARY LACONTE; BETH BINGHAM; NANCY TRESER OSGOOD; DAVID S. NEMER; ANN O'CONNOR; BRENDA HAMLETT, *Defendants-Appellees*, and CLAREMONT UNIFIED SCHOOL DISTRICT, *Defendant*.	No. 20-55999 D.C. No. 5:18-cv-02185-JGB-SHK OPINION

Appeal from the United States District Court
for the Central District of California
Jesus G. Bernal, District Judge, Presiding

Argued and Submitted August 31, 2021
Pasadena, California

Filed March 17, 2022

Before: Sandra S. Ikuta, Mark J. Bennett, and Ryan D. Nelson, Circuit Judges.

Opinion by Judge Ikuta

SUMMARY*[1]

Civil Rights

The panel affirmed in part and reversed in part the district court's summary judgment for public school defendants in an action brought pursuant to 42 U.S.C. § 1983 alleging First Amendment violations when the Claremont Unified School District severed its longstanding business relationship with plaintiffs, a company that provides field trip venues to school children and the principal shareholder of the company who made controversial tweets on his personal social media account.

Plaintiff James Patrick Riley is one of the principal shareholders of Riley's American Heritage Farms ("Riley's Farm"), which provides historical reenactments of American events and hosts apple

[*1] This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

picking. Between 2001 and 2017, schools within the Claremont Unified School District booked and attended field trips to Riley's Farm. In 2018, Riley used his personal Twitter account to comment on a range of controversial social and political topics. After some parents complained and a local newspaper published an article about Riley and his Twitter postings, the School District severed its business relationship with Riley's Farm. Patrick Riley and Riley's Farm brought suit against the School District, individual members of the school board and three school administrators (the "School defendants") alleging retaliation for protected speech.

In partially affirming the district court's summary judgment in favor of the School defendants, the panel held that although there was a genuine issue of material fact on the issue of whether the Riley plaintiffs' First Amendment rights had been violated, the individual School defendants were entitled to qualified immunity as to the damages claims because the right at issue was not clearly established when the conduct took place.

In reaching this conclusion, the panel first determined that the relationship between the Riley plaintiffs and the School District was analogous to those between the government and a government contractor and that the character of the services provided by the Riley plaintiffs justified the application of the framework established in *Pickering v. Bd. of Ed. of Twp. High Sch. Dist. 205*, 391 U.S. 563, 568 (1968). Applying the two-step burden-shifting approach for government contractors alleging

retaliation, the panel held that the plaintiffs had established a prima facie case of retaliation against the School defendants that could survive summary judgment. The panel held that there was no dispute that Riley engaged in expressive conduct, that some of the School defendants took an adverse action against Riley's Farm that caused it to lose a valuable government benefit and that those defendants were motivated to cancel the business relationship because of Riley's expressive conduct. The panel also held that there was sufficient evidence that the Board members had the requisite mental state to be liable for damages for the ongoing constitutional violation.

Because the Riley plaintiffs had carried their burden of making a prima facie case of retaliation, the burden shifted to the School defendants. The panel held that taking the evidence in the light most favorable to the Riley plaintiffs, the School defendants failed to establish that the School District's asserted interests in preventing disruption to their operations and curricular design because of parental complaints were so substantial that they outweighed Riley's free speech interests as a matter of law.

The panel rejected the School defendants' argument that they could not be held liable for unconstitutional retaliation because their actions were protected government speech. Even assuming that the selection of a field trip venue was protected government speech, the pedagogical concerns underlying the government-speech doctrine did not

exist here because Riley was not speaking for, or on behalf of, the School District.

The panel held that although there existed a genuine issue of material fact as to whether the School defendants violated the Riley plaintiffs' First Amendment rights, there was no case directly on point that would have clearly established that the School defendants' reaction to parental complaints and media attention arising from Riley's tweets was unconstitutional. The School defendants were therefore entitled to qualified immunity on the damages claim.

The panel held that the district court erred in dismissing the claims for injunctive relief which sought to enjoin the School District's alleged ongoing policy barring future field trips to Riley's Farm. The panel held that the testimony of the School District's superintendent was sufficient to create a genuine issue of material fact as to whether the Riley plaintiffs continue to suffer from an ongoing constitutional violation.

COUNSEL

Thomas J. Eastmond (argued) and David A. Robinson, Enterprise Counsel Group, ALC, Irvine, California; William J. Becker, Jr. and Jeremiah D. Graham, Freedom X, Los Angeles, California; for Plaintiffs-Appellants.

Daniel S. Modafferi (argued) and Golnar J. Fozi, Meyers Fozi & Dwork, LLP, Carlsbad, California, for Defendants-Appellees.

OPINION

IKUTA, Circuit Judge:

This case involves a school district that severed its longstanding business relationship with a company that provides field trip venues for public school children. The school district took this step after the principal shareholder of the field trip vendor made controversial tweets on his personal social media account, and some parents complained. In response to the school district's adverse action, the field trip vendor and its shareholder sued the responsible public school officials under 42 U.S.C. § 1983 for violating their First Amendment rights. We conclude that there is a genuine issue of material fact whether the plaintiffs' First Amendment rights have been violated, but the school officials are entitled to qualified immunity as to the plaintiffs' damages claims because the right at issue was not clearly established when the conduct took place. However, the district court erred in granting summary judgment to the school officials on the plaintiffs' claim for injunctive relief, because there is a genuine issue of material fact whether the school officials are maintaining an unconstitutional, retaliatory policy barring future patronage to the vendor.

I

James Patrick Riley is one of the principal shareholders of Riley's American Heritage Farms ("Riley's Farm").[2] Riley's Farm provides historical reenactments of events such as the American Revolution, the Civil War, and American colonial farm life for students on school field trips, and also hosts events like apple picking. During each year between 2001 and 2017, one or more schools within the Claremont Unified School District (referred to as CUSD or the "School District") booked and attended a field trip to Riley's Farm. The School District is governed by a publicly-elected, five-member Board of Education (the "Board"), and is managed on a day-to-day basis by its administrators.

As of August 2018, Riley and Riley's Farm maintained separate social media accounts, including accounts on Twitter. Riley used his personal Twitter account to comment on a range of controversial topics, including President Donald Trump's alleged relationship with Stormy Daniels, President Barack Obama's production deal with Netflix, Senator Elizabeth Warren's heritage, and Riley's opinions on gender identity. Some of Riley's controversial tweets included the following:

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

[2] We refer to Riley and Riley's Farm individually where appropriate, and collectively as the "Riley plaintiffs."

> right now. I'm running around; I'm treating the various desk lamps like mesquite campfires. You can probably hear it in Oklahoma. #ScotusPick
>
> - A friend saw an ice sculpture of Kirsten Gillibrand at a Democratic fundraiser. She actually looked more human that way - a bit more color in her cheeks.
>
> - So I'm planning a high school reunion and I just realized we may have been the last generation born with only two genders.
>
> - "Missing ISIS" Heartwarming story of a former Jihad fighter, now readjusting to life as a BLM protester.

Riley's tweets did not appear on any of Riley's Farm's social media accounts or web site. Nor did Riley's tweets reference Riley's Farm or anything related to the School District or school field trips in general.

In August 2018, a parent of a kindergarten student at Chaparral Elementary School (one of the schools within the School District) sent an email to her child's teacher, Michelle Wayson, regarding an upcoming field trip at Riley's Farm. The parent's email included screen shots of Riley's tweets, and stated "I do NOT feel comfortable with my son patronizing an establishment whose owner (and/or family/employees) might be inclined to direct bigoted opinions towards my child or other vulnerable

children in the group." Wayson forwarded the parent's email to the school principal, Ann O'Connor. Because all four of Chaparral's kindergarten classes were scheduled to attend an apple-picking tour at Riley's Farm in October 2018, O'Connor asked Wayson to discuss the parent's concern with the other three Chaparral kindergarten teachers and to determine whether alternative field trip venues would be more appropriate. Brenda Hamlett, the principal of Sumner Danbury Elementary School (also in the School District), reported that multiple parents subsequently asked her to excuse their children from attending field trips at Riley's Farm or choose an alternative field trip venue.

Around the same time, Lee Kane, a parent whose children had attended schools in CUSD, saw a Facebook post discussing Riley's tweets. In September 2018, Kane sent a copy of the Facebook post to David Nemer, one of the School District's board members, and expressed concern about the School District sending field trips to Riley's Farm "in light of a public controversy surrounding tweets" made by Riley.[3]

The same day, Nemer forwarded Kane's complaint to James Elsasser, the superintendent of the School District. Nemer told Elsasser: "There is concern on Facebook about some extremely

[3] Nemer says he also recalled "that other Claremont Unified School District residents and/or parents, whose names I do not recall, commented on that post, expressing similar concerns," though it is not clear whether they communicated directly with Nemer.

inappropriate and unacceptable tweets by the owner of an establishment in Oak Glen that has apparently been visited by CUSD field trips." In that same email, Nemer further described Riley's tweets as "obnoxious" and "bigoted." Nemer followed up his email to Elsasser with a second email stating, "I think many of our stakeholders would be uncomfortable with these tweets."[4]

Two days later, Elsasser and School District administrators met to discuss parent concerns regarding field trips to Riley's Farm. Elsasser asked the administrators to speak with the teachers at their schools to determine whether any of them wanted to continue patronizing Riley's Farm. O'Connor then emailed the Chaparral kindergarten teachers and instructed them to "find another alternative" for the field trip that would not give rise to parental complaints.

The following day, the *Redlands Daily Facts* (a local newspaper) published a news article about Riley and his Twitter posts. The article was titled: "These tweets sparked social media outcry against owner of Riley's Farm in Oak Glen." The article noted that some community members were disgusted by Riley's alleged white supremacist views espoused in his tweets, and that Riley's tweets had been shared over 1,300 times on Twitter.

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[4] At his deposition in this case, Elsasser later agreed that he considered some of Riley's comments to be "racist, sexist, or homophobic."

Because no administrator, teacher, or staff member expressed a desire to continue going to Riley's Farm, Julie Olesniewicz, the Assistant Superintendent for Educational Services, sent an email to the principals of each of the School District's elementary schools "asking that no CUSD school attend Riley's Farm field trips" and offering alternative options for the field trips. The parties dispute whether Olesniewicz's guidance is still in place."[5]

After Olesniewicz sent her email to the elementary school principals, Nemer sent an email to Elsasser asking, "Is there any followup information I can convey about the Rileys Farm issue?" Elsasser responded by email that "[a]ll schools that were scheduled to go to Riley's Farm that are operated by John Riley have been canceled."

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[5] " The Riley plaintiffs' assertion that Olesniewicz's guidance is still in place is based on Elsasser's testimony at his deposition:

> *Riley plaintiffs' counsel*: "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?"
>
> *Defendants' counsel*: "What did he say?"
>
> *Elsasser*: "The guidance is still in place. We've never revisited it."

In opposing the Riley plaintiffs' motion for partial summary judgment, defendants' counsel argued that Elsasser was merely clarifying opposing counsel's statement.

About a week later, on September 24, 2018, counsel for Riley's Farm (Thomas Eastmond) sent a letter to Elsasser and the individual board members, alleging that the School District had issued a policy forbidding teachers from taking field trips to Riley's Farm in retaliation for Riley's political posts. Alleging that this policy violated Riley's Farm's First Amendment rights, Eastmond's letter proposed terms of settlement. In a letter dated October 2, 2018, the District's general counsel denied that the District had issued a policy forbidding teachers from taking field trips to Riley's Farm. She asserted 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." The general counsel also stated that "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." Therefore, the general counsel rejected Eastmond's settlement proposals.[6]

On October 12, 2018, Riley and Riley's Farm filed an action for violation of their civil rights under 42 U.S.C. § 1983, alleging that the School District, individual members of the school board (Steven Llanusa, Hilary LaConte, Beth Bingham, Nancy Treser Osgood, and David Nemer), and three school

[6] The CUSD board members did not take part in the District's consideration of, or response to Eastmond's September 24, 2018 letter.

administrators (Elsasser, O'Connor, and Hamlett) violated the Riley plaintiffs' First Amendment rights by prohibiting teachers at Chaparral and Sumner Danbury Elementary Schools from patronizing Riley's Farm for school field trips, in retaliation for Riley's protected speech. The complaint sought both damages and injunctive relief against the defendants.

The district court dismissed the School District from the suit based on sovereign immunity.[7] The Riley plaintiffs moved for partial summary judgment on their claims against Elsasser and Nemer for damages. The School defendants moved for summary judgment as to all claims. The district court denied the Riley plaintiffs' motion for partial summary judgment and granted the School defendants' motions for summary judgment on the ground that they were entitled to qualified immunity. The Riley plaintiffs subsequently moved for reconsideration. *See* Fed. R. Civ. P. 59 and 60. In denying the motion, the court acknowledged that it erred in dismissing the claim for injunctive relief on the basis of qualified immunity, *see Pearson v. Callahan*, 555 U.S. 223, 242 (2009), but held the error was harmless because there was no evidence that the School defendants had a policy prohibiting future field trips to Riley's Farm.

II

The Riley plaintiffs appeal the district court's order granting summary judgment in favor of the

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[7] We refer to the remaining defendants individually where appropriate, and collectively as the "School defendants."

School defendants and its order denying their motion for partial summary judgment on their claims against Elsasser and Nemer for damages. We review a district court's decision on summary judgment de novo. *See L. F. v. Lake Wash. Sch. Dist. #414*, 947 F.3d 621, 625 (9th Cir. 2020). We may consider the district court's denial of the Riley plaintiffs' motion for partial summary judgment because it was "accompanied by a final order disposing of all issues before the district court" and "the record has been sufficiently developed to support meaningful review of the denied motion." *Brodheim v. Cry*, 584 F.3d 1262, 1274 (9th Cir. 2009) (quoting *Jones–Hamilton Co. v. Beazer Materials & Services, Inc.*, 973 F.2d 688, 694 n.2 (9th Cir. 1992)). In considering the appeal of a district court's disposition of cross motions for summary judgment, we view the evidence for each of the motions "in the light most favorable to the nonmoving party" for that motion and determine "whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law." *Lake Wash. Sch. Dist.*, 947 F.3d at 625 (quoting *Wallis v. Princess Cruises, Inc.*, 306 F.3d 827, 832 (9th Cir. 2002)).

III

We first consider the district court's grant of summary judgment in favor of the School defendants on the damages claim.

A government official is entitled to qualified immunity from a claim for damages unless the plaintiff raises a genuine issue of fact showing (1) "a

violation of a constitutional right," and (2) that the right was "clearly established at the time of [the] defendant's alleged misconduct." *Pearson*, 555 U.S. at 232 (internal quotation marks omitted). We may address these prongs in either order. *See id.* at 236. We begin with the first prong, and determine whether the Riley plaintiffs raised a genuine issue of material fact that their First Amendment rights were violated.[8]

A

The Riley plaintiffs claim that the School defendants retaliated against Riley and his company because he engaged in protected speech on his Twitter account. "'[A]s a general matter the First Amendment prohibits government officials from subjecting an individual to retaliatory actions' for engaging in protected speech." *Nieves v. Bartlett*, 139 S. Ct. 1715, 1722 (2019) (quoting *Hartman v. Moore*, 547 U.S. 250, 256 (2006)). "If an official takes adverse action against someone based on that forbidden motive, and non-retaliatory grounds are in fact insufficient to provoke the adverse consequences, the injured person may generally seek relief by bringing a First Amendment claim." *Id.* (internal quotation marks omitted).

Despite this general rule, the Supreme Court has recognized that the government may impose

[8] Because we must consider the merits of the Riley plaintiffs' constitutional claim in light of their request for injunctive relief, *see infra* at Section IV, judicial efficiency counsels us to begin with the first prong of the qualified immunity framework, *see Pearson*, 555 U.S. at 242.

"certain restraints on the speech of its employees" that would be "unconstitutional if applied to the general public." *City of San Diego v. Roe*, 543 U.S. 77, 80 (2004) (per curiam). As the Court explained, the government has "interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general." *Pickering v. Bd. of Ed. of Twp. High Sch. Dist. 205*, 391 U.S. 563, 568 (1968). "[T]he government's interest in achieving its goals as effectively and efficiently as possible is elevated from a relatively subordinate interest when it acts as sovereign to a significant one when it acts as employer." *Bd. of Cty. Comm'rs, Wabaunsee Cty., Kan. v. Umbehr*, 518 U.S. 668, 676 (1996) (quoting *Waters v. Churchill*, 511 U.S. 661, 675 (1994) (plurality opinion)). The government's power to impose such restrictions, however, is not unbridled. Government employees cannot "constitutionally be compelled to relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest." *Pickering*, 391 U.S. at 568.

In *Pickering*, the Court set out a framework to balance the competing interests between the government employer and employee. This framework (sometimes referred to as the *Pickering* balancing test) "requires a fact-sensitive and deferential weighing of the government's legitimate interests" as employer against the First Amendment rights of the employee. *Umbehr*, 518 U.S. at 677. Although the Court first applied this framework to government employees, it extended its application to retaliation

cases brought by government contractors because "the similarities between government employees and government contractors with respect to this issue are obvious." *Id.* at 674; *see also O'Hare Truck Serv., Inc. v. City of Northlake*, 518 U.S. 712, 721 (1996) (extending the *Pickering* framework to government contractors who had reason to believe their business with the government would continue "based on longstanding practice").

We have further extended the *Pickering* framework to a range of situations where "the relationship between the parties is analogous to that between an employer and employee" and "the rationale for balancing the government's interests in efficient performance of public services against public employees' speech rights applies." *Clairmont v. Sound Mental Health*, 632 F.3d 1091, 1101 (9th Cir. 2011). In this vein, we have held that the *Pickering* framework applied to a retaliation claim brought by a business vendor operating under a contract with the government for weatherization services, *Alpha Energy Savers v. Hansen*, 381 F.3d 917, 923 (9th Cir. 2004), to a claim by a domestic violence counselor employed by a private company that performed counseling services for a municipal court, *see Clairmont*, 632 F.3d at 1101–02, and to a claim by a volunteer probation officer, *Hyland v. Wonder*, 117 F.3d 405, 411 (9th Cir. 1997), *opinion amended on denial of reh'g*, 127 F.3d 1135 (9th Cir. 1997). By contrast, we have declined to apply the *Pickering* framework to retaliation claims brought by regulated entities, where the relationship between the plaintiff and the government was akin to that of a licensee-

licensor and bore no indicia of a typical employee-employer relationship. *See CarePartners, LLC v. Lashway*, 545 F.3d 867, 881–82 (9th Cir. 2008) (plaintiffs were owners and operators of state-licensed boarding homes); *Soranno's Gasco, Inc. v. Morgan*, 874 F.2d 1310, 1314–15 (9th Cir. 1989) (plaintiffs were sellers and distributors of petroleum operating under city permits).

If a plaintiff's retaliation claim is subject to the *Pickering* framework, a court applies a two-step, burden-shifting approach. *See Alpha Energy Savers*, 381 F.3d at 923. First, a plaintiff must establish a prima facie case of retaliation. This requires the plaintiff to show that "(1) it engaged in expressive conduct that addressed a matter of public concern; (2) the government officials took an adverse action against it; and (3) its expressive conduct was a substantial or motivating factor for the adverse action." *Id.* This final element of the prima facie case requires the plaintiff to show causation and the defendant's intent. Because § 1983 itself contains no intent requirement, we look to the underlying constitutional violation alleged. *See Daniels v. Williams*, 474 U.S. 327, 330 (1986). Where, as here, a plaintiff alleges First Amendment retaliation, the plaintiff must show that the government defendant "acted with a retaliatory motive." *Nieves*, 139 S. Ct. at 1722; *see also Heffernan v. City of Paterson*, 578 U.S. 266, 272 (2016) ("To win [a retaliation claim], the employee must prove an improper employer motive."). Put another way, a plaintiff must establish that the defendant was motivated (or intended) to take the

adverse action because of the plaintiff's expressive conduct. *See Nieves*, 139 S. Ct. at 1722.

If the plaintiff carries its burden of showing these three elements, the burden shifts to the government. *Alpha Energy Savers*, 381 F.3d at 923. The government can avoid liability in one of two ways. First, the government can demonstrate that its "legitimate administrative interests in promoting efficient service-delivery and avoiding workplace disruption" outweigh the plaintiff's First Amendment interests. *Id.* (citing *Pickering*, 391 U.S. at 568). Second, the government can show that it would have taken the same actions in the absence of the plaintiff's expressive conduct. *Id.* (citing *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977)). A plaintiff cannot establish unconstitutional retaliation "if the same decision would have been reached" absent the protected conduct, even if "protected conduct played a part, substantial or otherwise," in motivating the government's action. *Mt. Healthy*, 429 U.S. at 285 (internal quotations omitted).

B

We now turn to the question whether the Riley plaintiffs raised a genuine issue of material fact that their First Amendment rights were violated, and therefore the district court erred in granting summary judgment to the School defendants. We consider the facts in the light most favorable to the Riley plaintiffs. *See Lake Wash. Sch. Dist.*, 947 F.3d at 625.

1

To answer this question, we must first determine whether the *Pickering* framework applies to the Riley plaintiffs' claim of retaliation.[9] The Riley plaintiffs assert that the framework does not apply because their relationship to the School District was more akin to that of a private citizen than a government contractor. We disagree.

First, courts have frequently concluded that when a governmental entity outsources government services for performance by a private company, the relationship between the parties is analogous to that between the government and a government contractor. *See Clairmont*, 632 F.3d at 1101–02; *see also Umbehr*, 518 U.S. at 679; *O'Hare*, 518 U.S. at 714–15. As in *Clairmont*, where a municipal court relied on a private company to provide counseling services to probationers, *see* 632 F.3d at 1101–02, the School District here relied on Riley's Farm to provide educational services for public school students. Therefore, even though the record does not demonstrate that the Riley plaintiffs were categorized under California law as an "independent contractor," or that they had a written contract for services with

[9] We reject the Riley plaintiffs' argument that, because the School defendants did not file a protective cross appeal on the district court's holding, we are bound by the district court's finding that the *Pickering* framework does not apply to their First Amendment claim. An appellee may raise arguments that were rejected below without filing a cross-appeal. *See Rivero v. City and County of San Francisco*, 316 F.3d 857, 862 (9th Cir. 2002).

the School District, the relationship between the Riley plaintiffs and the School defendants is analogous to those we have recognized between the government and a government contractor. *See, e.g.*, *id.*; *Alpha Energy Savers*, 381 F.3d at 923.

Second, the rationale for balancing the government's interest in efficient performance of public service against the contractor's free speech rights is applicable here. *See Clairmont*, 632 F.3d at 1101–02. Because the Riley plaintiffs hosted field trips for students, the School District had an interest in ensuring that the services performed by Riley's Farm "were properly provided." *Id.* at 1102. Those interests included ensuring the students' safety and maintaining the School District's intended curricular design for the trips. We conclude that the character of the services provided by the Riley plaintiffs to the School District implicate the type of heightened government interests that the Court and our circuit have determined justify the application of the *Pickering* framework to a retaliation claim. *See Umbehr*, 518 U.S. at 674; *Clairmont*, 632 F.3d at 1101–02. The district court erred in holding to the contrary.

Having determined that the *Pickering* framework applies to the Riley plaintiffs' First Amendment claim, we now apply the two-step, burden-shifting approach for government contractors alleging retaliation. *See Umbehr*, 518 U.S. at 673; *Alpha Energy Savers*, 381 F.3d at 923.

We first consider whether the Riley plaintiffs have established a prima facie case of retaliation that can survive summary judgment. The first element of the prima facie case requires that the contractor engaged in expressive conduct that addressed a matter of public concern, a category of conduct that "lies at the heart of the First Amendment." *Lane v. Franks*, 573 U.S. 228, 235 (2014). There is no genuine issue of disputed fact that Riley engaged in such expressive conduct. Riley's tweets discussed matters that fall within the core of protected First Amendment activity including politics, religion, and issues of social relations. *See Janus v. Am. Fed'n of State, Cty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2476 (2018).

Nor is there a genuine issue of disputed fact that some of the School defendants took an adverse action against Riley's Farm. A plaintiff establishes the adverse action element of the prima facie case by demonstrating that the government action threatened or caused pecuniary harm, or deprived a plaintiff of some valuable government benefit. *Umbehr*, 518 U.S. at 674. This element is satisfied when the government cancels a for-profit contract with a contractor. *See Rivero*, 316 F.3d at 864. The cancellation of the field trips and prohibition of future field trips caused Riley's Farm to lose a valuable government benefit in the form of an expected pecuniary gain and an established business relationship with the School District. *See id.* at 865.

Finally, there is no genuine issue of disputed fact that some of the School defendants were

motivated to cancel the longstanding business relationship with the Riley plaintiffs because of Riley's expressive conduct. The field trips and the longstanding business relationship were cancelled only after Nemer and CUSD parents raised concerns about the content of Riley's tweets to Elsasser, Hamlett, and O'Connor. In his deposition, Elsasser admitted that the decision was made to appease parents based on their concern about the content of Riley's speech. When coupled with the temporal relationship between the expressive conduct and the defendants' collective opposition to and adverse action against the Riley plaintiffs, Elsasser's admission is sufficient to raise a prima facie showing of retaliatory intent. *See Alpha Energy Savers*, 381 F.3d at 929. And Nemer and Elsasser's description of Riley's speech ("inappropriate," "unacceptable, "obnoxious", "bigoted," "homophobic", and "racist") further demonstrates the School defendants' intent to punish the Riley plaintiffs because of Riley's protected conduct. *See id.* Thus, the Riley plaintiffs have made a prima facie case of First Amendment retaliation against Elsasser, Hamlett, O'Connor, and Nemer.

The School defendants argue that the Riley plaintiffs cannot satisfy the third element of the prima facie case because they have not shown that the defendants intended *to chill* Riley's speech. We disagree. A plaintiff need only show that the government intended "to retaliate against, obstruct, *or* chill the plaintiff's First Amendment rights." *Az. Students' Ass'n v. Az. Bd. of Regents*, 824 F.3d 858, 867 (9th Cir. 2016) (emphasis added). Such reprisal could include terminating the government's

relationship with the plaintiff entirely, rather than merely chilling the plaintiff's speech in the future. *See, e.g.*, *Alpha Energy Savers*, 381 F.3d at 922 (County's retaliatory acts included "'fixing it' so that [the plaintiff] would not receive further work from the County"); *Clairmont*, 632 F.3d at 1106 (evidence supported a finding that the municipal court pressured its contractor to fire the plaintiff because of his speech); *see also O'Brien v. Welty*, 818 F.3d 920, 932 (9th Cir. 2016); *Eng v. Cooley*, 552 F.3d 1062, 1074 (9th Cir. 2009) (holding that an employer's retaliation against an employee by "systematic investigations, prosecution, suspensions, and demotion" after the employee's protected conduct demonstrated that the conduct was a "substantial or motivating factor in the adverse employment action") (internal quotation marks omitted).

The prima facie case against Board members Llanusa, LaConte, Bingham, and Treser Osgood requires a different analysis. The Riley plaintiffs do not allege that these Board members took part in the cancellation of the field trips or the School District's severance of its relationship with the Riley plaintiffs. Nevertheless, because the Board members govern the School District, and have supervisory authority to stop the adverse actions against the Riley plaintiffs, they may incur liability due to their knowledge and acquiescence in a constitutional violation. *See OSU Student All. v. Ray*, 699 F.3d 1053, 1075 (9th Cir. 2012). In *OSU Student Alliance*, the publisher of a conservative school newspaper sued university officials under § 1983 on the ground that the school retaliated against it by limiting the distribution of its

newspaper on campus, pursuant to an unwritten policy. *See id.* at 1058–60. In addition to suing the director of facilities services, who had actually applied the policy to the newspaper, the plaintiff also sued the president and vice president of the university who had not been directly involved in enforcement of the policy, but had been informed about the application of the policy and done nothing to stop it. *See id.* at 1070–71. We held that "allegations of facts that demonstrate an immediate supervisor knew about the subordinate violating another's federal constitutional right to free speech, and acquiescence in that violation, suffice to state free speech violations under the First and Fourteenth Amendments." *Id.* at 1075. Therefore, the president and vice president of the university could be held liable under § 1983 for the continued enforcement of the retaliatory policy. *Id.* By contrast, the vice provost for student affairs, who merely received the "first email message complaining" about the policy, *id.* at 1078, and neither knew nor acquiesced in the decision to continue applying the policy to the paper, could not be held liable, *see id.* at 1078–79.

Here, taking the evidence in the light most favorable to the Riley plaintiffs, the Board members were made aware of the ongoing violation through Eastmond's demand letter, and then failed to remedy the policy. *See id.*[10] Under *OSU Student Alliance*, this

[10] We reject the Riley plaintiffs' argument that they need not establish the wrongdoer's retaliatory intent. The Court has repeatedly held that liability for retaliatory conduct requires proof of the defendant's retaliatory intent. *See Nieves*, 139 S. Ct.

is sufficient to create a prima facie case that the Board members had the requisite mental state to be held liable for damages resulting from the ongoing constitutional violation (i.e., the ongoing policy prohibiting future trips to Riley's Farm). *See id.* at 1075.

2

Because the Riley plaintiffs have carried their burden of making a prima facie case of retaliation, the burden shifts to the School defendants to demonstrate that they took the adverse action because they had "legitimate countervailing government interests [that were] sufficiently strong" under the *Pickering* balancing test to "outweigh the free speech interests at stake." *Umbehr*, 518 U.S. at 675, 685.[11]

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at 1722; *Heffernan*, 578 U.S. at 272. *O'Brien*, 818 F.3d at 932, cited by the Riley plaintiffs, required a plaintiff to prove that a defendant intended to (or was motivated to) take adverse action because of a plaintiff's protected conduct. *Blair v. Bethel School Dist.*, also cited by the Riley plaintiffs, is inapposite, because that case involved an elected official who was not shielded by the First Amendment from the ordinary "give-and-take of the political process." 608 F.3d 540, 543 (9th Cir. 2010).

[11] The question whether the government has met its burden of justifying its adverse action under *Pickering* is a question of law, but may raise "underlying factual disputes that need to be resolved by a fact-finder." *Moser v. Las Vegas Metro. Police Dep't*, 984 F.3d 900, 911 (9th Cir. 2021). A fact-finder's role in the *Pickering* analysis is limited to resolving those genuine disputes of historical fact necessary for the court to make its legal determination under *Pickering*. *See id.* Thus, a district court has discretion in "fashioning the most efficient way to resolve these

The government may demonstrate such legitimate countervailing interests by providing evidence that a contractor's expressive conduct disrupted the government workplace through, for example, interfering with the government services or operations provided by the contractor. *See Alpha Energy Savers*, 381 F.3d at 923. When asserting such an interest, the government "must demonstrate actual, material and substantial disruption, or reasonable predictions of disruption in the workplace." *Robinson v. York*, 566 F.3d 817, 824 (9th Cir. 2009) (internal quotation marks omitted). Evidence that actual disruption has already occurred in the workplace "will weigh more heavily against free speech." *Keyser v. Sacramento City Unified Sch. Dist.*, 265 F.3d 741, 749 n.2 (9th Cir. 2001). But "[t]he employer need not establish that the employee's conduct *actually* disrupted the workplace—'reasonable predictions of disruption' are sufficient." *Nichols v. Dancer*, 657 F.3d 929, 933 (9th Cir. 2011) (citation omitted). The government is more likely to meet its burden when an employee's disruptive conduct takes place in the workplace, compared to when the same conduct occurs "during the employee's free time away from the office." *Clairmont*, 632 F.3d at 1107 (citing *Connick v. Myers*, 461 U.S. 138, 153 (1983)); *see also Melzer v. Bd. of Educ. of City Sch. Dist. of City of New York*, 336 F.3d 185, 197 (2d Cir. 2003). While it "may rely on the possibility of future disruption," the government must support its claim that it reasonably predicted disruption "by some

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factual disputes" prior to its *Pickering* ruling (e.g., a special jury verdict form). *Id.*

evidence, not rank speculation or bald allegation." *Nichols*, 657 F.3d at 934.

Where public school officials assert that their interest in taking adverse action against a plaintiff was to avoid disruption to the school's operations and curricular design, courts consider whether students and parents have expressed concern that the plaintiff's conduct has disrupted the school's normal operations, or has eroded the public trust between the school and members of its community. *See Munroe v. Cent. Bucks Sch. Dist.*, 805 F.3d 454, 475–76 (3d Cir. 2015). Because schools act *in loco parentis* for students, *see Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 655 (1995), school officials can reasonably predict that parents and students will fear the influence of controversial conduct on the learning environment, *see Melzer*, 336 F.3d at 199. The disruption "created by parents can be fairly characterized as internal disruption to the operation of the school, a factor which may be accounted for in the balancing test and which may outweigh a public employee's rights." *Id.*

The government's evidence of disruption may be deemed substantial if parents are so concerned with controversial conduct that they choose (or threaten) to "remove their children from the school, thereby interrupting the children's education, impairing the school's reputation, and impairing educationally desirable interdependency and cooperation among parents, teachers, and administrators." *Id.* In this context, the Second Circuit held there was substantial disruption

justifying the government's adverse action against a public school teacher who was active in a pedophile association, where nearly 60 parents expressed concern that the teacher's controversial beliefs implicated the safety and well-being of the young students, and hundreds of students staged an assembly to share their views on the controversy. *See id.* at 191, 198–99. In particular, the court credited the school's claim that substantial disruption to its operations and its relationship with the parents arose from the parents' threats to remove children from school. *See id.* at 199. Despite explaining that the teacher's First Amendment interest in advocating for controversial political change was of the "highest value," *id.* at 198, the court held that the school's evidence of disruption justified its actions under the *Pickering* balancing test, *see id.* at 198–99. Likewise, the Third Circuit held that where a school received complaints from hundreds of parents about a teacher's blog that criticized her students, the school's assessment that the teacher's expression of disgust towards her students would disrupt her teaching duties and erode the trust between herself and her students (and their parents) counted as substantial disruption to justify terminating her. *See Munroe*, 805 F.3d at 473–74; *see also Craig v. Rich Twp. High Sch. Dist. 227*, 736 F.3d 1110, 1119–20 (7th Cir. 2013) (holding that the government had a legitimate interest in preventing disruption arising from parent complaints about a school guidance counselor who wrote a hyper-sexualized advice book for women and dedicated the book to his students.).

Applying this framework here, and taking the evidence in the light most favorable to the Riley plaintiffs, the School defendants have failed to establish that the School District's asserted interests in preventing disruption to their operations and curricular design because of parental complaints were so substantial that they outweighed Riley's free speech interests as a matter of law.

First, we give less weight to the government's concerns about the disruptive impact of speech outside the workplace context. *See Rankin v. McPherson*, 483 U.S. 378, 388–89 (1987); *Clairmont*, 632 F.3d at 1107. Riley's controversial tweets were made on his personal Twitter account, and did not mention or reference the School District or field trips to Riley's Farm in general. There are no allegations that Riley made (or planned to make) any controversial statements during a school field trip; indeed, there are no allegations that he interacted at all with the students during the field trips. Although Riley's tweets became associated with the School District due to some local media attention and posts on Facebook, taking the evidence in the light most favorable to the Riley plaintiffs, the attenuated relationship between Riley's controversial speech and the field trips themselves weighs against the School District's asserted interest in preventing disruption to its operations and curricular design.

Nor has the school demonstrated any actual disruption to its operations arising from Riley's speech. *See Keyser*, 265 F.3d at 749. The School defendants have provided the substance of two

complaints from parents, only one of which involved a student currently enrolled in the School District.[12] While Hamlett asserted that multiple parents asked the Sumner Danbury principal to either excuse their children from the field trips or choose an alternative venue, there is no evidence regarding the number of parents or the nature of those complaints. This is far afield from cases where the government gave weight to hundreds of parent and student complaints. *See Melzer*, 336 F.3d at 190–91 (record showed that nearly 60 parents and hundreds of students complained about the teacher's proximity to students); *Munroe*, 805 F.3d at 473–74 (school received complaints about teacher from hundreds of parents).

Likewise, the School defendants have failed to provide evidence of likely future disruption that would entitle them to summary judgment as a matter of law. *See Nichols*, 657 F.3d at 935. Unlike the evidence in *Meltzer*, where hundreds of parents threatened to remove their children from school, the record here shows only a handful of parent requests that a child be excused from a single field trip. Such requests do not evidence the substantial disruption that may arise from a large number of parents threatening to remove their children from school.

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[12] Moreover, there is a dispute whether that child was even scheduled to attend a field trip to Riley's Farm, or whether the parent had confused Riley's Farm with another, unrelated apple-picking venue with a similar name.

Although evidence that the media or broader community has taken an interest in the plaintiff's conduct may also weigh in favor of the government's assertion of disruption, *see Moser*, 984 F.3d at 909–10, the sparse media attention to Riley's tweets demonstrated in the record does not weigh in favor of the School defendants. The *Redlands Daily Facts*'s article about Riley's tweets noted that there was a "social media outcry" against Riley's Farm, and reported that Riley's tweets had been shared some 1,300 times. But there is no evidence in the record that Riley's tweets were covered by any other newspapers or media, and no indication that the tweets received nationwide attention. *Compare Munroe*, 805 F.3d at 462–63 (noting that the teacher's controversial blog post was reported by the Huffington Post, and the teacher "appeared on ABC, CBS, NBC, CNN, Fox News, and other television stations," and was interviewed by "several print news sources, including the Associated Press, Reuters, *Time Magazine*, and the *Philadelphia Inquirer*"). Although the School defendants presented evidence that a number of district residents or parents commented on the Facebook post discussing Riley's tweets, this evidence provides little support, as the School defendants did not specify the nature or number of those comments. The attenuated relationship between the content of the tweets and Riley's lack of involvement on the curricular aspects of the field trip diminish the impact of the media coverage on the School District's asserted interests.

We balance these minor occurrences against Riley's interest in engaging in controversial, unique

political discourse on his personal Twitter account. Those tweets are "entitled to special protection" given their contribution to the public political discourse. *Snyder v. Phelps*, 562 U.S. 443, 452 (2011).

In light of these considerations, the School defendants fall short of justifying their adverse actions against the Riley plaintiffs as a matter of law at summary judgment. While there is a genuine issue of historical fact about the degree of controversy arising from the speech (i.e., the extent of actual and predicted disruption in the learning environment), the record as currently developed, viewed in the light most favorable to the Riley plaintiffs, *see Lake Wash. Sch. Dist.*, 947 F.3d at 625, does not justify the School defendants' adverse action.

On the other hand, these same considerations lead us to reject the Riley plaintiffs' argument that they are entitled to partial summary judgment on their claims against Elsasser and Nemer for damages. Taking the facts in the light most favorable to those defendants, *see id.*, there remains a genuine issue of material fact as to the amount of disruption to the School District arising from Riley's tweets.

Finally, we consider whether the School defendants can avoid liability by demonstrating that they would have taken the same adverse actions against the Riley plaintiffs absent Riley's tweets. *See Mt. Healthy*, 429 U.S. at 287. The School defendants have not done so. To the contrary, they have admitted that they took the action directly in response to parent concerns about Riley's speech. There is no

genuine issue of disputed fact that the School defendants would not have cancelled the relationship with the Riley plaintiffs absent Riley's speech.

In light of this conclusion, we hold that the Riley plaintiffs have established that there is a genuine issue of material fact regarding whether the School defendants violated the Riley plaintiffs' First Amendment rights.

3

Independent from their argument that they were entitled to take adverse action against the Riley plaintiffs to avoid disruption pursuant to the *Pickering* balancing test, the School defendants raise the separate argument that they cannot be held liable for unconstitutional retaliation because their actions were protected government speech. We disagree. The government has broader authority to regulate its own speech, or speech that a reasonable observer may view as the government's own, *see, e.g.*, *Downs v. Los Angeles Unified Sch. Dist.*, 228 F.3d 1003, 1013–14 (9th Cir. 2000); *Johnson v. Poway Unified Sch. Dist.*, 658 F.3d 954, 969–70 (9th Cir. 2011), but not speech that cannot be reasonably viewed as coming from the government, *see Downs*, 228 F.3d at 1013, 1017.

To determine whether speech can be reasonably viewed as coming from the government, we look to non-exhaustive factors, including (i) who was directly responsible for the speech, (ii) who had access to the forum in which the speech occurred, (iii) who maintained editorial control over that forum, and

(iv) the purpose of the forum. *See Downs*, 228 F.3d at 1011–12. Applying this framework, we have held that a school district did not violate a teacher's First Amendment right by preventing the teacher from posting alternative views on homosexuality on a school-sponsored and school-maintained bulletin board. *See id.* at 1017. Nor did a school district violate the First Amendment by requiring a teacher to remove banners from his classroom that advocated the teacher's religion. *See Johnson*, 658 F.3d at 970; *see also Planned Parenthood v. Clark County School District*, 941 F.2d 817, 819, 829 (9th Cir. 1991) (en banc) (holding that a school district could decline to accept advertisements regarding abortion services in school publications because the school officials reasonably believed the advertisements may "put the school's imprimatur on one side of a controversial issue").

These principles are not implicated here. Although the information and speech Riley's Farm presents to school children may be deemed to be part of the school's curriculum and thus School District speech, the School defendants do not assert that the allegedly offensive tweets were made by or at Riley's Farm. All of the speech deemed offensive by the School District was made by Riley on his personal Twitter account. His tweets did not mention the School District or the field trips. There is no evidence here that a reasonable observer would view Riley's speech as the School District's speech. *See Planned Parenthood*, 941 F.2d at 829. Thus, even assuming the School District is correct that the selection of a field trip venue is protected government speech, the

pedagogical concerns underlying the government-speech doctrine do not exist here because Riley was not speaking for, or on behalf of, the School District. *See Downs*, 228 F.3d at 1011–12.

C

Because there is a genuine issue of material fact regarding whether the School defendants violated the Riley plaintiffs' First Amendment rights (the first prong of the qualified immunity inquiry), we now turn to the second prong, whether the defendants violated a constitutional right that was clearly established at the time of the alleged violation. *See Brosseau v. Haugen*, 543 U.S. 194, 198 (2004). A government official "violates clearly established law when, at the time of the challenged conduct, the contours of a right are sufficiently clear that every reasonable official would have understood that what he is doing violates that right." *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011) (cleaned up). The "existing precedent must have placed the statutory or constitutional question beyond debate." *Kisela v. Hughes*, 138 S. Ct. 1148, 1152 (2018) (internal quotation marks omitted).

The right to be free from First Amendment retaliation cannot be framed as "the general right to be free from retaliation for one's speech." *Reichle v. Howards*, 566 U.S. 658, 665 (2012). Rather, the right must be defined at a more specific level tied to the factual and legal context of a given case. *See id.* Where the plaintiff is a public employee or contractor, existing precedent must establish that the plaintiff's

free speech rights outweighed the government employer's legitimate interests as a matter of law. The question whether a public employee or contractor "enjoyed a clearly established right to speak" depends on "whether the outcome of the *Pickering* balance so clearly favored [the plaintiff] that it would have been patently unreasonable for the [government] to conclude that the First Amendment did not protect his speech." *Brewster v. Bd. of Educ. of Lynwood Unified Sch. Dist.*, 149 F.3d 971, 980 (9th Cir. 1998). Not surprisingly, there will rarely be a case that clearly establishes that the plaintiff is entitled to prevail under the fact-sensitive, context-specific balancing required by *Pickering*. *See id.* at 979–80.

Applying these principles here, we ask whether in September 2018, when these events occurred, it was clearly established that a school district could not cease patronizing a company providing historical reenactments and other events for students because the company's principal shareholder had posted controversial tweets that led to parental complaints.[13]

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[13] We reject the Riley plaintiffs' framing of this question, as whether it is clearly established that "[w]hen a person has a pre-existing commercial relationship with a public agency," the "business patronage pursuant to that relationship [is] a 'valuable government benefit' which the agency may not take away based on the person's First Amendment [] protected speech." This framing is at too high a level of generality, and is not adequately adjusted to account for the School District's interests in avoiding disruption to its operations under the *Pickering* test. Although we agree that the facts of a prior case do not have to be identical to establish clearly established law, *see al-Kidd*, 563 U.S. at 741, "the clearly established law must

We conclude that there was no case directly on point that would have clearly established that the School District's reaction to parental complaints and media attention arising from Riley's tweets was unconstitutional. Rather, the School defendants had a heightened interest, and thus more leeway, in taking action in response to the Riley plaintiffs' speech to prevent interruption to the school's operations. *See Pickering*, 391 U.S. at 570–73. The Riley plaintiffs have not pointed to any opinion that placed the constitutional inquiry here "beyond debate." *Kisela*, 138 S.Ct. at 1152.

Because the right at issue was not clearly established, the School defendants are entitled to qualified immunity on the Riley plaintiffs' damages claims. We therefore affirm the district court's grant of summary judgment to all School defendants on the Riley plaintiffs' claim for damages.[14]

IV

We next turn to the Riley plaintiffs' claim for injunctive relief against the School defendants, which seeks to enjoin the School District's alleged ongoing policy barring future field trips to Riley's Farm. The Riley plaintiffs assert that the district court erred in

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be particularized to the facts of the case" at hand, *White v. Pauly*, 137 S. Ct. 548, 552 (2017) (internal quotation marks omitted).

[14] We likewise affirm the dismissal of the Riley plaintiffs' request for punitive damages, because a court may not award punitive damages where compensatory damages cannot be awarded. *See Deland v. Old Republic Life Ins. Co.*, 758 F.2d 1331, 1339 n.4 (9th Cir. 1985).

granting summary judgment to the School defendants on this claim because there is a genuine issue of fact whether the School District maintains such policy.

"Although sovereign immunity bars money damages and other retrospective relief against a state or instrumentality of a state, it does not bar claims seeking prospective injunctive relief against state officials to remedy a state's ongoing violation of federal law." *Az. Students' Ass'n*, 824 F.3d at 865 (citing *Ex Parte Young*, 209 U.S. 123, 149–56 (1908)). To bring a claim for prospective injunctive relief, a plaintiff "must identify a practice, policy, or procedure that animates the constitutional violation at issue." *Id.* (citing *Hafer v. Melo*, 502 U.S. 21, 25 (1991)); *see also Monell v. N.Y.C. Dep't of Soc. Servs.*, 436 U.S. 658, 690 & n. 55 (1978).

To obtain injunctive relief for a violation of § 1983, a plaintiff must establish: "(1) actual success on the merits; (2) that it has suffered an irreparable injury; (3) that remedies available at law are inadequate; (4) that the balance of hardships justify a remedy in equity; and (5) that the public interest would not be disserved by a permanent injunction." *Edmo v. Corizon, Inc.*, 935 F.3d 757, 784 (9th Cir. 2019), *cert. denied*, 141 S. Ct. 610 (2020) (internal quotation marks omitted).

"[T]he deprivation of constitutional rights 'unquestionably constitutes irreparable injury.'" *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)). Thus, evidence of an ongoing constitutional

violation (i.e., a policy or practice) satisfies the second element of the injunctive relief test. *See id.* Finally, "it is always in the public interest to prevent the violation of a party's constitutional rights." *Id.* (quoting *Sammartano v. First Judicial District Court*, 303 F.3d 959, 974 (9th Cir. 2002)).

Applying this framework here, we conclude that the district court erred in dismissing the Riley plaintiffs' claim for injunctive relief. Because we have already concluded that there is genuine issue of material fact regarding whether the Riley plaintiffs have established a First Amendment violation, *see supra* at Section III.B.2, we must determine whether there is a genuine issue of material fact that the violation is ongoing, *see Az. Students' Ass'n*, 824 F.3d at 865.

The district court held that there was no ongoing constitutional violation as a matter of law because the School District had no "standing, future-looking prohibition" against future field trips to Riley's Farm. We disagree. Elsasser's testimony that the "guidance [requesting that no CUSD school attend Riley's Farm field trips] is still in place," is sufficient to create a genuine issue of material fact as to whether the Riley plaintiffs continue to suffer from an ongoing constitutional violation. The district court's statement that "[i]t would be improper . . . to reverse a policy which does not exist" failed to view the plain text of Elsasser's testimony in the light most

favorable to the Riley plaintiffs.[15] Although the School defendants dispute the existence of an ongoing unconstitutional policy, we have held that equity favors injunctive relief under such circumstances because a defendant "cannot be harmed by an order enjoining an action" it purportedly will not take. *Melendres*, 695 F.3d at 1002. And although the School defendants argue that "no District school has expressed a desire to attend Riley's Farm," and therefore "no further consideration of this issue has been necessary," that assertion does not contradict Elsasser's statement that the guidance remains in place.

The School defendants' argument that injunctive relief is not appropriate because parents have considerable influence on the School's choice of field trips, and therefore a different group of parents could decide to revisit the decision to continue patronizing Riley's Farm, does not alter our conclusion. If there is a policy preventing the School District from future patronage to Riley's Farm, the influence of parents on the decision-making process is

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[15] Moreover, the district court erred to the extent it held that the Riley plaintiffs did not have standing to seek injunctive relief because they were not in immediate danger of sustaining a future injury. *See City of Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983). Because there is a genuine dispute of material fact regarding whether the School defendants maintain an ongoing policy in violation of the Riley plaintiffs' First Amendment rights, and the "deprivation of constitutional rights unquestionably constitutes irreparable injury," *Melendres*, 695 F.3d at 1002 (internal quotation marks omitted), the Riley plaintiffs have standing to seek injunctive relief.

beside the point. The policy would still be in place, and the Riley plaintiffs would continue to be subjected to it. Likewise, the fact that Elsasser testified that the School District is not currently booking field trips because of COVID-related concerns does not alter the conclusion that, once field trips resume, the School District would bar patronage to the Farm pursuant to the policy. Therefore, the district court erred in granting summary judgment in favor of the School defendants on the Riley plaintiffs' injunctive relief claim.

V

Finally, we address the School defendants' argument that the individual Board members are improper defendants in this suit because they played no part in the alleged constitutional violation, and therefore cannot be held liable as supervisors. Because the individual Board defendants are entitled to qualified immunity from the damages claim, *see supra* at Section III.C, we need only address whether those individuals are properly named defendants on the claim for injunctive relief.

A plaintiff seeking injunctive relief in a § 1983 action against the government "is not required to allege a named official's personal involvement in the acts or omissions constituting the alleged constitutional violation." *Colwell v. Bannister*, 763 F.3d 1060, 1070 (9th Cir. 2014) (citation omitted). Instead, "a plaintiff need only identify the law or policy challenged as a constitutional violation and name the official within the entity who can

appropriately respond to injunctive relief." *Hartmann v. California Dep't of Corr. & Rehab.*, 707 F.3d 1114, 1127 (9th Cir. 2013) (citing *L.A. Cnty. v. Humphries*, 131 S. Ct. 447, 452, 454 (2010)). Thus, a plaintiff seeking injunctive relief for an ongoing First Amendment violation (e.g., a retaliatory policy) may sue individual board members of a public school system in their official capacities to correct the violation. *See Az. Students' Ass'n*, 824 F.3d at 865; *Freedom From Religion Found., Inc. v. Chino Valley Unified Sch. Dist. Bd. of Educ.*, 896 F.3d 1132, 1138 (9th Cir. 2018) (noting that California school boards are the governing body for the school district).

The Riley plaintiffs have done just that. They have sued the individual Board defendants in their official capacity, requesting prospective injunctive relief to remedy the School District's ongoing retaliatory policy. The parties agree that the Board members govern the School District. This is consistent with the authority granted to the Board under the California Education Code, which vests it with the authority to "prescribe and enforce rules not inconsistent with law." Cal. Educ. Code § 35010(a), (b); *see also Freedom From Religion Found., Inc.*, 896 F.3d at 1138. Should the Riley plaintiffs prevail on their First Amendment claim for injunctive relief, the Board defendants are proper individuals to remedy a policy that continues to animate the School District's

ongoing constitutional violation. *See Az. Students' Ass'n*, 824 F.3d at 865.[16]

In sum, we affirm the district court's grant of qualified immunity on the Riley plaintiffs' claim for damages, and reverse the court's grant of summary judgment on the claim for injunctive relief.[17]

AFFIRMED IN PART, REVERSED IN PART, and REMANDED.[18]

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[16] Defendant Bingham is no longer a CUSD Board member, and therefore has no legal authority to remedy any ongoing violation of law. We therefore order her dismissed from the claim for injunctive relief. The record does not indicate whether any other defendants have likewise ceased serving in an official capacity for the School District, and therefore should also be dismissed from the claim for injunctive relief. The district court may make this determination on remand.

[17] The Riley plaintiffs also appeal the district court's denial of their motion for reconsideration. We dismiss their appeal as moot with respect to the district court's grant of summary judgment on their injunctive relief claim. *See Ortiz v. City of Imperial*, 884 F.2d 1312, 1314 n.1 (9th Cir. 1989). We affirm the district court's denial of the Riley plaintiffs' motion to reconsider with respect to the district court's grant of summary judgment on the Riley plaintiffs' damages claims. *See id.*

[18] Each party shall bar its own costs on appeal.

United States Court of Appeals for the Ninth Circuit

Office of the Clerk
95 Seventh Street
San Francisco, CA 94103

Information Regarding Judgment and Post-Judgment Proceedings

Judgment

- This Court has filed and entered the attached judgment in your case. Fed. R. App. P. 36. Please note the filed date on the attached decision because all of the dates described below run from that date, not from the date you receive this notice.

Mandate (Fed. R. App. P. 41; 9th Cir. R. 41-1 & -2)

- The mandate will issue 7 days after the expiration of the time for filing a petition for rehearing or 7 days from the denial of a petition for rehearing, unless the Court directs otherwise. To file a motion to stay the mandate, file it electronically via the appellate ECF system or, if you are a pro se litigant or an attorney with an exemption from using appellate ECF, file one original motion on paper.

Petition for Panel Rehearing (Fed. R. App. P. 40; 9th Cir. R. 40-1) Petition for Rehearing En Banc (Fed. R. App. P. 35; 9th Cir. R. 35-1 to -3)

(1) A. Purpose (Panel Rehearing):

- A party should seek panel rehearing only if one or more of the following grounds exist:
  - ► A material point of fact or law was overlooked in the decision;
  - ► A change in the law occurred after the case was submitted which appears to have been overlooked by the panel; or
  - ► An apparent conflict with another decision of the Court was not addressed in the opinion.
- Do not file a petition for panel rehearing merely to reargue the case.

B. Purpose (Rehearing En Banc)

- A party should seek en banc rehearing only if one or more of the following grounds exist:
  - ► Consideration by the full Court is necessary to secure or maintain uniformity of the Court's decisions; or
  - ► The proceeding involves a question of exceptional importance; or
  - ► The opinion directly conflicts with an existing opinion by another court of appeals or the Supreme Court and substantially affects a rule of national application in which there is an overriding need for national uniformity.

(2) Deadlines for Filing:

- A petition for rehearing may be filed within 14 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the United States or an agency or officer thereof is a party in a civil case, the time for filing a petition for rehearing is 45 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the mandate has issued, the petition for rehearing should be accompanied by a motion to recall the mandate.
- *See* Advisory Note to 9th Cir. R. 40-1 (petitions must be received on the due date).
- An order to publish a previously unpublished memorandum disposition extends the time to file a petition for rehearing to 14 days after the date of the order of publication or, in all civil cases in which the United States or an agency or officer thereof is a party, 45 days after the date of the order of publication. 9th Cir. R. 40-2.

(3) Statement of Counsel

- A petition should contain an introduction stating that, in counsel's judgment, one or more of the situations described in the "purpose" section above exist. The points to be raised must be stated clearly.

(4) **Form & Number of Copies (9th Cir. R. 40-1; Fed. R. App. P. 32(c)(2))**

- The petition shall not exceed 15 pages unless it complies with the alternative length limitations of 4,200 words or 390 lines of text.
- The petition must be accompanied by a copy of the panel's decision being challenged.
- A response, when ordered by the Court, shall comply with the same length limitations as the petition.
- If a pro se litigant elects to file a form brief pursuant to Circuit Rule 28-1, a petition for panel rehearing or for rehearing en banc need not comply with Fed. R. App. P. 32.
- The petition or response must be accompanied by a Certificate of Compliance found at Form 11, available on our website at www.ca9.uscourts.gov under *Forms*.
- You may file a petition electronically via the appellate ECF system. No paper copies are required unless the Court orders otherwise. If you are a pro se litigant or an attorney exempted from using the appellate ECF system, file one original petition on paper. No additional paper copies are required unless the Court orders otherwise.

Bill of Costs (Fed. R. App. P. 39, 9th Cir. R. 39-1)

- The Bill of Costs must be filed within 14 days after entry of judgment.
- See Form 10 for additional information, available on our website at www.ca9.uscourts.gov under *Forms*.

Attorneys Fees

- Ninth Circuit Rule 39-1 describes the content and due dates for attorneys fees applications.
- All relevant forms are available on our website at www.ca9.uscourts.gov under *Forms* or by telephoning (415) 355-7806.

Petition for a Writ of Certiorari

- Please refer to the Rules of the United States Supreme Court at www.supremecourt.gov

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- Please check counsel listing on the attached decision.
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  - ► Thomson Reuters; 610 Opperman Drive; PO Box 64526; Eagan, MN 55123 (Attn: Maria Evangelista (maria.b.evangelista@tr.com));
  - ► and electronically file a copy of the letter via the appellate ECF system by using "File Correspondence to Court," or if you are an attorney exempted from using the appellate ECF system, mail the Court one copy of the letter.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 10. Bill of Costs

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APPENDIX C

U.S. Const. amend. I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. amend. XIV, secs. 1, 5

Sec. 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Sec. 5. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

42 U.S.C. § 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

APPENDIX D

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

MAY 09 2022

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

RILEY'S AMERICAN HERITAGE FARMS, a California corporation and JAMES PATRICK RILEY, an individual, Plaintiffs - Appellants, v. JAMES ELSASSER; et al., Defendants - Appellees, and CLAREMONT UNIFIED SCHOOL DISTRICT, Defendant.	No. 20-55999 D.C. No. 5:18-cv-02185-JGB-SHK U.S. District Court for Central California, Riverside **MANDATE**

The judgment of this Court, entered March 17, 2022, takes effect this date.

This constitutes the formal mandate of this Court issued pursuant to Rule 41(a) of the Federal Rules of Appellate Procedure.

FOR THE COURT:

MOLLY C. DWYER
CLERK OF COURT

By: Nixon Antonio Callejas Morales
Deputy Clerk
Ninth Circuit Rule 27-7