William J. Becker, Jr., Esq. (SBN: 134545)
Bill@FreedomXLaw.com
FREEDOM X
11500 Olympic Blvd., Suite 400
Los Angeles, California 90064
Telephone: (310) 636-1018

Counsel for Plaintiffs

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
EASTERN DIVISION

RILEY'S AMERICAN HERITAGE FARMS, a California corporation, et al.,

Plaintiffs,

vs.

CLAREMONT UNIFIED SCHOOL DISTRICT, et al.,

Defendants.

Case No.: 5:18-cv-02185-JGB-SHK

Hon. Jesus G. Bernal

PLAINTIFFS' OPPOSITION TO MOTION FOR SUMMARY JUDGMENT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

Date: May 8, 2023
Time: 9:00 a.m.
Ctrm: 1

Compl. Filed: October 12, 2018
Trial Date: None set

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I. INTRODUCTION

This case is not moot. Plaintiffs James P. Riley ("Riley") and Riley's American Heritage Farms ("Riley's Farm") (collectively "Plaintiffs") have a reasonable expectation, based on Defendants' past conduct and loopholes in their newly-adjusted policy, that they will again suffer a deprivation of their First Amendment rights. This case therefore presents an actual, ongoing controversy because the conduct giving rise to it is capable of repetition, yet evading review. Accordingly, Plaintiffs seek prospective injunctive relief to restrain the Claremont Defendants from retaliating against them for exercising their constitutional right to free speech in the future.

In its opinion on appeal of the first summary judgment motion in this action, the Ninth Circuit declared the existence of an ongoing discriminatory policy foreclosing summary judgment as to prospective injunctive relief ("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."). *Riley's Am. Heritage Farms v. Elsasser*, 32 F.4th 707, 731 (9th Cir. 2022). In response to the Ninth Circuit's finding, the Claremont Defendants now hope to close this loophole and moot this case by replacing the ongoing unwritten policy, or "guidance," with a written policy, BP 6153, purporting to eliminate any "current policy … barring or discouraging field trips to Riley's Farm." (Def.'s Br., 8:2-3) (emphasis added).

Notwithstanding the new policy's intended goals, Defendants have failed to render this action moot. First, the new policy lacks any objective safeguards preventing teachers or administrators from subjectively embargoing Riley's Farm. Second, the new policy fails to restrain Defendants from using insubstantial projected "disruption" improperly as a pretext for taking adverse action against vendors like Riley's Farm based on their speech. Third, the District's resolution

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purporting to "reaffirm" a lack of a policy barring Riley's Farm field trips does not have the force of law. Finally, the discretionary executive "instructions" purported to have been issued by the District's Superintendent, James Elsasser, do not sufficiently "entrench" a reversal of the District's policy to ensure that the unlawful policy cannot recur.

II. SUMMARY OF FACTS

On June 8, 2020, Defendants filed a motion for summary judgment. Pl.'s Statement of Additional Material Facts ("SAMF"), No. 1.) In deciding the motion, the Court, *inter alia*, found in favor of Defendants by determining there to be no triable issues as to prospective injunctive relief. (SAMF, No. 2). Plaintiffs appealed the ruling to the Ninth Circuit. (SAMF, No. 3.)

In its published Opinion, the Ninth Circuit reversed the Court's ruling on prospective injunctive relief and remanded it for further proceedings. *Riley's Am. Heritage Farms v. Elsasser*, *supra*. (SAMF, No. 4.)

The appellate panel held:

> 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.

Id. at 728.

> [T]he 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.

Id. at 722.

> 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

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> 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. 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.

Id. at 731.

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

Id. at 731-732.

In reaction to the Opinion, Defendants enacted Board Policy 6153 and its accompanying Administrative Regulation 6153. (Def.'s SUF No. 5.) It is undisputed that Defendants' current policy consists entirely of their "policies and procedures for school-related trips and excursions are set forth in Board Policy 6153 and its accompanying Administrative Regulation 6153." *Id*. These policies and procedures provide no safeguards to ensure that District administrators and staff will avoid

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violating the constitutional rights of Plaintiffs or other vendors in the future and say nothing about how principals and teachers are to address parental or community complaints concerning vendors. (SAMF, No. 6.)

Superintendent James Elsasser's instruction to principals "that the District does not permit Principals to consider the political beliefs or speech of persons affiliated with a proposed field trip vendor in determining whether to approve a field trip" lacks enforceable and permanent standards. (SAMF, No. 7.)

Elsasser's instruction to principals "that they are expected to treat Riley's Farm the same as they would any other field trip vendor" lacks enforceable and permanent standards. (SAMF, No. 8.)

CUSD's Resolution No. 06-2023 stating that it "has no policy barring or discouraging District personnel from organizing field trips to Riley's Farm" lacks the force of law. (SAMF, No. 9.)

On October 7, 2021, Riley's Farm was contacted by Heather Stradley of Mountain View Elementary via an online reservation form requesting a field trip booking on May 1, 2022. Subsequently, on or about October 8, 2021, Riley's Farm contacted Stradley and was told she was not allowed to book a field trip with Riley's Farm due to district policy. (SAMF, No. 10.)

There have been no field trips to Riley's Farm since the policy of barring them went into effect in 2018. (SAMF, No. 11.)

Defendants have purported to alter their policy regarding Riley's Farm only in response to a court decision. They have not attempted to undertake a reformation of their policy at any time prior to the Ninth Circuit's decision and there is no evidence the constitutional violations will not recur.

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III. ARGUMENT

A. Summary Judgment Cannot Be Granted If Evidence Supports Plaintiff's Causes Of Action

Claremont Defendants' Motion for Summary Judgment ("Defendants' Motion") must be denied for every cause of action upon which Plaintiffs offer sufficient evidence to establish the prima facie case. "The judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial … Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions …" *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 249-255 (1986). Summary judgement is a drastic remedy and must therefore only be granted "with caution." *Id*. at 255. Summary judgment cannot be granted when there is a "genuine dispute" as to any "material fact." Fed. R. Civ. P. 56(a).

In determining whether a case presents any questions of material fact under the applicable substantive law, the trial court must view the evidence in the light most favorable to the nonmoving party. *Citizens for Better Forestry v. United States Dep't of Agric*., 341 F.3d 961, 969 (9th Cir 2003); *see also Tolan v. Cotton*, 572 U.S. 650, 656-657 (2014) (courts may not resolve genuine disputes of fact in favor of the party seeking summary judgment). This requires the trial court to believe the evidence of the opposing party, and to draw all reasonable inferences that may be drawn from the facts before the court in favor of the opposing party. *Anderson v. Liberty Lobby, Inc*. *supra*, at 255. "An issue of fact may arise from inferences to be drawn from the evidence, and all doubts as to the existence of a genuine issue as to a material fact must be resolved against the party moving for a summary judgment." *Consol. Elec. Co. v. U.S. for Use and Benefit of Gough Industries, Inc.*, 355 F.2d 437, 440, n. 11 (9th Cir. 1966).

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B. Whether An Ongoing Policy Barring Or Discouraging Field Trips To Riley's Farm Exists Presents A Triable Issue Of Fact As To Prospective Injunctive Relief

Triable issues of material fact exist as to whether Defendant's policy of barring or discouraging field trips to Riley's Farm constitutes an ongoing violation of federal law and entitle Plaintiffs to prospective injunctive relief. "California school districts are 'arms of the state' entitled to sovereign immunity under the Eleventh Amendment." *Barto v. Miyashiro*, 21-56223, 2022 WL 17729410, at *1 (9th Cir. Dec. 16, 2022) (citation omitted). "Thus, the Eleventh Amendment bars suits against school district officials sued in their official capacities." *Id*., (citation omitted). "However, the *Ex Parte Young* exception to Eleventh Amendment immunity, 209 U.S. 123, 159–60 (1908), applies where a plaintiff alleges an ongoing violation of federal law, and where the relief sought is prospective rather than retrospective." *Id*., (citation omitted) (cleaned up); *see also Doe v. Lawrence Livermore Nat'l Lab*., 131 F.3d 836, 839 (9th Cir. 1997) (when injunctive relief sought, state officials sued in official capacity are not entitled to Eleventh Amendment immunity).

"A plaintiff may bring a Section 1983 claim alleging that public officials, acting in their official capacity, took action with the intent to retaliate against, obstruct, or chill the plaintiff's First Amendment rights." *Arizona Students' Assn. v. Arizona Bd. of Regents*, 824 F.3d 858, 867 (9th Cir. 2016); *Gibson v. United States*, 781 F.2d 1334, 1338 (9th Cir. 1986).

Claremont Defendants acted in their official capacity to chill Plaintiffs' First Amendment rights in retaliation for Plaintiffs' protected speech. Plaintiffs request permanent prospective injunctive relief restraining Defendants from their retaliatory activities. Accordingly, Plaintiffs must show either an ongoing violation of the First Amendment or a "sufficient likelihood that [they] will again be wronged in a similar

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way." *See*, *id*; *City of L.A. v. Lyons*, 461 U.S. 95, 111 (1983); *Villa v. Maricopa Cty.*, 865 F.3d 1224, 1229 (9th Cir. 2017)

"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.,* (citations omitted; cleaned up). "In the analogous context of municipal liability for § 1983 claims, Plaintiffs can establish liability in one of three ways: (1) by proving that an employee committed the violation pursuant to a formal policy or longstanding practice or custom that constitutes the standard operating procedure of the governmental entity; (2) by establishing that the individual who committed the constitutional tort was an official with final policy-making authority; or (3) by proving that an official with final policy-making authority ratified a subordinate's unconstitutional decision or action and the basis for it." *Id*.

"Policies can include written policies, unwritten customs and practices, failure to train municipal employees on avoiding certain obvious constitutional violations, ... and, in rare instances, single constitutional violations that are so inconsistent with constitutional rights that even such a single instance indicates at least deliberate indifference of the municipality." *Benavidez v. Cty. of San Diego*, 993 F.3d 1134, 1153 (9th Cir. 2021) (cleaned up).

Defendants' liability on this case is based on (1) unwritten customs and practices, (2) a failure to train municipal employees on avoiding certain obvious constitutional violations, and (3) multiple constitutional violations indicating at least deliberate indifference by the Defendants.

Fed. R. Civ. P. 65 governs the issuance of injunctions. To obtain a permanent injunction, a plaintiff must satisfy four factors: "(1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public

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interest would not be disserved by a permanent injunction." *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006) (citations omitted).

The likelihood of irreparable injury is particularly strong in cases involving infringement of First Amendment rights: "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury" for purposes of the issuance of a preliminary injunction. *Elrod v. Burns*, 427 U.S. 347, 373 (1976).

C. Defendants Bear The "Heavy" and "Formidable" Burden Of Showing That They Will No Longer Bar Field Trips To Riley's Farm Based On Riley's Protected Speech

As the Ninth Circuit has determined, there was a triable issue of material fact as to whether the Claremont Defendants had instituted and maintained an ongoing policy barring future field trips to Riley's Farm. Amended Opinion, pp. 7, 35-38. In response, the Board Defendants adopted Resolution No. 06-2023, purportedly "reaffirming" that the District "has no policy barring or discouraging District personnel from organizing field trips to Riley's Farm." Further, Defendants contend that CUSD Superintendent James Elsasser has "instructed" District principals that the District does not permit them to consider the political beliefs or speech of persons affiliated with a proposed field trip vendor in determining whether to approve a field trip. (SUF 10, 11.) Therefore, they argue, injunctive relief is moot.

However, a court's power to grant injunctive relief may survive a defendant's cessation or discontinuance of the allegedly illegal activity when there is "some cognizable danger of recurrent violation." *United States v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953); *Oregon Natural Resources Council v. United States Bureau of Land Mgt.*, 470 F.3d 818, 820 (9th Cir. 2006); *Speech First, Inc. v. Schlissel,* 939 F.3d 756, 769-770 (6th Cir. 2019) (request for injunction not moot where university

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changed disciplinary policy only after suit filed and would not affirmatively state it did not intend to reenact challenged measures).

Moreover, mere voluntary cessation of challenged conduct does not make a case moot. To establish mootness, a defendant must show that "subsequent events [have] made it absolutely clear that the allegedly wrongful behavior cannot reasonably be expected to recur." *FTC v. Affordable Media, LLC*, 179 F.3d 1228, 1238 (9th Cir. 1999) (cleaned up); *Rosebrock v. Mathis*, 745 F.3d 963, 971 (9th Cir. 2014) (governmental policy change not reflected in statutory or regulatory change does not necessarily render case moot); *Rio Grande Silvery Minnow v. Bureau of Reclamation*, 601 F.3d 1096, 1115 (10th Cir. 2010) (voluntary cessation exception rarely moots a federal case).

In determining whether a legislative change has rendered a controversy moot, courts are "particularly wary of legislative changes made in direct response to litigation." *Cuviello v. City of Vallejo*, 944 F.3d 816, 824 (9th Cir. 2019). This Court should be wary.

Indeed, as the Ninth Circuit observed in this case, "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." Amended Opinion, p. 37, citing *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012). This equitable principle is reinforced where defendants' policies leave open any prospect of being misapplied, misunderstood, or reversed. "[A] defendant cannot automatically moot a case simply by ending its unlawful conduct once sued." *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91 (2013), citing *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982). "Otherwise, a defendant could engage in unlawful conduct, stop when sued to have the case declared moot, then pick up where he left off, repeating this cycle until he achieves all his unlawful ends.

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Given this concern, our cases have explained that 'a defendant claiming that its voluntary compliance moots a case bears the formidable burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur.'" *Id.*, citing *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 190 (2000). (Emphasis added.) "It has long been established that the 'mere voluntary cessation of allegedly illegal conduct does not moot a case; if it did, the courts would be compelled to leave the defendant free to return to his old ways." *Porter v. Bowen*, 496 F.3d 1009, 1017 (9th Cir. 2007), citing *United States v. Concentrated Phosphate Export Ass'n*, 393 U.S. 199, 203 (1968) (cleaned up). "Only if subsequent events have made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur, and interim relief or events have completely and irrevocably eradicated the effects of the alleged violation may a case be found moot because the defendant has ceased the complained-of conduct." *Id.*, (citations omitted; cleaned up) (emphasis added). "Moreover, the burden of demonstrating mootness is 'heavy' and must be carried by the party claiming that the case is moot." *Id.*, (citation omitted) (emphasis added).

Defendants erroneously assert that the capable of repetition yet evading review doctrine does not apply to government officials. (Def.'s Mot., p. 9, lines 22-23.) They misstate the more qualified rule that a claim is presumed moot when a government actor voluntarily ceases challenged conduct "unless there is a reasonable expectation that the legislative body is likely to enact the same or substantially similar legislation in the future." *Bd. of Trustees of Glazing Health & Welfare Tr. v. Chambers*, 941 F.3d 1195, 1197 (9th Cir. 2019). However, "[t]his is no bare deference: [courts] probe the record to determine whether the government has met its burden, even as we grant it a presumption of good faith." *Brach v. Newsom*, 38 F.4th 6, 13 (9th Cir. 2022). "[W]hen the Government asserts mootness based on such a change it still must bear the heavy burden of showing that the challenged

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conduct cannot reasonably be expected to start up again." *Tuck's Rest. and B. v. Newsom*, 220CV02256KJMCKD, 2022 WL 5063861, at *3 (E.D. Cal. Oct. 4, 2022), citing *Rosebrock v. Mathis*, 745 F.3d 963, 971 (9th Cir. 2014). "This doctrine aims to prevent gamesmanship—i.e., to prevent a defendant from engaging in unlawful conduct, stopping when sued in order to have the lawsuit declared moot, and then resuming the conduct." *Id.*, citing *Already, LLC v. Nike, Inc.*, *supra*, at 91. "A presumption of good faith … cannot overcome a court's wariness of applying mootness under 'protestations of repentance and reform, especially when abandonment seems timed to anticipate suit, and there is probability of resumption." *McCormack v. Herzog*, 788 F.3d 1017, 1025 (9th Cir. 2015), citing *United States v. W.T. Grant Co.*, 345 U.S. 629, 632 n.5 (1953).

A recent and useful example of this qualified rule is found in the case of *Fikre v. FBI*, 904 F.3d 1033 (9th Cir. 2018). There, a plaintiff was placed and maintained on the federal government's "No Fly List." He sued for violation of his due process rights. While the suit was pending, the government defendants removed the plaintiff from the list, and contended that this made his claim moot. *Id.* at 1035. The Ninth Circuit held that this "voluntary cessation" was insufficient to satisfy the government's burden to demonstrate "with assurance that there is no reasonable expectation that the alleged violation will recur." *Id.* at 1038 (cleaned up). Even when the party ceasing unlawful conduct is the government, and thus entitled to a presumption that it will act in good faith, "the government must still demonstrate that the change in its behavior is 'entrenched' or 'permanent.' " *Id.* at 1037, citing *McCormack v. Herzog*, *supra*, at 1025. The Ninth Circuit explained that an actual legislative change, carrying the force of law, may satisfy this burden, because "the rigors of the legislative process bespeak finality and not for the moment, opportunistic tentativeness." *Id.* at 1038 (cleaned up). "On the other hand, an executive action that is not governed by any clear or codified procedures cannot

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moot a claim." *Id*. (Cleaned up.) Because the plaintiff's removal from the No Fly List was merely "discretionary" and not "entrenched" or "permanent," the plaintiff's claim for prospective injunctive relief was not moot. *Id*. at 1040.

In addition, the presumption of government's good faith is not an irrebuttable one. Courts may properly inquire into the "avowed rationale for governmental action when assessing the merits of a claim of voluntary cessation." *Fikre*, 904 F.3d at 1038. Coextensively, a case may not be mooted based on a government actor's voluntary cessation of challenged activity when, as here, the officials "ha[d] at all times continued to argue vigorously that [their] actions were lawful." *Olagues v. Russoniello*, 770 F.2d 791, 794. (9th Cir. 1985); *see also McCormack*, 788 F.3d 15 1025 (official's continued insistence that voluntarily ceased policies were not unconstitutional weighed in favor of finding a live controversy). For voluntary cessation to moot a case, the government must acknowledge that its prior conduct was wrongful. *Fikre*, 904 F.3d at 1040 (there must exist "the government's acquiescence to the righteousness of [the plaintiff's] contentions.").

A plaintiff may also "overcome the rebuttable presumption that government officials act in good faith by proving malice, or bad faith; "in other words, a specific intent to injure the plaintiff on the part of a government official." *Morris v. United States*, 33 Fed. Cl. 733, 752 (1995), citing *Torncello v. United States*, 681 F.2d 756, 770 (1982).

D. The Heavy, Formidable Burden Is Not Met On This Record

Defendants have not met their heavy burden by making it absolutely clear the violation of Plaintiff's constitutional rights will not happen again. Defendants contend that "the repeal, amendment, or expiration of challenged legislation is generally enough to render a case moot and appropriate for dismissal" (citing *id*. at 1198) (emphasis added). BP 6153 does not satisfy this standard. Critically, by virtue of their decision to enact BP 6153, Defendants have neither altered nor vitiated prior

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"legislation" since no prior legislation was ever enacted. This is a crucial nuance, which, understood, invalidates Defendants' entire "voluntary cessation" argument. By claiming that BP 6153 "reaffirms" a policy of not restricting patronage of Riley's Farm—consistent with their position throughout this case that there never was any such policy—they cannot logically claim to have stopped or changed anything.[1] The "voluntary cessation" doctrine only applies when something is actually ceased. How can the District logically claim to have "ceased" a policy it simultaneously claims never existed in the first place?

In the typical voluntary cessation case, officials challenged on unconstitutional enactments "see the error of their ways" and repeal the offending policies. Here, however, Defendants want to have it both ways. They persist in denying there ever was an unconstitutional policy while taking advantage of a doctrine that allows officials to moot a case by reversing such a policy. In reality, Defendants' adjustments to its policies do not substantively alter the status quo under which the infringements on Plaintiffs' rights occurred, and which may recur. They deny their hands were ever in the cookie jar while promising to never put their hands in the cookie jar again.[2] That's not how the voluntary cessation doctrine works.

Rather, Defendants have adopted broad policy language that, examined closely, affords them ongoing license to continue doing what they claim they were never doing, and to harm Plaintiffs in the same fundamental way as before. This is apparent by the terms of the legislation constituting the policy.[3] For example, the

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[1] *See*, *e.g.*, Defendants' Answering Brief in the Appeal, at p. 42: "There is no blacklist. It would be improper for any court to direct defendants to reverse a policy which does not exist."

[2] We wish humbly to take credit for naming this postulation the "cookie jar paradox."

[3] "CUSD's policies and procedures for school-related trips and excursions are set forth in Board Policy 6153 and its accompanying Administrative Regulation 6153." (SUF No. 5.)

policy fails to provide any process or mechanism preventing schools from simply claiming a lack of "interest" in Riley's Farm or ignoring it as an option altogether. A teacher can simply disregard Riley's Farm by not requesting a field trip there. Or, as in a recent instance, a school can simply cancel a reservation without explanation (SAMF, No. 10.) Some of the policy's terms are so anodyne as to make no substantive difference (e.g., teachers must give 10-day notice of field trip requests to principals (SUF No. 6); statement of purpose of the trip and its relation to the course of study (SUF No. 7); duty of principals to review and, where appropriate, approve all requests for field trips (SUF No. 8); consideration of the safety and supervision of students during the proposed trip, whether the proposed trip furthers educational objectives which relate directly to the curriculum, and the cost of the proposed trip (SUF No. 9)).

Defendants confuse the scope of the policy by suggesting it to be supplemented by Superintendent Elsasser's "instructions" and by Resolution No. 06-2023. In particular, they contend that Superintendent Elsasser has now "instructed CUSD Principals that the District does not permit Principals to consider the political beliefs or speech of persons affiliated with a proposed field trip vendor in determining whether to approve a field trip." (SUF 10.) However, again, according to Defendants, this does not constitute any material change in their position. Defendants always denied that they were retaliating against Plaintiffs' speech; rather, they claimed they were just "respon[ding] to parent complaints…not based on an intent to chill protected speech…The decision was based solely on parent concerns." *See* Defendants' Opposition to Motion to Alter or Amend Judgment, Doc. No. 91. Critically, Defendants have left themselves exactly as much discretion as they had before to respond to parent or community complaints by retaliating against controversial speech.

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As the Court of Appeal discussed at length, however, Defendants may not give that kind of unlimited weight to parent or community complaints when First Amendment rights are at stake. While, under the *Pickering*[4] balancing test, the government may justify adverse action against First Amendment activity by asserting "legitimate countervailing interests [that are] sufficiently strong" to "outweigh the free speech interests at stake" (*Bd. of Ct. Comm'rs, Wabaunsee Cty., Kan. v. Umbehr*, 518 U.S. 668, 676 (1996)), it must show that such action is necessary to prevent "actual, material and substantial disruption, or reasonable predictions of [such] disruption" to government operations. Amended Opinion, p. 25, citing, e.g., *Robinson v. York*, 566 F.3d 817, 824 (9th Cir. 2009); *Nichols v. Dancer*, 657 F.3d 929, 933 (9th Cir. 2011). Examining the facts of this case at length, the Ninth Circuit concluded that the District had failed to demonstrate such disruption or likelihood of further disruption. Amended Opinion, pp. 28-29. It held that under "the record as currently developed, viewed in the light most favorable to the Riley plaintiffs…does not justify the School defendants' adverse action. *Id*. at 30.

Nothing in either BP 6153, nor Superintendent Elsasser's instructions, would restrain District officials from doing the exact same thing again as they did before—namely, affording impermissible weight to an insubstantial number of "parent complaints" to justify taking adverse action against protected speech when there exists insufficient actual or anticipated "disruption" to render that adverse action constitutionally privileged.

Further, it is undisputed that "CUSD's policies and procedures for school-related trips and excursions are set forth in Board Policy 6153 and its accompanying Administrative Regulation 6153." (SUF No. 5.) The instructions and Resolution do

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[4] *Pickering v. Bd. of Ed. Of Twp. High Sch. Dist*. 205, 391 U.S. 563, 568 (1968)

not set forth policy language but are mutable, waivable, unenforceable, unreviewable, vague, and overbroad (e.g., Principals and employees are not "permitted" to "consider" the "political beliefs or speech" of persons affiliated with a proposed field trip vendor in determining whether to approve a field trip. (SUF Nos. 10-11)). No one is capable of knowing whether principals and employees are ideologically motivated in their selection of field trip vendors if they choose not to announce the reasons for not sending field trips to Riley's Farm. And rather than a statement of what the District's policy is (e.g., "It is the policy of this District to prohibit viewpoint discrimination in the vendor selection process"), Resolution No. 06-2023 is a statement addressed in the negative exerting no prophylactic constraint on vendor selection decisions to avoid Riley's Farm (District "has no policy barring or discouraging District personnel from organizing field trips to Riley's Farm." (SUF No. 16)). And it lacks the force of law. "Unlike ordinances, resolutions do not have the force of law within the jurisdiction but are merely expressions of opinion or evidence of a decision made by the body." *Sausalito v. County of Marin*, 12 Cal. App. 3d 550, 565 (1970).

Nothing stands in the way of the current "policy" being gamed or withdrawn at any time in the future. For example, the policy (i.e., BP 6153/AR 6153) does not address, much less repudiate, Elsasser's prior "guidance" nor establishes standards for responding to parental/community complaints while balancing Plaintiffs' free speech rights. It contains no mechanism to restrain them from yielding to parental/community concerns or using those concerns as pretextual reasons to avoid Riley's Farm. Nor do the non-policy instructions and resolution contain such safeguards.

Under both the policy and Elsasser's new toothless "instructions," principals and teachers remain as free as they were before to avoid sending field trips to Riley's Farm in response to even one complaint. The instructions do nothing to paint over

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Elsasser's deposition testimony acknowledging the importance of maintaining the District's community relationships:

> I mean, we have a lot of support from our community here in the school district, so we have a tremendous Ed foundation that helps support us and donates over $200,000 a year to the district to help us with providing music and art instruction and technology. We have local service clubs that provide us tremendous support, two different Claremont Rotary Clubs, a Kiwanis Club, the University Club. So we have a lot of partners in the district that support the school district. And so, yeah, we try to be collaborative. As I said, this community -- they kind of expect the district to be collaborative.

Becker Decl., ¶ 3, Exh. "1"

Nothing in BP 6153 nor Elssaser's current "instructions" indicate any intention to be any less deferential to parental/community complaints. Nothing would prevent one, two, or a handful of parents from complaining about Riley's latest heresy and having District officials unconstitutionally prioritize those complaints above Plaintiffs' First Amendment rights. Elsasser or his successors are free to return to their "old ways." They remain free, just as before, to cloak retaliation against Plaintiffs' speech under the pretext of "just following parental complaints" without violating either BP 6153 or the current "instructions."

To the extent the new policy might have the effect of reducing the potential for boycotting Riley's Farm, it nevertheless leaves that potential undisturbed and in a manner that can still be exploited. In such a case, where a government actor has in fact enacted legislation that inflicts essentially the same harm on plaintiffs but only to a lesser degree, the case is not moot. *See N.E. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 662 (1993) (holding that the plaintiffs' claim challenging repealed legislation was not moot because the legislature enacted new legislation that "disadvantaged [the plaintiffs] in the same fundamental way," even though to a "lesser degree"); *Cuviello v. City of Vallejo*,

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supra, at 824 ("If the amended ordinance threatens to harm a plaintiff in the same fundamental way—even if to a lesser degree—the plaintiff will still have a live claim for prospective relief.").

In addition, Plaintiffs have submitted evidence sufficient to create a triable issue of material fact as the existence of malice or bad faith by Defendants, which would "overcome the rebuttable presumption that government officials act in good faith." *See Morris*, 33 Fed. Cl. at 732. Elsasser stated in his deposition that he himself considered Riley's comments to be "racist, sexist or homophobic." (Pl.'s Opp'n. to Mot. For Summary Judgment, Pl.'s Statement of Genuine Disputes of Material Fact, Dkt. 76-1, Additional Fact No. 1.) Another defendant, David Nemer of the District's legislative body, characterized Riley's comments as "extremely inappropriate and unacceptable" and "obnoxious and bigoted." (Pl.'s Mot. For Summary Judgment, Statement of Undisputed Facts, Dkt. 71-1, No. 37.) The District expressly cited its own disagreement with the content of Riley's speech as the basis for cutting off business: "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…The District has…no obligation to expose children to an individual who engages in these crude and tasteless comments." *Id*. A trier of fact could conclude from these statements that Defendants' own distaste for the content of Riley's speech, and not purported concerns for parental and community reaction, were the true motivating force behind their adverse action against Riley, and that the handful of complaints were a mere bad-faith pretext. If Defendants acted in bad faith before, they can reasonably be expected to do so again, and any presumption of good faith is overcome. The presence of triable issues of material fact with regard to this and other issues precludes summary judgment.

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IV. CONCLUSION

Defendants have not met their heavy burden of demonstrating mootness by making it "absolutely clear" that their wrongful behavior cannot reasonably be expected to recur and that new legislation has completely and irrevocably eradicated the effects of the alleged violations. Defendants' own position is that they have repealed nothing; they persist in contending there was never any retaliatory policy to repeal and that they were not motivated by personal animus toward Riley but were merely acting on parental complaints.

The current policy gives Defendants as much license as before to violate Plaintiffs' constitutional rights under just as impermissibly thin a basis. Defendants' failure to include language addressing how they would respond to community or parental concerns demonstrates an unassessed vulnerability. The record discloses no field trips to Riley's Farm since the unconstitutional policy went into effect in 2018. It does reveal that Defendants will enact a policy only when moved by a court's pronouncements to do so as it has in response to the Ninth Circuit opinion, but not independent of court involvement.

Accordingly, a triable issue exists as to whether Defendants policy of exclusion reasonably could be expected to recur. The Court, therefore, is respectfully requested to deny the motion.

Respectfully submitted,

Date: April 3, 2023 FREEDOM X

By: /s/ *William J. Becker, Jr.*
William J. Becker, Jr., Esq.

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