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APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed December 27, 2022]

No. 20-16540
D.C. No. 3:17-cv-02478-JD

KEVIN CHEN, through his Guardian Kai Dong Chen, Plaintiff-Appellant,	)
and	)
PHILIP SHEN, through his Guardian John Shen; NIMA KORMI, through his Guardian Ellie Kormi; MICHAEL BALES, through his Guardian Patricia Mingucci, Plaintiffs,	)
v.	)
ALBANY UNIFIED SCHOOL DISTRICT; VALERIE WILLIAMS, in her personal and official capacities as Superintendent of the Albany Unified School District;	)

JEFF ANDERSON, in his personal and official capacities as Principal of Albany High School; MELISA PFOHL, in her personal and official capacities as Assistant Principal of Albany High School,
Defendants-Appellees,

and

ALBANY HIGH SCHOOL,
Defendant.

No. 20-16541
D.C. No. 3:17-cv-03657-JD

CEDRIC EPPLE,
Plaintiff-Appellant,

v.

ALBANY UNIFIED SCHOOL DISTRICT; ALBANY HIGH SCHOOL; VALERIE WILLIAMS, in her personal and official capacities as Superintendent of the Albany Unified School District; JEFF ANDERSON, in his personal and official capacities as Principal of Albany High School; MELISA PFOHL, in her personal and official capacities as Assistant Principal of Albany High School; CHARLES BLANCHARD; JACOB

CLARK; KIM TRUTANE; ALBANY UNIFIED SCHOOL DISTRICT BOARD OF EDUCATION,
Defendants-Appellees.

OPINION

Appeal from the United States District Court
for the Northern District of California
James Donato, District Judge, Presiding

Argued and Submitted December 6, 2021
San Francisco, California

Filed December 27, 2022

Before: Ronald M. Gould and Daniel P. Collins, Circuit Judges, and Roslyn O. Silver,[*] District Judge.

Opinion by Judge Collins;
Concurrence by Judge Gould

SUMMARY[**]

First Amendment / Free Speech

The panel affirmed the district court's judgment rejecting First Amendment claims brought by students against Albany High School and school officials after the students were disciplined for assertedly "private"

[*] The Honorable Roslyn O. Silver, United States District Judge for the District of Arizona, sitting by designation.

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

off-campus social media posts that amounted to severe bullying or harassment targeting particular classmates.

The panel held that, under the circumstances of the case, the school properly disciplined two of the involved students for bullying. Students Kevin Chen and Cedric Epple claimed that defendants violated their free speech rights under the First Amendment, the California Constitution, and the California Education Code. They argued that their speech was not susceptible to regulation because they engaged in it off campus, and therefore defendants could not constitutionally discipline them.

First, the panel discussed the framework that the Supreme Court has established for determining whether school districts can discipline students for on-campus speech. Under that framework, students do not have a First Amendment right to target specific classmates in an elementary or high school setting with vulgar or abusive language. As a result, there was no question that Epple and Chen could be disciplined for their speech had it occurred on campus. The posts in the social media account include vicious invective that was targeted at specific individuals and that employed deeply offensive and insulting words and images that, as used here, contribute nothing to the "marketplace of ideas." Moreover, some of the posts used violent imagery that, even if subjectively intended only as immature attempts at malign comedy, would reasonably be viewed as alarming, both to the students targeted in such violently-themed posts and to the school community more generally. Nothing in the First

Amendment would even remotely require schools to tolerate such behavior or speech that occurred under its auspices.

Second, the panel considered whether Epple and Chen were insulated from discipline because their speech occurred off campus. The panel concluded, taking into account the Supreme Court's recent decision in *Mahoney Area Sch. Dist. v. B.L. ex rel. Levy*, 141 S. Ct. 2038 (2021), that the speech bore a sufficient nexus to Albany High School and its students to be susceptible to regulation by the school. Specifically, the panel applied the sufficient-nexus test, outlined in *McNeil v. Sherwood Sch. Dist. 88J*, 918 F.3d 700, 707 (9th Cir. 2019), to the speech at issue here, keeping in mind the additional considerations identified in *Mahoney*. Under *McNeil*, Epple's subjective intention to keep the account private was not controlling. The panel held that given the ease with which electronic communications may be copied or shown to other persons, it was plainly foreseeable that Epple's posts would ultimately hit their targets, with resulting significant impacts to those individual students and to the school as a whole. The remaining *McNeil* factors strongly supported the school's assertion of disciplinary authority. Although Chen's involvement in the account was substantially more limited that Epple's, the panel concluded that he was nonetheless properly subject to discipline as well. Chen contributed to the account multiple times in ways that were directly related to Albany High School. As with Epple, Chen's conduct had a sufficient nexus to Albany High School and, under *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), was properly subject to

discipline. Accordingly, the panel rejected Epple's and Chen's claims that their First Amendment rights were violated by defendants' disciplinary actions towards them.

Finally, the panel concluded that the discipline did not independently violate the California Constitution or the California Education Code. Because California follows federal law for free expression claims arising in a school setting, Epple's and Chen's reliance on the California Constitution failed for the same reasons discussed above. The panel held that Epple's and Chen's reliance of California Education Code §§ 48950(a) and 48907 similarly failed, and it did not preclude defendants from disciplining Epple and Chen.

Epple claimed that he was deprived of his due process right to a fair hearing before an impartial tribunal because a member of the school board who voted to expel him was biased against him. The district court dismissed this claim on the ground that Epple had failed to exhaust judicial remedies. Even if Epple's judicial remedies were exhausted, the panel affirmed the dismissal of Epple's due process claim on the separate ground that a California state court's decision rejecting Epple's claims of bias had preclusive effect here.

Judge Gould concurred. He wrote separately, in light of the continued disturbing prevalence of hate speech, to underscore that the First Amendment and Supreme Court precedent do not require courts to always strike down a government entity's attempts to prevent harm to their citizens—especially in the context of hateful speech at schools harming children.

COUNSEL

Alan Alexander Beck (argued), Law Offices of Alan Beck, San Diego, California; Darryl D. Yorkey, Law Offices of Darryl Yorkey, Berkeley, California; for Plaintiffs-Appellant.
Seth L. Gordon (argued), Katherine A. Alberts, and Louis A. Leone, Leone Alberts & Duus APC, Concord, California, for Defendants-Appellees.

OPINION

COLLINS, Circuit Judge:

This case concerns a public high school's ability under the First Amendment to discipline students for assertedly "private" off-campus social media posts that, once they predictably made their way on to campus, amounted to "severe bullying or harassment targeting particular" classmates. *Mahanoy Area Sch. Dist. v. B.L. ex rel. Levy*, 141 S. Ct. 2038, 2045 (2021). We hold that, under the circumstances of this case, the school properly disciplined two of the involved students for bullying. We therefore affirm the district court's judgment rejecting the students' First Amendment claims against the high school and others.

I

A

Because this appeal arises from a grant of summary judgment against the student Plaintiffs, "we must credit [their] evidence as true and draw all reasonable inferences in [their] favor." *Demarest v. City of Vallejo*, 44 F.4th 1209, 1213 (9th Cir. 2022). For purposes of

these appeals, we therefore take the following facts as true.

During the 2016–2017 school year, Plaintiffs-Appellants Cedric Epple and Kevin Chen were students at Albany High School ("AHS"), a public high school in Albany, California. In November 2016, at the suggestion of a friend, Epple created a private Instagram account to share comments "privately with my small group of friends." Unlike Epple's "'main' Instagram account," which he used to "share images that are appropriate for a wide audience," he intended this new account, which operated under the username "yungcavage," to be "a private forum where [he] could share funny memes, images, and comments with [his] close friends that [they] thought were funny, but which other people might not find funny or appropriate." Epple attempted to keep the account "very private," rejecting several requests to follow the account and only approving requests to "follow" the account from "close friends" that he thought he "could trust to keep the material private." Over the ensuing months, Epple only allowed about "13 people to follow the account," including Chen. He "never intended any person outside [his] close group of friends to see the images [he] posted to the account." Chen "followed" the account using the Instagram username "kkkevinkkkkk." Chen likewise understood that Epple's second Instagram account was to "be a private forum (by invite only), exclusive to [their] friends, and a place where [they] could share sarcasm, jokes, funny images, and other banter privately." Not all of the persons who eventually followed the account knew who the owner of the account was.

Between November 2016 and March 2017, Epple used the account to make a number of cruelly insulting posts about various AHS students. These ranged from immature posts making fun of a student's braces, glasses, or weight to much more disturbing posts that targeted vicious invective with racist and violent themes against specific Black classmates. For example, in early February 2017, Epple uploaded a photograph in which a Black member of the AHS girls' basketball team was standing next to the team coach, who was also Black, and Epple drew nooses around both their necks and added the caption "twinning is winning." In another post, he combined (1) a screen shot of a particular Black student's Instagram post in which she stated "I wanna go back to the old way" with (2) the statement "Do you really tho?", accompanied by a historical drawing that appears to depict a slave master paddling a naked Black man who is strung up by rope around his hands. On February 11, 2017, he posted a screenshot of texts in which he and a Black classmate were arguing, and he added the caption "Holy shit I'm on the edge of bringing my rope to school on Monday." Other posts, although not referencing specific students, contained images either depicting, or making light of, Ku Klux Klan violence against Black people. One post included what appears to be a historical photograph of a lynched man still hanging from a tree; another depicts a Klan member in a white hood; and a third combines the caption "Ku klux starter pack" with pictures of a noose, a white hood, a burning torch, and a Black doll.

Epple also created several posts that, while omitting references to violence, still aimed highly offensive

racist insults at identifiable Black classmates. In one, he uploaded an image of a Black student sitting in class that was captioned with the statement "The gorilla exhibit is nice today." In another post, Epple included side-by-side images of one of his Black classmates and a gorilla. Chen added a comment on that post stating, "Its too good," but one of the private account's other followers responded with a series of comments saying: "Hey not funny," "Fuck you," and "Delete this." Chen then responded to these comments with a further comment stating, "no fuck YOU you dirty zookeeping son of a bitch." Two of Epple's other posts feature the back of the head of two different Black students while each was sitting in class, with the first including his comment "Fucking nappy ass piece of shit" and the second saying "Fuck you." After a Black classmate asked to join the account, Epple made a post asking his followers, "Who the fuck is this nigger." Chen responded by "liking" that post.

In addition to the comments mentioned earlier, Chen contributed to the Instagram account on several other occasions. For example, he took a picture of a Black student during class, without her permission, and sent it by Snapchat with the caption, "She's eating a fucking carrot"; Epple then posted that captioned picture to the Instagram account. In comments on another post, Chen called a non-Black student who followed the account a "nigger" after the student guessed (incorrectly) that Chen was the owner of the account.

Although the "yungcavage" account was intended to be private, knowledge of its contents eventually spread

to the school. During the weekend of March 18–19, 2017, one of the account's followers showed multiple photos from that account to the girls' basketball player who had been depicted with a noose. On Monday, March 20, that student, in turn, shared what she had learned with several other students who had been targeted by the account's posts. That same day, one of the followers of the account was asked to lend his phone to a student who claimed to need to call her mother, and while this student had the phone, she took it into the restroom, where she and another student took pictures of some of the contents of the yungcavage account. Those photographs were then shared with other students.

As knowledge of the account rapidly spread, a group of about 10 students gathered at the school, several of whom were upset, yelling, or crying. Although the next class period had started, the students "were all too upset to go to class." The school's Principal, Jeff Anderson, asked them to come to the conference room adjacent to his office, where they were joined by two of the school's Assistant Principals, Melisa Pfohl and Tami Benau. Benau stated that she had "never seen a group of students as upset as these girls were." The school administrators summoned the school's counselors and mental health staff to join them, and around the same time, some of the students' parents (who had presumably been contacted by their children) began to arrive.

After being shown some of the account's posts, Benau concluded that the posts depicting lynching and nooses could be construed as threats of violence, and

she therefore called the police. The school administrators arranged for the students to provide written statements, and Benau and the police also interviewed some of the students. The next day, March 21, Anderson, Pfohl, and two police officers met with each of the three students who had been identified as being responsible for the account (Epple, Chen, and one other), together with at least one of the parents of each respective student. Epple "took full responsibility for creating all the images and posts." Chen admitted that he followed the Instagram account and that he had "liked" and commented on some of the posts. All three students were suspended for five days. A few days later, Anderson separately told Epple and Chen that he was going to recommend that they be expelled and that their suspensions would continue pending those expulsion proceedings. In later explaining the grounds for the suspensions, Anderson stated that posts on the account constituted "harassment and bullying based on race and gender" and that he had an obligation under California and federal law "to respond to peer to peer harassment that could cause a hostile environment."

Anderson called a faculty meeting after school on March 21 to discuss the incident. The teachers complained that the meeting should have been held the day before, because a "majority" of the students knew about the matter and wanted to talk about it in class, leaving the teachers to deal "with the situation all day without any official information from the school." As Anderson later explained it, the teachers said that "a lot of students were upset by what they had heard

about the account and wanted to talk about it in class, which disrupted [the teachers'] plans for the class."

The record contains additional undisputed evidence concerning the effect that knowledge of the Instagram account had on students at AHS. On March 20, the student who had been targeted in the post containing a drawing of a slave being abused left school early because she "was too upset to return to class." She also reported being afraid to go to one of her classes because the students in that class included one who had favorably commented on a post that included a photograph of a hooded Klansman. Another Black student stated that she missed multiple days of school after learning that a post made fun of her "Afro" hair style and her physical appearance, and her parents eventually withdrew her from AHS. Other students targeted by the posts reported that they felt "devastated," "scared," and "bullied," and that their grades suffered. According to Pfohl, "[t]he AHS school counselors and mental health staff were inundated with students needing help to handle their feelings of anger, sadness, betrayal and frustration about the racist posts and comments in the Instagram account." Albany Unified School District ("AUSD") Superintendent Valerie Williams described the incident's impact:

> From my meetings with the students that were shown in the postings and conversations with several parents of the students, the impact has been significant and ongoing. Parents stated they are afraid for their children's safety on campus and off campus. They stated that their

> children are traumatized and cannot study, and that they are afraid to be in the same class or on the same campus as the students who posted. Several of the students' grades dropped because they were unable to attend school or some classes, and they are now worried about failing their classes. Some students could not return to school for several days. Most of the students say they are hurt, angry and feel betrayed. One parent reported to me that his daughter has lost sleep, that sometimes she can talk about the incident and sometimes she is too upset to talk at all about the postings.

A group of school parents organized a rally on March 26, 2017 "to bring people together and start the healing process." AUSD Board of Education ("AUSD Board") member Kim Trutane posted on Facebook about the rally, saying, "[H]as this been conceived in coordination with the Black/African American Parents Engagement Group?" and "So glad that you are joining forces! I am definitely going . . . . Looking forward to sending a strong message of support . . . that we will not tolerate racism, Albany is for everyone!" One local publication that covered the rally published a picture of Trutane at the event, holding a sign saying, "WE are DIVERSE & GREAT."

Another student who had followed the account was suspended for only five days and returned to school on March 30. Later that afternoon, he attended, together with other student followers of the account, a "restorative justice session" organized by AHS, using the services of a local community organization. More

than 100 protestors gathered outside the session, which led some of the participants to fear for their safety. After waiting several hours while the demonstration continued, the student followers of the account who were at the meeting decided to leave the school. On their way out of the building, a student demonstrator punched two of them in the face, breaking the nose of one of them.

Chen's and Epple's expulsion hearings before the AUSD Board were scheduled for June 1, 2017. However, on May 1, Chen and three other students filed a federal suit against AUSD, and on May 26, the district court issued a temporary restraining order enjoining his expulsion hearing. Epple's expulsion hearing went forward on June 1 was concluded on June 20. On June 22, three members of the AUSD Board, including Trutane, voted in favor of expulsion, and two members abstained.

Epple appealed his expulsion to the Alameda County Board of Education ("ACBE"), arguing, *inter alia*, that he was denied a fair hearing because Trutane was biased against him. According to Epple, Trutane should have recused herself from the AUSD Board's expulsion hearing because she participated in a demonstration and other advocacy against Epple and his account. The ACBE disagreed and upheld Epple's expulsion in September 2017. Epple filed a petition for a writ of mandate in California state court. The state court denied his petition on October 1, 2020, after finding that ACBE applied the correct legal standard

and that the record did not demonstrate an unacceptable probability that Trutane was biased.[1]

B

Four days after the AUSD Board voted to expel him, Epple filed a federal action against AUSD, the AUSD Board, the three AUSD Board members who had voted to expel him, the AUSD Superintendent (Williams), AHS, Principal Anderson, and Assistant Principal Pfohl. Epple alleged that Defendants had violated his free speech rights under the First Amendment and California law, and he also asserted that all Defendants except Williams, Anderson, and Pfohl had violated his due process rights in connection with his expulsion hearing. As noted above, Chen and three other students had already filed a similar action several weeks earlier. Chen and those students named as defendants AUSD, AHS, Superintendent Williams, Principal Anderson, and Assistant Principal Pfohl.[2] In that complaint, Chen alleged similar free speech claims against all Defendants, and he also contended that all Defendants had violated his due process rights in connection with his suspension. Two other lawsuits were filed and ultimately joined by a total of five other students who had been disciplined for their involvement with the Instagram account. *See John Doe v. Albany Unified Sch. Dist.*, 3:17-cv-02767-JD (N.D.

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[1] We grant Epple's motion to take judicial notice of the state court's order denying his petition.

[2] Chen and his co-plaintiffs also initially asserted claims against an AHS teacher, but those claims were promptly voluntarily dismissed.

Cal. filed May 12, 2017); *John Doe v. Albany Unified Sch. Dist.*, 3:17-cv-03418-JD (N.D. Cal. filed June 13, 2017). The district court deemed all of these cases related. All plaintiffs filed motions for summary judgment on their respective free speech claims, and Defendants filed cross-motions for full or partial summary judgment.

On November 29, 2017, the district court held in Defendants' favor with respect to Epple's, Chen's, and four other plaintiffs' free speech claims. The district court reasoned that under *C.R. v. Eugene School District 4J*, 835 F.3d 1142 (9th Cir. 2016), these six plaintiffs' speech was susceptible to regulation by the school because (1) the speech had a sufficient nexus to the school; and (2) it was reasonably foreseeable that the speech would reach the school and create a risk of a substantial disruption. The district court then found that under the Supreme Court's decision in *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), these six plaintiffs were properly disciplined because their speech caused or contributed to a substantial disruption at AHS and "clearly interfered with 'the rights of other students to be secure and to be let alone'" (quoting *Tinker*, 393 U.S. at 508). The court held that the four remaining plaintiffs—none of whom are involved in this appeal—could not be disciplined under *Tinker* because they had not "create[d] a substantial risk of disruption," nor had they "interfered with the rights of other students."

By April 2018, the only plaintiffs whose claims remained at issue were Epple, Chen, and one of Chen's

co-plaintiffs. In August 2018, the district court dismissed Epple's and Chen's due process claims without prejudice, holding that, because they had not yet filed a petition for writ of mandate in California state court challenging the relevant administrative actions, they had failed to exhaust still-available judicial remedies.[3] *See Doe v. Regents of the Univ. of Cal.*, 891 F.3d 1147, 1154–55 (9th Cir. 2018) (holding that, in order to attempt to avoid the preclusive effect of a California state administrative decision, a party "must exhaust judicial remedies" by filing a petition for writ of mandate). Due to delays associated with proceedings concerning the remaining co-defendant, the district court did not enter final judgment against Epple and Chen until July 27, 2020. Epple and Chen timely appealed.

The district court had original jurisdiction pursuant to 28 U.S.C. §§ 1331, 1343, and 1367 and we have appellate jurisdiction under 28 U.S.C. § 1291. We review de novo both the district court's grant of summary judgment regarding Epple's and Chen's free speech claims, *LaVine v. Blaine Sch. Dist.*, 257 F.3d 981, 987 (9th Cir. 2001), and its dismissal, under Federal Rule of Civil Procedure 12(b)(6), of Epple's due process claim. *Chandler v. McMinnville Sch. Dist.*, 978 F.2d 524, 526 (9th Cir. 1992).

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[3] As noted earlier, after the district court issued its order, Epple filed a petition for writ of mandate in California state court. *See supra* at 15.

II

Epple and Chen claim that Defendants violated their free speech rights under the First Amendment, the California Constitution, and the California Education Code. They argue that their speech was not susceptible to regulation because they engaged in it off campus, and therefore Defendants could not constitutionally discipline them. We affirm the district court, and our analysis proceeds in three steps. First, we discuss the framework that the Supreme Court has established for determining whether school districts can discipline students for on-campus speech. Under this framework, there is no question that Epple and Chen could be disciplined for their speech had it occurred on campus. Second, we consider whether Epple and Chen are insulated from discipline because their speech occurred off campus. Taking into account the Supreme Court's recent decision in *Mahanoy*, we conclude that the speech bore a sufficient nexus to AHS and its students to be susceptible to regulation by the school. Finally, we conclude that the discipline did not independently violate the California Constitution or the California Education Code.

A

"The First Amendment guarantees wide freedom in matters of adult public discourse," but that does not mean that "the same latitude must be permitted to children in a public school." *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 682 (1986). The Supreme Court has made clear that "the First Amendment rights of students in the public schools 'are not automatically coextensive with the rights of adults in other settings,'

and must be 'applied in light of the special characteristics of the school environment.'" *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 266 (1988) (citations omitted). "[A] school need not tolerate student speech that is inconsistent with its basic educational mission." *LaVine*, 257 F.3d at 988 (citing *Kuhlmeier*, 484 U.S. at 266). "In a math class, for example, the teacher can insist that students talk about math, not some other subject. In addition, when a teacher asks a question, the teacher must have the authority to insist that the student respond to that question and not some other question, and a teacher must also have the authority to speak without interruption and to demand that students refrain from interrupting one another." *Mahanoy*, 141 S. Ct. at 2050 (Alito, J., concurring) (citation omitted).

More generally, the conduct of students in the school setting, including their speech, may be restricted if either [1] it "might reasonably [lead] school authorities to forecast substantial disruption of or material interference with school activities" or [2] it "collides 'with the rights of other students to be secure and to be let alone.'" *Wynar v. Douglas Cnty. Sch. Dist.*, 728 F.3d 1062, 1070 (9th Cir. 2013) (quoting *Tinker*, 393 U.S. at 508, 514). The Supreme Court recently clarified that the "standard" for showing a risk of "substantial disruption" is a "demanding" one that requires "something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint." *Mahanoy*, 141 S. Ct. at 2047–48 (quoting *Tinker*, 393 U.S. at 509). And with respect to the second alternative, we have recognized that "[t]he precise scope of *Tinker*'s

interference with the rights of others language is unclear," but the speech must be more than "merely offensive to some listener." *C.R.*, 835 F.3d at 1152 (citations omitted).

Moreover, even outside the school setting, "[t]he First Amendment rights of minors are not 'co-extensive with those of adults.'" *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 214 n.11 (1975) (citation omitted). For example, the "traditional categorical exceptions" from the First Amendment that the Court has recognized, such as obscenity and "fighting words," *see R.A.V. v. City of St. Paul*, 505 U.S. 377, 383 (1992), may have a broader sweep in the context of minors. *See*, *e.g.*, *Ginsberg v. New York*, 390 U.S. 629, 636–43 (1968) (upholding a ban on the sale to minors of sexually oriented material deemed to be obscene as to minors, even though the material was entitled to First Amendment protection with respect to adults). That principle acquires special force when applied in the school context, which, as noted, involves "special characteristics" that may justify additional restrictions *Kuhlmeier*, 484 U.S. at 266. Thus, whatever the contours of the fighting words doctrine in the context of confrontations among adults in a public forum, *cf. R.A.V.*, 505 U.S. at 414 (White, J., concurring in the judgment) (rejecting, in the context of a facial challenge to an ordinance, a conception of the "fighting words" doctrine that would deem expression to be unprotected merely because it "causes hurt feelings, offense, or resentment"), students do not have a First Amendment right to "target" specific classmates in an elementary or high school setting "with vulgar or abusive language." *See Mahanoy*, 141 S. Ct. at 2047; *see also id.* at 2052

(Alito, J., concurring) ("[A] school must have the authority to protect everyone on its premises, and therefore schools must be able to prohibit threatening and harassing speech."); *cf. Fraser*, 478 U.S. at 682 ("It does not follow . . . that simply because the use of an offensive form of expression may not be prohibited to adults . . . , the same latitude must be permitted to children in a public school."). Without limiting "any political viewpoint" or other protected content, schools may insist on "civil discourse" in the school context, thereby teaching and reinforcing "the shared values of a civilized social order." *Fraser*, 478 U.S. at 683, 685; *see also C.R.*, 835 F.3d at 1152 (distinguishing between speech that "is merely offensive to some listener" and "sexual harassment" targeted at particular students).

Against this backdrop, we readily conclude that the First Amendment would not prevent a school from punishing the sort of speech at issue here had it "occur[red] under [the school's] supervision." *Mahanoy*, 141 S. Ct. at 2045. The posts in the yungcavage account include vicious invective that was targeted at specific individuals and that employed deeply offensive and insulting words and images that, as used here, contribute nothing to the "marketplace of ideas." *See id.* at 2046; *cf. Monteiro v. Tempe Union High Sch. Dist.*, 158 F.3d 1022, 1031–32 (9th Cir. 1998) (rejecting claim that school district violated student's equal protection rights by assigning *Huckleberry Finn*, with its use of racial epithets, as mandatory reading). Moreover, some of the posts used violent imagery that, even if subjectively intended only as immature attempts at malign comedy, would reasonably be viewed as alarming, both to the students targeted in such

violently-themed posts and to the school community more generally. In particular, combining photographs of specific students with images drawing upon the horrific legacy of terroristic violence executed by the Klan against Black people would understandably be deeply upsetting and intimidating to the targeted students. *Cf. Virginia v. Black*, 538 U.S. 343, 352–57 (2003) (recounting the Klan's long history of terroristic violence).

Had these posts been printed on flyers that were distributed furtively by students on school grounds but then discovered by school authorities, the "collision with the rights of [the targeted] students to be secure and to be let alone" would be obvious. *Tinker*, 393 U.S. at 508. As we explained in *C.R.*, severe targeted harassment of fellow students based on their physical characteristics—there, sexual harassment that "positions the target as a sexual object" and here, racial harassment that vilifies people based on their race—threatens the targeted students' "sense of physical, as well as emotional and psychological, security." 835 F.3d at 1152; *see also Monteiro*, 158 F.3d at 1033 ("[R]acist attacks need not be directed at the complainant in order to create a hostile educational environment."). And the likelihood of "substantial disruption of or material interference with school activities" from such malicious abuse aimed at particular students is equally obvious and, as we explain below, amply demonstrated in the record here. *Tinker*, 393 U.S. at 514; s*ee infra* at 28–29. Even assuming *arguendo* that the posts at issue did not amount to unprotected true threats or fighting words, nothing in the First Amendment would even remotely

require schools to tolerate such behavior or speech that occurs under its auspices. *Mahanoy*, 141 S. Ct. at 2045.

B

The central question here is instead whether the assertedly off-campus nature of the speech places it outside of the school's authority to regulate or to discipline. Although *Tinker* involved "only a school's ability to regulate students' *on-campus* speech," *C.R.*, 835 F.3d at 1149, we have held that students' "off-campus speech is not necessarily beyond the reach of a school district's regulatory authority." *McNeil v. Sherwood Sch. Dist. 88J*, 918 F.3d 700, 706 (9th Cir. 2019). The contours of such authority to regulate off-campus speech were recently considered by the Supreme Court in *Mahanoy*, and so we begin by reviewing that decision and then considering its impact on our caselaw addressing school authority over off-campus speech.

1

In *Mahanoy*, a public high school student ("B.L.") who was not selected for the school varsity cheerleading team reacted by posting to Snapchat an image, which would be visible to her approximately 250 "friends" for 24 hours, containing the caption, "Fuck school fuck softball fuck cheer fuck everything." 141 S. Ct. at 2043. She posted the image on a weekend while she was off campus. *Id.* The school discovered the post and suspended the student from the junior varsity cheerleading squad. *Id.* The student sued, and the Third Circuit held that schools generally may not

discipline students for engaging in speech that occurs off-campus. *Id*. at 2043–44.

The Supreme Court rejected the Third Circuit's categorical rule that "the special characteristics that give schools additional license to regulate student speech always disappear when a school regulates speech that takes place off campus." *Mahanoy*, 141 S. Ct. at 2045. The Court held that public schools may regulate *some* off-campus student speech, but it made clear that public schools have diminished authority to regulate off-campus speech as opposed to on-campus speech. In so holding, the Court refused to "set forth a broad, highly general First Amendment rule stating just what counts as 'off campus' speech and whether or how ordinary First Amendment standards must give way off campus to a school's special need to prevent, *e.g.*, substantial disruption of learning-related activities or the protection of those who make up a school community." *Id*. Instead, the Court identified three features of off-campus speech that "diminish the strength of the unique educational characteristics that might call for special First Amendment leeway" in evaluating a school's actions. *Id*. at 2046. First, because "off-campus speech will normally fall within the zone of parental, rather than school-related, responsibility," a school will "rarely" be able to invoke the "doctrine of *in loco parentis*"—*i.e.*, that the school "stand[s] in the place of students' parents"—in attempting to regulate such speech. *Id*. Second, recognizing broad authority in schools over off-campus speech would give them authority over "all the speech a student utters during the full 24-hour day," which would threaten students' ability to "engage in that kind of speech at all,"

including potentially "political or religious speech that occurs outside school or a school program or activity." *Id*. Third, schools have both an interest in protecting and an obligation to protect "the 'marketplace of ideas,'" which "must include the protection of unpopular ideas," and that important interest would be threatened by excessive school authority over off-campus speech. *Id*.

Applying these considerations to the school's punishment of B.L.'s speech, the Court held that "the school violated B. L.'s First Amendment rights." *Mahanoy*, 141 S. Ct. at 2048. In reaching this conclusion, the Court emphasized that B.L.'s "posts appeared outside of school hours from a location outside the school"; that she "did not identify the school in her posts or target any member of the school community with vulgar or abusive language"; and that she "transmitted her speech through a personal cellphone, to an audience consisting of her private circle of Snapchat friends." *Id*. at 2047. Given these facts, "B.L. spoke under circumstances where the school did not stand *in loco parentis*," and she was communicating to her friends, on her own time, a protected message of "irritation with, and criticism of, the school and cheerleading communities." *Id*. The Court acknowledged that B.L.'s off-campus actions "risk[ed] transmission [of the posts] to the school itself," *id*., but it concluded that the school had failed to present evidence establishing "the sort of 'substantial disruption' of a school activity or a threatened harm to the rights of others that might justify the school's action." *Id*. (citing *Tinker*, 393 U.S. at 514).

2

Although the Supreme Court in *Mahanoy* declined to articulate "a broad, highly general First Amendment rule stating just what counts as 'off campus' speech" or identifying when "a school's special need[s]" as recognized in *Tinker* might justify regulating such speech, *see* 141 S. Ct. at 2045, our caselaw has set forth additional standards that address that issue. Prior to *Mahanoy*, we devised a three-factor test for "determin[ing], based on the totality of the circumstances, whether [off-campus] speech bears a sufficient nexus to the school" to allow regulation by a school district. *McNeil*, 918 F.3d at 707. "This test is flexible and fact-specific, but the relevant considerations will include (1) the degree and likelihood of harm to the school caused or augured by the speech, (2) whether it was reasonably foreseeable that the speech would reach and impact the school, and (3) the relation between the content and context of the speech and the school." *Id.* (citations omitted).

Nothing in *Mahanoy* is inconsistent with our sufficient-nexus test, much less "clearly irreconcilable" with it. *See Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003) (en banc). The Supreme Court's analysis of the school's ability to regulate B.L.'s speech in *Mahanoy* considered many of the same factors, including whether "'substantial disruption' of a school activity or a threatened harm to the rights of others" had been shown; the fact that B.L.'s speech, when posted, "might well be transmitted to other students, team members, coaches, and faculty"; and the "message" communicated by the post and whether it

implicated matters of legitimate concern to the school's special interests or more conventionally protected content. *See* 141 S. Ct. at 2047. Moreover, the additional specific considerations that the Court identified—whether the school can be said to be acting *in loco parentis* in regulating the speech; whether off-campus regulation threatens a student's ability to engage in certain speech "at all"; and whether the speech implicates interests in protecting unpopular ideas, *id*. at 2046—all fit comfortably within the three-factor framework we articulated in *McNeil*, particularly *McNeil*'s third factor. Properly applied, our sufficient-nexus test avoids the concerns that the Court identified about school regulation of off-campus speech. We therefore must apply the *McNeil* sufficient-nexus test to the speech at issue here, keeping in mind the additional considerations identified in *Mahanoy*.

3

Under those standards, we think it is clear that Epple's speech bore a sufficient nexus to AHS to warrant disciplinary action by the school.

Epple emphasizes that the Instagram account was intended to be private and that it was never his intention "to cause any school disruption." But under *McNeil*, Epple's subjective intention to keep the account private is not controlling, and we must consider "whether it was *reasonably foreseeable* that the speech would reach and impact the school." 918 F.3d at 707 (emphasis added). Epple, of course, failed in his effort to keep the posts private, because a follower of the account told one of the targeted students about it. *See supra* at 10. Given the ease with which

electronic communications may be copied or shown to other persons, it was plainly foreseeable that Epple's posts would ultimately hit their targets, with resulting significant impacts to those individual students and to the school as a whole. *See D.J.M. ex rel. D.M. v. Hannibal Pub. Sch. Dist. No. 60*, 647 F.3d 754, 762 (8th Cir. 2011) (upholding school discipline against D.J.M. for private instant messages to C.M. that contained threats towards classmates, stating that "a reasonable person should be aware that electronic communications can now be easily forwarded" and that, "[s]ince C.M. was a classmate of the targeted students, D.J.M. knew or at least should have known that the classmates he referenced could be told about his statements").

Of course, as *Mahanoy* makes clear, the mere fact that a student's off-campus communication finds its way to the school is not alone sufficient to warrant regulation by school officials. *See* 141 S. Ct. at 2047 (invalidating school's discipline over B.L.'s off-campus speech despite the fact that she used a medium that clearly "risk[ed] transmission to the school itself"). But the remaining *McNeil* factors strongly support the school's assertion of disciplinary authority here. Once the privacy of the account was breached, and knowledge of the posts rapidly (and predictably) spread, the "degree and likelihood of harm to the school caused or augured by the speech" was significant. *McNeil*, 918 F.3d at 707. The students who were the targets of the posts' vicious abuse reported that they felt "devastated," "scared," and "bullied," and that their grades suffered. *See supra* at 13–14. One targeted student missed multiple tests and days of school, and her parents eventually withdrew her from AHS. Even

students who were not targeted by the posts became distraught and were among a group who spontaneously gathered together, "crying and yelling" and "too upset to go to class." The uncontested evidence shows that, as Assistant Principal Pfohl explained, the "AHS school counselors and mental health staff were inundated with students needing help to handle their feelings of anger, sadness, betrayal and frustration about the racist posts and comments in the Instagram account."

Epple contends that the students' reactions to the speech cannot be given controlling weight, because those reactions were occasioned by the offensive content of the speech and therefore raise the specter of a "heckler's veto." He argues that "even the most racist expressive conduct such as promoting the swastika as part of a Nazi party rally is entitled to government protection" and that *Mahanoy* underscores the school's obligation to defend "unpopular expression." 141 S. Ct. at 2046. These arguments are unavailing on the facts of this case. For two reasons, "the relation between the content and context of the speech and the school" here does not present the danger of censorship and instead weighs heavily in favor of upholding the school's assertion of disciplinary authority. *McNeil*, 918 F.3d at 707.

First, once Epple's posts hit their targets, the school was confronted with a situation in which a number of its students thereby became the subjects of "serious or severe bullying or harassment targeting particular individuals"—which *Mahanoy* specifically identifies as an "off-campus circumstance[]" in which "[t]he school's regulatory interests remain significant." 141 S. Ct. at

2045. As Epple acknowledges, he was expelled on the ground that he had engaged in "bullying" within the meaning of the generally applicable and speech-neutral prohibitions contained California Education Code section 48900.4.[4] Although Epple may be correct that his parents have the primary responsibility for policing his off-campus use of social media, the school's authority and responsibility to act *in loco parentis* also includes the role of *protecting other students* from being maltreated by their classmates. Epple's conduct here strongly implicated that "significant" interest of the school. *See Mahanoy*, 141 S. Ct. at 2045.

Epple is quite wrong in suggesting that the specifically *race-based* nature of the harassment here somehow immunizes it from the school's authority to protect its students from experiencing "serious or severe bullying or harassment." *Mahanoy*, 141 S. Ct. at 2045; *cf. R.A.V.*, 505 U.S. at 389 (noting that general laws against harassing conduct and other forms of employment discrimination may be violated by speech). Indeed, a *failure* by the school to respond to Epple's

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[4] *See* CAL. EDUC. CODE § 48900.4 (authorizing expulsion if a student "has intentionally engaged in harassment, threats, or intimidation, directed against . . . pupils, that is sufficiently severe or pervasive to have the actual and reasonably expected effect of materially disrupting classwork, creating substantial disorder, and invading the rights of . . . pupils by creating an intimidating or hostile educational environment"); *id.* § 48900(r) (authorizing expulsion for "bullying," which includes acts defined in § 48900.4 that target a student and may reasonably be expected, *inter alia*, to substantially interfere with the student's "academic performance" or "ability to participate in or benefit from" the school's services, or to have a "substantially detrimental effect on the pupil's physical or mental health").

harassment might have exposed it to potential liability on the theory that it had "failed to respond adequately" to a "racially hostile environment" of which it had become aware. *See Monteiro*, 158 F.3d at 1033 (citation omitted); *see also id.* at 1034 ("It does not take an educational psychologist to conclude that being referred to by one's peers by the most noxious racial epithet in the contemporary American lexicon, being shamed and humiliated on the basis of one's race, and having the school authorities ignore or reject one's complaints would adversely affect a Black child's ability to obtain the same benefit from schooling as her white counterparts.").

Second, Epple's posts do not stand on the same footing as his example of the "racist expressive conduct" of those who use "the swastika as part of a Nazi party rally." For one thing, Epple never contended in the proceedings below that, like swastika-waving Nazis, he was actually espousing and communicating the view that Black people are supposedly inferior. Although his summary judgment motion described the images as "politically charged" and as "seemingly advocat[ing] for a particular political ideology through the use of satire," Epple's declaration in support of that motion explained his posts as simply "juvenile and offensive" attempts at "humor" that were posted "with the sole intention of entertaining my friends." As a result, his claim that the school was somehow censoring the promotion of a disfavored ideological message rings hollow. Moreover, given the extraordinary nature of the abuse Epple targeted at specific classmates, his discipline does not raise the specter of punishment based on a "mere desire to avoid

the discomfort and unpleasantness that always accompany an unpopular viewpoint." *Tinker*, 393 U.S. at 509. On the contrary, even assuming *arguendo* that Epple's posts did not amount to "fighting words" or true threats, they were enough of a near-miss that, in the context of minors in a secondary school environment, they are nonetheless fairly viewed as "a particularly intolerable (and socially unnecessary) *mode* of expressing *whatever* idea the speaker wishes to convey." *R.A.V.*, 505 U.S. at 393; *see also Sypniewski v. Warren Hills Reg'l Bd. of Educ.*, 307 F.3d 243, 267 (3d Cir. 2002) (noting that, for First Amendment purposes, "the public school setting is fundamentally different from other contexts, including the university setting"). Students such as Epple remain free to express offensive and other unpopular viewpoints, but that does not include a license to disseminate severely harassing invective targeted at particular classmates in a manner that is readily and foreseeably transmissible to those students.

Epple again emphasizes that he did not ever intend for the targets of his posts to ever see them. But having constructed, so to speak, a ticking bomb of vicious targeted abuse that could be readily detonated by anyone following the account, Epple can hardly be surprised that his school did not look the other way when that shrapnel began to hit its targets at the school. And, as we have explained, recognizing an authority in school administrators to respond to the sort of harassment at issue here presents no risk that they will thereby be able to "punish[] students engaged in protected political speech in the comfort of their own homes." Epple's actions had a sufficient nexus to AHS,

and his discipline fits comfortably within *Tinker*'s framework and does not threaten the "marketplace of ideas" at AHS. *Mahanoy*, 141 S. Ct. at 2046.

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Although Chen's involvement in the account was substantially more limited than Epple's, we conclude that he was nonetheless properly subject to discipline by the school as well.

As we have explained, *see supra* at 10–11, Chen contributed to the Instagram account multiple times in ways that were directly related to AHS. For example, he took a picture of a Black student during class, without her permission, and captioned it in the Snapchat app with the statement, "She's eating a fucking carrot." Epple thereafter posted that Snapchat screenshot to the yungcavage account. Chen commented "Its too good" on a post comparing a specific Black classmate to a gorilla, and he responded to another student's criticism of that post with the statement, "fuck YOU you dirty zookeeping son of a bitch." Chen called a non-Black student a "nigger" after that student guessed (incorrectly) that he created the account; and he "liked" a post in which Epple called a Black classmate a "nigger."

Although Chen's participation in the targeted abuse of specific students in these posts was much less than Epple's, he affirmatively liked two such posts and denounced, in vulgar terms, another follower who criticized one such post. At the very least, Chen is akin to a student who eggs on a bully who torments classmates. A school may properly take account of such

affirmative participation in what ended up, after the account became known, as abusive harassment targeted at particular students. Moreover, several of the targeted students stated that the severity of the hostile environment they experienced was exacerbated by the knowledge that other students participated in the account and "liked" the abusive posts. As with Epple, Chen's conduct has a sufficient nexus to AHS and, under *Tinker*, was properly subject to discipline.

* * *

Accordingly, we reject Epple's and Chen's claims that their First Amendment rights were violated by Defendants' disciplinary actions towards them.

C

We reject Epple's and Chen's arguments that Defendants violated their rights under the California Constitution and California Education Code §§ 48950(a) and 48907.

"Because California follows federal law for free expression claims arising in the school setting," *Dariano v. Morgan Hill Unified Sch. Dist.*, 767 F.3d 764, 776 n.4 (9th Cir. 2014), Epple's and Chen's reliance on the California Constitution fails for the same reasons discussed above. *See California Teachers Ass'n v. Governing Bd. of San Diego Unified Sch. Dist.*, 53 Cal. Rptr. 2d 474, 480 (Ct. App. 1996).

Epple's and Chen's reliance on California Education Code § 48950(a) also fails. Section 48950(a) provides that a school district may not discipline a student "solely on the basis of conduct that is speech or other

communication that, when engaged in outside of the campus, is protected from governmental restriction by the First Amendment to the United States Constitution or Section 2 of Article I of the California Constitution." CAL. EDUC. CODE § 48950(a). But, as we have explained, Epple's and Chen's speech "outside of the campus" here is *not* "protected from governmental restriction by the First Amendment." The limitation in § 48950(a) was therefore not violated here. Moreover, § 48950(d) provides that "[t]his section does not prohibit the imposition of discipline for harassment, threats, or intimidation, unless constitutionally protected," *id.* § 48950(d), and for the reasons we have set forth, the relevant speech at issue constituted harassment that, under the circumstances of this case, was not "constitutionally protected." Epple's and Chen's reliance on § 48950 therefore fails for this additional reason.

Epple's and Chen's argument under California Education Code § 48907 fares no better. That section provides, in relevant part, that "[p]upils of the public schools, including charter schools, shall have the right to exercise freedom of speech and of the press." CAL. EDUC. CODE § 48907(a). But California courts have made clear that this provision "constitutes a statutory embodiment of the *Tinker* and related First Amendment cases at that time." *Smith v. Novato Unified Sch. Dist.*, 59 Cal. Rptr. 3d 508, 516 (Ct. App. 2007) (quoting *Lopez v. Tulare Joint Union High Sch. Dist. Bd. of Trs.*, 40 Cal. Rptr. 2d 762, 771 (Ct. App.

1995)).[5] Therefore, § 48907 does not affect our earlier analysis, and it does not preclude Defendants from disciplining Epple and Chen here.

III

Epple claims that he was deprived of his due process right to a fair hearing before an impartial tribunal because Trutane, a member of the AUSD Board who voted to expel him, was biased against him. As noted earlier, *see supra* at 17–18, the district court dismissed this claim on the ground that Epple had failed to exhaust judicial remedies, as assertedly required to attempt to avoid the preclusive effect of the administrative decision against Epple. *See Doe*, 891 F.3d at 1155. However, Epple subsequently did file a petition for a writ of mandate challenging the ACBE's decision, and the superior court denied the petition.[6] Because Epple did not appeal that decision and it is now final, he contends that he has exhausted his judicial remedies and that we therefore must vacate

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[5] *Smith* recognized that "section 48907 provides broader protection" than the federal First Amendment "for student speech *in California public school newspapers*." *See* 59 Cal. Rptr. 3d at 516 (emphasis added). But as relevant here, § 48907 provides no greater protection than the First Amendment. *Id.*

[6] Under California law, a petition for a writ of administrative mandamus under Code of Civil Procedure § 1094.5 is the ordinary means for "inquiring into the validity of any final administrative order or decision made as the result of a proceeding in which by law a hearing is required to be given, evidence is required to be taken, and discretion in the determination of facts is vested in the inferior tribunal, corporation, board, or officer." CAL. CODE CIV. PROC. § 1094.5(a); *Doe*, 891 F.3d at 1155.

the district court's dismissal of his due process claim. But even if Epple is correct that his judicial remedies have now been exhausted, we affirm the dismissal of Epple's due process claim on the separate ground that the *state court's* decision rejecting Epple's claims of bias has preclusive effect here.

The California superior court expressly considered Epple's claim that his "[p]rocedural due process" rights were violated in "that he was denied a fair hearing because of bias by Trutane." The court rejected that claim, holding that "the record does not demonstrate an unacceptable probability of bias by the members of the AUSD that ordered his expulsion." The court reasoned that "Trutane's involvement in various community activities related to supporting impacted students and eliminating racism in the schools during [the] time period at issue did not establish the 'concrete bias, personal interest, or malice' necessary to require her recusal." Having litigated and lost this due process issue in state court, Epple may not now relitigate that issue in federal court.

"In determining the preclusive effect of a state administrative decision or a state court judgment, we follow the state's rules of preclusion." *White v. City of Pasadena*, 671 F.3d 918, 926 (9th Cir. 2012). California's doctrine of "[i]ssue preclusion 'prevents a party from obtaining a second adjudication of an issue that has already been adjudicated against that party on the merits by a court of competent jurisdiction.'" *Hardwick v. County of Orange*, 980 F.3d 733, 740 (9th Cir. 2020) (quoting *Pajaro Valley Water Mgmt. Agency v. McGrath*, 27 Cal. Rptr. 3d 741, 745 (Ct. App. 2005)).

"Issue preclusion applies: '(1) after final adjudication (2) of an identical issue (3) actually litigated and necessarily decided in the first suit and (4) asserted against one who was a party in the first suit or one in privity with that party.'" *Id.* (quoting *DKN Holdings LLC v. Faerber*, 352 P.3d 378, 387 (Cal. 2015)). Epple does not (and cannot) challenge the first, third, or fourth elements. Instead, he challenges only the second element, asserting that the issues are not identical because the due process standard applied by the California superior court differs from the federal due process standard recognized in our caselaw. We disagree.

Applying the standards set forth in *Nasha L.L.C. v. City of Los Angeles*, 22 Cal. Rptr. 3d 772 (Ct. App. 2004), the superior court held that a violation of due process occurs in the administrative context when there is "an unacceptable probability of actual bias on the part" of an actual decisionmaker. *Id.* at 780 (citation omitted). Epple contends that this standard is materially different from the federal due process standard, which he claims requires recusal if there is "even an appearance of bias." We discern no material difference between *Nasha* and federal law on this point.

Nasha's standard requiring either actual bias or an "unacceptable probability of actual bias" was drawn verbatim from *Breakzone Billiards v. City of Torrance*, 97 Cal. Rptr. 2d 467, 492 (Ct. App. 2000), which quoted that phrase from our decision in *United States v. Oregon*, 44 F.3d 758, 772 (9th Cir. 1994). And we, in turn, derived that standard from *Withrow v. Larkin*,

421 U.S. 35 (1975), in which the Court held that due process would be violated in situations in which "the *probability of actual bias* on the part of the judge or decisionmaker is too high to be constitutionally tolerable." *Id.* at 47 (emphasis added). That was the same standard applied by the Supreme Court in *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868 (2009), where the Court reaffirmed that due process requires a decisionmaker's recusal, not only when he or she "has 'a direct, personal, substantial, pecuniary interest' in a case," *id.* at 876 (citation omitted), but also when "the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable." *Id.* at 877 (quoting *Withrow*, 421 U.S. at 47). Because, in applying *Nasha*, the superior court applied the same federal standard articulated in *Withrow* and reaffirmed in *Caperton*, Epple is wrong in contending that the superior court did not decide the identical federal due process issue that he seeks to relitigate here. *See also Williams v. Pennsylvania*, 579 U.S. 1, 4 (2016) (applying the same "objective standard that requires recusal when the likelihood of bias on the part of the judge ' "is too high to be constitutionally tolerable" ' " (quoting *Caperton*, 556 U.S. at 872 (in turn quoting *Withrow*, 421 U.S. at 47))).

Epple's contrary argument is based largely on a single out-of-context quotation from this court's decision in *Stivers v. Pierce*, 71 F.3d 732 (9th Cir. 1995). In *Stivers*, we stated:

> There are two ways in which a plaintiff may establish that he has been denied his constitutional right to a fair hearing before an

> impartial tribunal. In some cases, the proceedings and surrounding circumstances may demonstrate *actual bias* on the part of the adjudicator. In other cases, the adjudicator's pecuniary or personal interest in the outcome of the proceedings may create an *appearance of partiality* that violates due process, even without any showing of actual bias.

Id. at 741 (citations omitted). Seizing on the latter sentence, Epple claims that it stands for the proposition that "even an appearance of bias in an administrative hearing gives rise to a violation of due process." But this statement is merely a reference to, and not an alteration of, the settled *Withrow* standard that has now been repeatedly reaffirmed by the Supreme Court. That due process standard does not require "any showing of actual bias," *id.*, but will also apply upon a showing of a "*probability* of actual bias on the part of the judge or decisionmaker" that "is too high to be constitutionally tolerable." *Withrow*, 421 U.S. at 47 (emphasis added). *Stivers*'s reference to a constitutionally disqualifying "appearance of partiality" merely restates the *Withrow* rule in other terms.

Accordingly, the due process issue that Epple seeks to raise in federal court is one that he has already litigated and lost on the merits in a full and fair de novo review by a California state court. The state court's decision is therefore entitled to preclusive effect, and it requires us to reject Epple's due process argument, regardless of whether we would have reached the same conclusion as the state court did. *See B&B Hardware, Inc. v. Hargis Indus., Inc.*, 575 U.S.

138, 157 (2015) ("[I]ssue preclusion prevents relitigation of wrong decisions just as much as right ones." (simplified)).

IV

For the foregoing reasons, we affirm the district court's judgment.

AFFIRMED.

GOULD, Circuit Judge, concurring:

I join Judge Collins's excellent opinion in full. I write separately to express my views on the topic of hate speech, disturbingly present in both the facts of the case before the panel and regrettably, a reemerging threat to society throughout the nation today. I reaffirm the viewpoint I stated when another case involving hate speech in schools came before this court: "Hate speech, whether in the form of a burning cross, or in the form of a call for genocide, or in the form of a tee shirt misusing biblical text to hold gay students to scorn, need not under Supreme Court decisions be given the full protection of the First Amendment in the context of the school environment, where administrators have a duty to protect students from physical or psychological harms." *Harper v. Poway Unified Sch. Dist.*, 455 F.3d 1052 (9th Cir. 2006) (Gould, J., concurring in the denial of rehearing en banc), *vacated on other grounds*, 549 U.S. 1262 (2007). The continued prevalence of hate speech and crimes against American citizens and residents on the basis of race, ethnicity, religion, sexual orientation, gender identity, and disability is evidence of the enduring threat of hate crimes to the fabric of American

democratic society and to the safety and security of individuals.[1]

In light of this threat, I write to underscore that the First Amendment and Supreme Court precedent do not require courts always to strike down a government entity's attempts to prevent harm to their citizens – especially in the context of hateful speech at schools harming children.

The Supreme Court in *Beauharnais v. Illinois*, 343 U.S. 250 (1952), upheld a criminal libel statute that sought to prevent the publications of items that subjected "citizens of any race, color, creed or religion to contempt, derision, or obloquy or which is productive of breach of the peace or riots." Though the viability of the *Beauharnais* decision has been called into question by our sister circuits,[2] the case has not been overturned

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[1] The FBI collects data on the prevalence of hate crimes reported to the agency by participating law enforcement agencies. *E.g.,* Federal Bureau of Investigation, *2019 Hate Crime Statistics*, https://ucr.fbi.gov/hate-crime/2019. Even if the reporting of hate crimes represents a fraction of the overall population of a given citizenry, the existence of such hate crimes can serve as a reminder to a given individual that others in society do not see them as full, human members of society and that others pose a risk to their participation in a democratic society. *See e.g.,* Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320 (1989); National Museum of African American History & Culture, *The Evidence of Things Unsaid*, https://nmaahc.si.edu/explore/stories/evidence-things-unsaid.

[2] We have also previously expressed skepticism of *Beauharnais*. *See* Dworkin v. Hustler Mag. Inc., 867 F.2d 1188, 1200 (9th Cir. 1989) ("We agree with the Seventh Circuit that the permissibility of group libel claims [discussed in *Beauharnais*] is highly

and the Supreme Court's rationale focused on protecting the dignity of the enumerated class of citizens remains persuasive. Courts should hesitate to question attempts by the government, through its elected bodies, to protect their constituents, and this deference is applicable both when the actions in question are undertaken at the federal level by the Congress of the United States and when actions to protect students are undertaken at the local level by an elected school board, such as in Albany, California. Some may believe that attempts to solve the persistent issue of hate speech are misguided and ill-advised; but in response, the measured words of Justice Frankfurter come to mind: "It may be argued, and weightily, that this legislation will not help matters; that tension and on occasion violence between racial and religious groups must be traced to causes more deeply embedded in our society than the rantings of modern Know-Nothings. . . . That being so, it would be out of bounds for the judiciary to deny the legislature a choice of policy, provided it is not unrelated to the problem and not forbidden by some explicit limitation on the State's power." *Id.* at 262. This is especially true in the context of the present case, where school administrators,

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questionable at best."). However, those decisions centered on the libel theory rationale within *Beauharnais* likely undermined by *New York Times v. Sullivan,* 376 U.S. 254 (1964), while the majority opinion in *Beauharnais* also embraced a broad conception of the legislature's ability to regulate hate speech due to its pernicious effects on citizens' ability to participate fully in the democratic process as another basis for its ruling. This rationale has reemerged throughout the years since the *Beauharnais* opinion, *see* R.A.V. v. City of St. Paul, Minn., 505 U.S. 377, 416 (1992) (Stevens, J., concurring in the judgment).

including members of the elected Alameda County Board of Education, tried to protect their students from hate speech that could reasonably be construed as containing an implied threat of violence. Possibly, the school district could have taken alternative routes, such as attempting to educate and reform the perpetrators of the hate speech in line with the school's role as educators. But our role is not to dictate education policy from the bench, but rather to ensure that the Constitution and the applicable laws were correctly followed. I conclude that the school district's actions, in light of the potential for violence, the substantial disruption of school activities, and the infringement upon the rights of other students to be physically secure in their learning environment, were permissible and benign to the system of free expression protected by the First Amendment. The possibility that government actions aimed at improving the lives of students may not eventually be fully effective is no reason to say that the school board cannot try to protect its students.

The context of the public school raises the stakes. The public school is a special institution within American society, serving as "the first opportunity most citizens have to experience the power of government. . . [and t]he values they learn there, they take with them in life." *New Jersey v. T.L.O.,* 469 U.S. 325, 385–86 (1985) (Stevens, J., concurring in part and dissenting in part). This comes with the understanding that even for public school officials, "[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other

matters of opinion." *W. Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943). However, this understanding of the role of schools comes with a companion understanding that schools serve an essential role in imbuing and inoculating positive values in children, such as teaching the values central to good citizenship. *See, e.g., Pierce v. Soc'y of the Sisters,* 268 U.S. 510, 534 (1925). One aspect of those values is a central understanding of the dignity and respect that must be afforded to all citizens and people, regardless of any personal characteristics or attributes like race, religion, and sexual orientation, and the role of that respect for the individual in the healthy functioning of a multiracial, pluralistic democracy. As Justice Brennen stated in *Illinois v. Allen*, 397 U.S. 337, 350-51 (1970), we recognize "that respect for the individual which is the lifeblood of the law." *See also Faretta v. California*, 422 U.S. 806, 834 (1975). The flipside of that central understanding is that hate speech is antithetical to the values of this nation.

Hateful speech encourages hateful thoughts, which lead to hateful goals of individuals; those, in turn, lead to hateful actions and sometimes violence, resulting in harm to the public. No court would seriously entertain an argument that schools must teach hateful speech on the grounds of academic equality or fairness when it so clearly is antithetical to our values. Hate speech has no role in our society and contributes little or nothing to the free-flowing marketplace of ideas that is essential to protect in a school environment. Just as a school cannot be forced to teach hate speech, neither should it be forced to entertain and tolerate within its walls hate speech promulgated by arrantly misguided students.

When school authorities take action to root out the persistent echoes of racism that arise from time to time in American society, courts should not stop them, instead allowing racist comments to be rooted out and not deemed protected by the First Amendment. These principles apply with cogent force to hate speech that threatens to dehumanize ethnic or racial groups within our multiracial society.

We may properly consider the incalculable harm that hate speech can cause ethnic or racial minorities in the context of school settings. Justice Thomas's words are illustrative in this evaluation: "In every culture, certain things acquire meaning well beyond what outsiders can comprehend." *Virginia v. Black*, 538 U.S. 343, 388 (2003) (Thomas, J., dissenting). His words counsel us to keep in mind the differing cultural and historical circumstances that might lead different groups to experience hate speech differently. Children go to school to enrich their lives and gain knowledge and skills to assist their full and productive participation in society. But consider how an African American child must feel if confronted with images sent to other students portraying the child as inferior, as less intelligent and as less human. As in the facts of the case before us, African American children may be particularly sensitive to imagery portraying them as slaves or akin to animals. Similarly, Jewish children may be particularly sensitive to images portraying them as rats or vermin, or even insects, as was done in Nazi Germany as prelude to the Holocaust. Indeed, each ethnic, racial, or other minority group will recognize visual images or verbal phrasings that dehumanize their community and encourage hate to be

visited upon them, resulting in the disruption or interference with their effective learning process. Such an inquiry must be fact-specific and unique to the circumstances of each case, but in an especially egregious example like the case before us today, the answer is clear, as expressed in the majority opinion. In my view, civilized society should not tolerate imagery encouraging hate; government bodies, consistent with the Constitution, can and should be able to take steps to stop it.

We should understand the government, through our vast network of public schools, must be able to address systemic hatred towards minority groups within the boundaries of the school, consistent with constitutional limits placed upon government actors. Consider Justice Jackson's warning against "allow[ing] zeal for our own ideas of what is good in public instruction to induce us to accept the role of a super board of education for every school district in the nation." *McCollum v. Bd. of Ed. of Sch. Dist. No. 71, Champaign Cnty., Ill.*, 333 U.S. 203, 237 (1948) (Jackson, J., concurring). We have a role to play when constitutional rights, such as those involving free speech in the case before us, are implicated, but primary responsibility for the operation of the school rests with elected officials and their selected representatives, and we should not stand in the way of school boards protecting their own students from the vile effects of hate speech.

School boards properly have power to discipline the perpetrators of hate speech. Despite the lower court record indicating that some involved students allegedly boasted that "they were going to win" and not face the

consequences of their hurtful speech, I conclude that culpable racist students are properly punished for their abhorrent actions, which in this case dehumanized African American students through imagery and verbiage harkening back to the days of slavery and the discredited language of eugenics.

I write to stress that school officials, and government officials more broadly, should not be unduly constrained in their attempts to regulate hate speech for the purpose of protecting the intended targets of said speech. This may require some refining of the Supreme Court's prior guidance in its precedents. For example, while recognizing that my views on hate speech may be less protective of speech than some current doctrine, I would conclude here that the racist characterizations and images, dehumanizing African Americans students, is sufficient to show a threat of imminent violence, fights or other attacks on African Americans, including, within the school context, bullying and harassment. Justice Thomas, in his dissent in *Virginia v. Black* involving a state statute banning cross burning with an intent to intimidate, noted his disagreement with the majority opinion's rationale that "imput[ed] an expressive component to the activity in question [i.e., cross burning]." 538 U.S. 343, 388 (2003) (Thomas, J., dissenting). Instead, Justice Thomas focused on the intimidating conduct itself as grounds for upholding the Virginia statute. Refocusing our attention on the hate speech issues in this case, I conclude that "just as one cannot burn down someone's house to make a political point and then seek refuge in the First Amendment, those who hate cannot terrorize and

intimidate to make their point." *Id.* at 394. In our case, the culprits believed that they could escape the consequences of their hate speech that generated indisputable fear and intimidation in their targeted student victims because their conduct was couched in avowed "speech." If the Supreme Court decides to reassess its precedents in this area, I urge them to not blink the fact of grievous harm that hate speech causes its targets. I also urge the Court not to give any First Amendment protection for racist hate speech. For example, the Court could consider modifying the *Brandenburg* test to require only a probable and emerging threat of violence rather than imminent lawless action as a result of speech in order to regulate it. Regardless, I would adopt an expansive view of the ability of government officials who regulate schools to protect the future citizens they are bound to serve and educate.

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

Case Nos. 3:17-cv-02478-JD (lead case)
3:17-cv-02767-JD
3:17-cv-03418-JD
3:17-cv-03657-JD

[Filed November 29, 2017]

PHILIP SHEN, et al.,
Plaintiffs,

v.

ALBANY UNIFIED SCHOOL DISTRICT, et al.,
Defendants.

RICK ROE, et al.,
Plaintiffs,

v.

ALBANY UNIFIED SCHOOL DISTRICT, et al.,
Defendants.

JOHN DOE,
Plaintiff,

v.

ALBANY UNIFIED SCHOOL DISTRICT, et al.,
Defendants.

C.E.,
Plaintiff,

v.

ALBANY UNIFIED SCHOOL DISTRICT, et al.,
Defendants.

ORDER RE SUMMARY JUDGMENT MOTIONS

Re: Dkt. No. 43 in 3:17-cv-02478-JD

These cases arise out of disciplinary actions taken by Albany Unified School District ("AUSD" or "the District") in response to racist and derogatory content posted on an Instagram account by several students at Albany High School ("AHS"). A student created the account in November 2016 and gave access to a group of AHS students. In March 2017, the AHS student United States District Court Northern District of California body and school personnel discovered the account and its contents. AUSD expelled the account's creator and suspended the other students involved. AUSD also sponsored a variety of events in response to the situation, including a "restorative justice" session that culminated in threats, and in some cases physical assaults, against the disciplined students and their families. Plaintiffs, who are the disciplined students, allege violations of free speech and due process under the federal constitution and California state law, and

have sued the District and its officials[1] to set aside the disciplinary actions, among other relief.

In this order, the Court resolves the freedom of speech issues only. These questions are central to plaintiffs' lawsuits, and the parties agreed to address them early on summary judgment. Dkt. No. 71.[2] Because the ten plaintiffs have filed several separate complaints, all of which have been related but not consolidated for case management purposes, and because the parties filed multiple overlapping motions and cross-motions for summary judgment, the litigation is a procedural thicket. Reduced to the pertinent essentials, plaintiffs filed motions for summary judgment on their First Amendment claims, and the District filed a cross-motion on the same issue. *See* Dkt. No. 43 (motion for partial summary judgment); Dkt. No. 59 (District's cross-motion); Dkt. No. 72, Dkt. Nos. 40 and 42 in *Roe*, Dkt. No. 16 in *Doe*, Dkt. No. 13 in *C.E.* (opposition to District's cross-motion and additional cross-motions); Dkt. No. 55 in *Roe* (District's consolidated reply). This order applies to the First Amendment and related state law claims alleged in all of the complaints by all plaintiffs.

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[1] The named defendants include AUSD as well as AHS officials, teachers, and AUSD Board of Education officials. All named defendants have appeared jointly in these cases. For convenience, in the rest of this order, the Court refers to AUSD as the representative defendant. The Court takes up individual defendants' qualified immunity arguments at the end of the order.

[2] Unless otherwise specified, citations to the docket are to the lead case, Case No. 17-2478.

BACKGROUND

For summary judgment purposes, the parties agree on the material facts. In November 2016, AHS student C.E. created a private Instagram account with the handle @yungcavage, and invited several AHS students to follow it.[3] Dkt. No. 13-1 ¶ 7 in *C.E.* Only the express invitees were able to see or react to the posts by commenting or by liking them. By March 2017, at least nine AHS students could access the @yungcavage account. Some of the approved followers were C.E.'s close friends, and others were just passing acquaintances. *See, e.g.*, Dkt. No. 54-5 ¶ 2 in *Roe*.

Between November 2016 and March 2017, @yungcavage made thirty to forty posts. Dkt. No. 13-1 ¶ 7 in *C.E.* The posts in large part targeted fellow AHS students and school personnel with racist and derogatory comments, often with a picture identifying the target. *See* Dkt. No. 60-8 Exh. A ("Set 1"); Dkt. No. 60-9 ("Set 2"). Among other images, these posts depicted:

- A "Ku klux starter pack" featuring a noose, a burning torch, a black doll, and a white hood. Set 1 at ECF p.12.
- A screenshot of an African-American student from her own Instagram page, which she had captioned "i [sic] wanna go back to the old way," juxtaposed with an image of a white man beating a black slave hung by his hands.

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[3] Some of the plaintiffs of minor age requested permission to proceed pseudonymously, which the Court granted. Dkt. No. 88.

The image posted by @yungcavage is captioned, "Do you really tho?" *Id.* at ECF p.17.

- An AHS student and the AHS basketball coach, both of whom are African-American, with nooses drawn around their necks, captioned, "twinning is winning." *Id.* at ECF p.22.

- A screenshot of a Snapchat conversation where a female African-American AHS student asks C.E. to delete a video he posted online. In that video, a male student touches her hair without her permission. In the screenshotted conversation, C.E. refuses to take down the video. The post is captioned: "Holy shit I'm on the edge of bringing my rope to school on Monday." *Id.* at ECF p.24; *see also* Dkt. No. 60-3 ¶ 3.

- "Things The World Wouldn't Have If Black People Didn't Exist", including "United States avg. IQ: 98", a KKK hood, and men dressed in orange prison garb. Set 2 at ECF p.7.

- The back of a female African-American AHS student's head, captioned "Kamryn or amber" and "Fucking nappy ass piece of shit." *Id.* at ECF p.9.

- Multiple comparisons of African-American women and students to gorillas. *Id.* at ECF p.3; Set 1 at ECF p.19.

- The back of a female African-American AHS student's head captioned "Fuck you." Set 2 at ECF p.10.

- Screenshot of an iPhone's text replacement page, showing that the phone auto-corrects the word "nigger" to "nibber." Captioned: "Making my texts more black friendly." *Id.* at ECF p.13.

In total, ten different AHS students were depicted on the account, and several photos were taken on school property. Dkt. No. 55-4 at 13 in *Roe*. The parties agree that C.E., the creator of the @yungcavage account, made all the original posts on the account. *See* Dkt. No. 13-1 ¶ 7 in *C.E.* With one exception, the other students disciplined by the District liked or commented on the posts, or took photographs that ended up on the account, but did not directly post images. *See, e.g.*, Dkt. No. 43-1 at ECF pp.2-3, 7, 15. One student, pseudonymous plaintiff Nick Noe, had access to the account but never commented on or otherwise responded to it online. Dkt. No. 40-1 ¶¶ 5-7 in *Roe*. C.E. states, and the District does not dispute, that he did not post any images to his Instagram account during school or on school property. Dkt. No. 13-1 ¶ 7 in *C.E.* The other plaintiffs similarly state that they did not access Instagram, comment on, or like any images during school or on school property.

The pretense of keeping the @yungcavage account private evaporated on the weekend of March 17, 2017, when the *Doe* plaintiff showed some of C.E.'s posts to two of the targeted AHS students, both African-American. Dkt. No. 16-1 ¶ 7 in *Doe*. One of those

students saw photos of herself, including a photo of her and her basketball coach with nooses drawn around their necks. Dkt. No. 60-12 ¶ 8. She also saw a post about auto-correcting "nigger" to "nibber," a photo of her next to a napping student (which she took as a reference to "nappy" hair), and comments made by the account's followers that denigrated the intelligence of African-Americans. *Id.*

News of the @yungcavage account spread to other AHS students over the weekend. *Id.* ¶ 13 (student heard of account on Sunday). On the morning of Monday, March 20, at school, a student who had heard about the account asked one of the plaintiffs if she could borrow his phone to make a call. Dkt. No. 54-3 ¶ 10 in *Roe*. She took his phone to a bathroom, where she accessed his Instagram application and took photos of @yungcavage posts using her own phone. *Id.* She did this at the request of a friend who had heard about the account over the weekend and wanted to see the posts. *Id.*

By lunchtime on Monday, a visibly distraught and agitated group of students -- several of whom were targets of the account -- had gathered in a school hallway. Some students were in tears, others were yelling. AHS Principal Anderson heard the disturbance from his office and brought the students into a conference room. Dkt. No. 59-1 ¶ 2. This was AUSD's first awareness of the Instagram account.

By afternoon, many more students had obtained copies of the @yungcavage posts. Dkt. No. 60-8 ¶ 8. News about the situation spread rapidly through the school. One student, for example, learned about the

account on a high school club chat line that Monday morning. Dkt. No. 60-5 ¶ 2. C.E. discovered that his account had become public knowledge and disabled it that day. Dkt. No. 13-1 ¶ 9 in *C.E.* On the evening of the same day, he permanently deleted the account.[4] *Id.*

By June 2017, AUSD had suspended each of the account's followers for various periods of time. *See, e.g.*, Dkt. No. 43 at 3. AUSD permanently expelled C.E from AHS. Dkt. No. 13-1 in *C.E.* ¶ 14.

LEGAL STANDARDS

The parties seek summary judgment on whether AUSD's disciplinary actions violated plaintiffs' free speech guarantees under the First Amendment and the California Education Code. "A party may move for summary judgment, identifying each claim or defense -- or the part of each claim or defense -- on which summary judgment is sought. The Court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The Court may dispose of less than the entire case and even just portions of a claim or defense. *Smith v. State of California Dep't of Highway Patrol*, 75 F. Supp. 3d 1173, 1179 (N.D. Cal. 2014).

Under Rule 56, a dispute is genuine "if the evidence is such that a reasonable jury could return a verdict"

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[4] The photos taken by the AHS student on the morning of March 20 are the only remaining visual record of the images, comments, and likes on the @yungcavage account. Those photos do not capture all the activity on the account.

for either party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A fact is material if it could affect the outcome of the suit under the governing law. *Id.* at 248-49. To determine whether a genuine dispute as to any material fact exists, a court must view the evidence in the light most favorable to the non-moving party and draw "all justifiable inferences" in that party's favor. *Id.* at 255.

The primary legal question presented for summary judgment is whether plaintiffs' Instagram activity -- their posts, their comments, their likes, and that they followed the @yungcavage account -- was protected from school discipline by the First Amendment. It is of course a "bedrock principle" under the First Amendment that the government cannot prohibit or penalize the expression of an idea "simply because society finds the idea itself offensive or disagreeable." *Texas v. Johnson*, 491 U.S. 397, 414 (1989). It is also beyond dispute that the First Amendment protects not only literal speech but also conduct with expressive elements. Conduct may be protected speech for purposes of the First Amendment if there was intent to convey a particularized message, and "great" likelihood that that message would be understood by viewers. *Id.* at 404.

The wrinkle here is that the speech and conduct involved a public high school and its students. The "constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings." *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 682 (1986). "Schools must achieve a balance between protecting the safety and well-being of

their students and respecting those same students' constitutional rights." *C.R. v. Eugene Sch. Dist. 4J*, 835 F.3d 1142, 1148 (9th Cir. 2016) (internal citation omitted).

Consequently, "school speech" is not analyzed under the traditional First Amendment framework. Rather, as our circuit has determined, a school-specific framework applies: "vulgar, lewd, obscene, and plainly offensive speech" is governed by *Fraser*; "school-sponsored speech" is governed by *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988); "speech promoting illegal drug use" is governed by *Morse v. Frederick*, 551 U.S. 393 (2007); and speech that falls into none of these categories is governed by *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969). *See generally Wynar v. Douglas Cty. Sch. Dist.*, 728 F.3d 1062, 1067 (9th Cir. 2013).

Earlier decisions addressing school speech often focused on whether the speech occurred on- or off-campus. Geographic location is still a relevant factor, *Wynar,* 728 F.3d at 1068, but strict tests of locality are not compatible with the online methods of communication in our digital age. In response to our internet world, where today's students are particularly comfortable residents, the courts have developed updated approaches to analyzing school speech issues. Our circuit has "identified two tests used . . . to determine when a school may regulate off-campus speech." *C.R.*, 835 F.3d at 1149. The first test looks for a sufficient nexus between the speech and the school and was applied by the Fourth Circuit in *Kowalski v. Berkeley County Schs.*, 652 F.3d 565 (4th Cir. 2011).

The second test asks whether it was reasonably foreseeable that the off-campus speech would reach the school and was applied by the Eighth Circuit in *S.J.W. v. Lee's Summit R-7 Sch. Dist.*, 696 F.3d 771 (8th Cir. 2012). The Ninth Circuit has declined to choose between the two approaches, noting that both tests "rely on the speech's close connection with the school to permit administrative discipline." *C.R.*, 835 F.3d at 1151 n.4.

AUSD argues that plaintiffs' activities satisfied both the nexus and reasonable foreseeability approaches, and so were subject to discipline as school speech. Plaintiffs dispute that mainly on the grounds that the challenged communications happened off-campus in a private online forum. If the plaintiffs' Instagram activity was indeed school speech, the parties further disagree over whether it was protected under *Tinker*. *Tinker* does not protect student speech that "materially disrupts classwork or involves substantial disorder or invasion of the rights of others." *Tinker*, 393 U.S. at 513. AUSD says it could discipline the plaintiffs for their speech, which both substantially disrupted school and which infringed on the rights of other students. Plaintiffs argue that they neither caused substantial disruption, nor interfered with the rights of others.

DISCUSSION

I. The Instagram Activity Falls Under The First Amendment

All of the challenged actions occurred on a social media site, and the parties dispute the extent to which the First Amendment applies to all of the online

conduct. Plaintiffs interacted with the @yungcavage account in different ways. Plaintiff C.E. created the account and uploaded the original posts. Other plaintiffs commented. Still others only liked some posts, and one plaintiff had account access but did not post a comment or indicate a like.

Without question, the original posts and verbal comments are within the scope of the First Amendment. This applies to C.E., Philip Shen, Nima Kormi, Michael Bales, Kevin Chen, John Doe of the *Roe* action, and the *Doe* plaintiff, all of whom posted either original content or verbal comments.

Plaintiffs Rick Roe and Paul Poe liked some of the posts without adding any text. This too is expression covered by the First Amendment. On the Instagram phone application, a user can like an image either by tapping a heart-shaped icon under the post or by double-tapping the image itself. A notification goes out to the poster that someone has liked his or her post, and the like is also visible to anyone else who can see the post. This action broadcasts the user's expression of agreement, approval, or enjoyment of the post, which is clearly speech protected by the First Amendment. *See Bland v. Roberts*, 730 F.3d 368, 386 (4th Cir. 2013), as amended (Sept. 23, 2013) ("liking" Facebook political campaign page is substantive speech); *see also City of Ladue v. Gilleo*, 512 U.S. 43, 55 (1994) (displaying signs is substantive speech even though it "may not afford the same opportunities for conveying complex ideas as do other media").

The parties' disagreement is sharpest in the case of Nick Noe. Noe and defendants contest whether he has

any First Amendment claim at all from just following the @yungcavage postings. Defendants say that he does not because he was, at most, a passive consumer of content and not an active speaker. Noe's own declaration goes to some length to state that he joined only at C.E.'s request and that he "never accessed the account to view any of the dialogue or images that were posted" and was not aware of its content until he was questioned by AUSD officials on March 21. Dkt. No. 40-1 ¶¶ 5-7 in *Roe*.

Both sides frame their debate in terms of whether Noe was engaged in affirmative expressive conduct, but the better approach is to view his activity as that of a reader. The First Amendment protects readers as well as speakers. "The right of freedom of speech and press includes not only the right to utter or to print, but the right to distribute, the right to receive, [and] the right to read." *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965). *See also Stanley v. Georgia*, 394 U.S. 557, 564 (1969) ("right to receive information and ideas, regardless of their social worth"). This principle has been applied specifically to students and schools. *Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 867 (1982) (right to receive information is "inherent corollary" of rights explicitly guaranteed by First Amendment). As a follower of online content, Noe is no different for First Amendment purposes than the pre-internet readers discussed in these cases. It is also worth noting that AUSD disciplined Noe for viewing the @yungcavage posts, which is precisely the type of government conduct that these cases condemned under the First Amendment.

Looking for a moment beyond the speech issues, the disciplinary action against Noe is troubling in many respects. From the record before the Court, it appears that Noe did nothing more than have access to the posts, and the District agrees that Noe's conduct was "completely devoid of any affirmative expressions or purpose, action, or ideology." Dkt. No. 55-4 at 7 in *Roe*. It is not clear how Noe or any student would have known that online access or viewing alone could result in a suspension, and it is even less clear how a suspension for those reasons squares with our traditional ideas of freedom of thought, due process, and fairness. Giving schools the power to control what students are permitted to look at online is a deeply problematic proposition. These aspects of Noe's case will likely be addressed more fully in later proceedings. For now, the Court finds that Noe engaged in protected First Amendment activity.

II. The Instagram Activity Was School Speech

The next issue is whether plaintiffs' online conduct qualifies as school speech potentially subject to greater regulation by school authorities. The answer to this question entails "a circumstance-specific inquiry to determine whether a school permissibly can discipline a student for off-campus speech." *C.R.*, 835 F.3d at 1150. In making that determination, our circuit applies the nexus and reasonable foreseeability tests. *Id.*

As the Ninth Circuit said in *Wynar*, the nexus test is exemplified by the Fourth Circuit's approach in *Kowalski*. In *Kowalski*, Musselman High student Kara Kowalski created a MySpace discussion group where

she and over two dozen Musselman students ridiculed a fellow student as a "whore" infected with herpes. *Id.* at 567-68. Kowalski argued that she could not be disciplined for speech that took place at home after school. The Fourth Circuit disagreed, finding a sufficient nexus between Kowalski's speech and the school. The court noted that the group consisted predominantly of students at Musselman High, the group was named S.A.S.H. for "Students Against Slut Herpes," the dialogue foreseeably took place between Musselman students and impacted the school environment, and the group thread was understood by the victim as an attack "made in the school context." *Id.* at 573.

The undisputed facts here amply satisfy the nexus test and its focus on "the subject and addressees" of the speech at issue. *Wynar*, 728 F.3d at 1069. The followers were mainly AHS students, and the posts featured ten different AHS students as well as school personnel. Some of the most offensive posts -- for instance, the image of nooses drawn around the necks of an African-American student and an African-American basketball coach -- depicted school activities and were clearly taken on campus, even if not posted to Instagram from campus. Dkt. No. 60-14 ¶ 3. Other posts were directly responsive to events that took place at school. For instance, one post related to an argument that C.E. had with a female African-American AHS student. In February 2017, C.E. had recorded a video of another male AHS student touching her hair without her permission. Dkt. No. 60-3 ¶ 3. C.E. then posted it on an Instagram account (not @yungcavage) visible to other AHS students. The female student asked C.E. to delete

the video, both in person and via Snapchat. *Id.* ¶ 4. C.E. posted a screenshot of that Snapchat conversation on @yungcavage and captioned it, "Holy shit I'm on the edge of bringing my rope to school on Monday." Set 1 at ECF p.24.

The same result is readily reached under the Eighth Circuit test, which asks whether it was reasonably foreseeable that the speech or conduct would reach the school and create a risk of a substantial disruption. *S.J.W. v. Lee's Summit R-7 Sch. Dist.*, 696 F.3d 771, 777 (8th Cir. 2012). In *S.J.W.*, two students created a blog with racist content as well as sexually degrading comments about specifically identified female classmates. *Id.* at 773. The two students used a Dutch domain site to prevent anyone from finding their blog using a Google search and told only six school friends about their blog. They intended the blog to be a secret, but "whether by accident or intention, word spread quickly." *Id.* at 774. The *S.J.W.* court found that it was reasonably foreseeable that the blog might reach the school because it "targeted" the school. *Id.* at 778. Similarly, the Ninth Circuit has found that it is reasonably foreseeable for speech made by students about other students to reach a school. *Wynar*, 728 F.3d at 1069.

The undisputed facts here also satisfy the "reasonable foreseeability" test. Like the speech in *Wynar* and in *S.J.W.*, the activity was targeted to the school. Posts, comments, and likes were made by students and about students, and it was precisely the targeted nature of the content on the @yungcavage account that led the *Doe* plaintiff to show the account

to others. Moreover, plaintiffs' activity on Instagram appear to have been related to ongoing social tensions at school, which again increased the likelihood their speech would reach and disturb the campus. The District has offered evidence that some of the activity on the account was co-extensive with a campaign of offensive comments directed by C.E. and his school friends at a group of female African-American students. For example, at the time the *Doe* plaintiff showed the posts to his two friends, he explained "that his friend group thinks they are superior to her group, because her group's hair is too nappy and their skin is too dark." Dkt. No. 60-12 ¶ 8. One student targeted by the @yungcavage account reported that C.E. had previously texted her with a racial slur and then blamed the text on Kevin Chen. Dkt. No. 60-12 ¶ 14. Another student targeted by the @yungcavage account reported that C.E. had told her she should be lynched, and that Kevin Chen and C.E. had called her and her friends "'nigger' using the hard 'r' at the end." Dkt. No. 60-6 ¶ 7. These circumstances made it reasonably foreseeable that the contents of the account would eventually reach and disrupt AHS.

In opposition to both tests, plaintiffs say that the private and self-contained nature of the Instagram account takes it out of the domain of school speech, *see, e.g.*, Dkt. No. 43 at 10, but that is not at all the case. As an initial matter, none of the Fourth, Eighth, or Ninth Circuit's decisions have focused on a student's subjective intent for speech to remain private. And the record does not support a finding that maintaining privacy was an essential element of plaintiffs' conduct. Although C.E. states that he allowed access only to

close friends, two of the plaintiffs have stated that they did not know C.E. well. Dkt. No. 54-3 ¶ 2 in *Roe*; Dkt. No. 54-5 ¶ 2 in *Roe*. This undercuts C.E.'s suggestion that the account was an intimate forum for friends with a shared understanding of each other's privacy expectations. It also does not appear that C.E. ever instructed his followers to keep information about the account private, even though at least one of the followers was a friend of AHS students targeted by the account. Nor does it appear that anyone other than C.E. determined who was allowed to follow the account and who was not. Plaintiffs who commented on and liked posts had little reason to believe their conduct would stay secret when they could not control who was allowed to follow the account at all. In addition, it is common knowledge that little, if anything, posted online ever stays a secret for very long, even with the use of privacy protections.

Plaintiffs' other efforts to avoid the school speech domain are equally unavailing. They say that this treatment would make school officials "the final *de facto* judge and disciplinarian for all student conduct not only inside of school but also outside the school." Dkt. No. 43 at 9; Dkt. No. 13 at 11 in *C.E.* That goes too far. The threshold question of whether speech is "school speech" does not resolve the scope of protection offered by the First Amendment. Under *Tinker*, school speech may be constitutionally restricted or disciplined only if it risks a substantial disruption of the school environment or violates the rights of other students to be secure. *Tinker*, 393 U.S. at 513.

The *Shen* plaintiffs suggest that Ninth Circuit precedent forecloses *Tinker*'s application to speech that is not either a threat of physical violence as in *LaVine v. Blaine Sch. Dist.*, 257 F.3d 981 (9th Cir. 2001), or *Wynar*, or sexual harassment occurring near school property or immediately after school as in *C.R.* Dkt. No. 72 at 9. That also is not the case. Those may have been the specific facts involved in the circuit's opinions, but the circuit has expressly contemplated that *Tinker* may apply to "websites dedicated to disparaging or bullying fellow students." *Wynar*, 728 F.3d at 1069. Here, there is no question that the speech at issue satisfies threshold tests like the nexus test adopted by the Eighth Circuit or the reasonable foreseeability test adopted by the Fourth. *Id.* Plaintiffs' argument also unduly slights the fact that schools are responsible for preventing not only acts of violence or assault, but also harassment and bullying. *Kowalski*, 652 F.3d at 572.

III. Most Of The Plaintiffs Were Properly Disciplined

Since plaintiffs' speech was school speech, *Tinker* governs the review of defendants' disciplinary measures. *Tinker* allows schools to discipline speech that "materially disrupts classwork or involves substantial disorder or invasion of the rights of others." *Tinker*, 393 U.S. at 513. School officials do not have to wait for the disruption or invasion to take place; they may act prophylactically if it is reasonable under the circumstances. *See LaVine*, 257 F.3d at 989; *Wynar*, 728 F.3d at 1070. The reasonable foreseeability test also focuses on the risk of disruption, and does not

require a disturbance to erupt before the school may act. *See, e.g.*, *S.J.W.*, 696 F.3d at 777-78.

AUSD's authority under *Tinker* to discipline C.E., the creator and main content supplier for the @yungcavage account, is not open to serious question. "In the school context, . . . [t]he cases do not distinguish between 'substantial disruption' caused by the speaker and 'substantial disruption' caused by the reactions of onlookers or a combination of circumstances." *Dariano v. Morgan Hill Unified Sch. Dist.*, 767 F.3d 764, 778 (9th Cir. 2014) (as amended Sept. 17, 2014) (petition for rehearing en banc denied). That fits well here because a cascade of disruptive events immediately followed the public disclosure of C.E.'s @yungcavage account. After the disclosure, the students who first gathered in the hallway were "all too upset to go to class" and "were crying hysterically and talking loudly about the posts." Dkt. No. 60-6 ¶ 3. One school administrator stated, "I had never seen a group of students as upset as these girls were. The intensity of the crying and the yelling was very disturbing and disruptive." Dkt. No. 60-12 ¶ 3.

The level of disruption then rose even higher. School officials called in mental health counselors to help calm down the students. Dkt. No. 60-8 ¶ 5. After reviewing the posts and comments depicting and referencing the KKK, lynching, and nooses, District officials called the Albany police because "the posts could be construed as threats of violence." Dkt. No. 60-12 ¶ 4. That afternoon, the police and District officials conducted interviews with targeted students and their parents. *Id.* ¶ 7. Many of the targeted students were unable to resume school

in a normal way. One student missed multiple days of school and tests out of embarrassment and fear. Dkt. No. 60-5 ¶ 4. Another stated that she has had a hard time in school ever since March because she feels "paranoid about classmates taking photographs of me and using them in the most offensive ways." Dkt. No. 60-3 ¶ 17.

While administrators dealt with targeted students and their parents on the afternoon of the 20th, news of the account quickly spread throughout the school at large. By March 21, faculty members reported that classes were disrupted by upset students who wanted to talk about the situation. Dkt. No. 59-1 ¶ 19.

Taken as a whole, the record firmly establishes that C.E. caused a substantial disruption at AHS. That is enough under *Tinker* to support defendants' disciplinary measures, and consideration of whether C.E. also invaded the rights of others is not necessary. Plaintiffs try to minimize the level of disruption by blaming the District for over-reacting, but it is clear that with or without the intervention of school officials, the students learned about the @yungcavage account and had very strong reactions to it while at school. That the disruption fell short of a full-scale riot is also of no moment. C.E. suggests that anything less than that is not sufficient under *Tinker*, Dkt. No. 13 at 18 in *C.E.,* but the Supreme Court hardly indicated that *Tinker* applies only when the school is in flames or out of control. *See also Kowalski v. Berkeley County Schools*, 652 F.3d at 574 (school may act early to avoid continuing and more serious harm).

Defendants also properly disciplined plaintiffs Philip Shen, Kevin Chen, the *Doe* plaintiff, Rick Roe, and Paul Poe, all of whom expressed approval of or liked posts that specifically targeted students at AHS when, among other incidents:

- Philip Shen commented "yep" on C.E.'s post mocking an African-American student who said that she wanted to "go back to the old way." Next to a photo of the student, C.E. had posted a picture of a black slave being beaten by a white man and captioned the picture, "Do you really tho?" Set 1 at ECF p.17.

- Kevin Chen commented "Its[sic] too good" on a post comparing an African-American AHS student to a gorilla. Set 2 at ECF pp.3-4. On that post, Chen responded "no fuck YOU you dirty zookeeping son of a bitch" to a commenter who wrote "Hey not funny/Fuck you/Delete this." Chen also provided some of the photos of AHS students that ended up on the @yungcavage account and took at least one of those photos in class. Dkt. No. 60-8 ¶¶ 25-26.

- The *Doe* plaintiff liked posts including a photo comparing an African-American female student to a gorilla and the post captioned "Holy shit I'm on the edge of bringing my rope to school on Monday." Set 2 at ECF p.3, Set 1 at ECF p.24. He commented with three laughing emojis on a post that compared an

AHS student's rear end to a tub of cottage cheese. Set 1 at ECF p.15.

- Rick Roe liked C.E.'s post about going "back to the old way" (described above). Set 1 at ECF p.17. Roe also liked C.E.'s post showing the back of an African-American female student's head and "Fucking nappy ass piece of shit," Set 2 at ECF p.9, and a post that compared a female student's body to that of Jabba the Hutt. Set 1 at ECF p.21.

- Paul Poe liked almost every post at issue in this case, including the post where nooses were drawn around the necks of an African-American AHS student and an African-American basketball coach, and the post where C.E. said in reference to an African-American AHS student, "Holy shit I'm on the edge of bringing my rope to school on Monday." Set 1 at ECF pp.22, 24.

There is no doubt that these plaintiffs meaningfully contributed to the disruptions at AHS by embracing C.E.'s posts in this fashion. The evidence shows that AHS students were upset precisely because others, namely these plaintiffs, had supported C.E.'s conduct. *See, e.g.*, Dkt. No. 60-3 ¶ 15 (student "devastated" that classmates had "'liked' and encouraged the racists [*sic*] posts"); Dkt. No. 60-4 ¶ 7 (when student saw seven likes on C.E.'s comment of "Holy shit I'm on the edge of bringing my rope to school on Monday," student felt "disgusted and scared" and "threatened"); Dkt. No. 60-6 ¶ 12 (student depicted in "back to the old way" post felt "upset" and "unwelcome" that other students "approved

of C.E.'s comment and the picture by liking it or posting 'yep'").

While that alone is again enough under *Tinker*, these plaintiffs also clearly interfered with "the rights of other students to be secure and to be let alone." *Tinker*, 393 U.S. at 508. As our circuit has held, while speech that is "merely offensive to others" does not come within *Tinker*, the precise scope of the interference language is unclear. *C.R.*, 835 F.3d at 1152 (internal quotation omitted). Nevertheless, good guidelines exist for determining what constitutes impermissible interference with the rights of other students. In *C.R.*, for example, our circuit held that sexually harassing conduct toward a student violates her right to be secure because it "threaten[s] the individual's sense of physical, as well as emotional and psychological, security." *C.R.*, 835 F.3d at 1152. The same can be said for the racist and derogatory comments plaintiffs made here about their peers. In both cases, the speech "positions the target as a[n] . . . object rather than a person" and thereby violates the targeted student's right to be secure. *C.R.*, 835 F.3d at 1152.

Kowalski is also instructive. In upholding discipline imposed on a student for online harassment and intimidation of a peer, the court emphasized that personally derogatory speech is "not the conduct and speech that our educational system is required to tolerate, as schools attempt to educate students about 'habits and manners of civility' or the 'fundamental values necessary to the maintenance of a democratic

political system.'" *Kowalski*, 652 F.3d at 573 (quoting *Fraser*, 478 U.S. at 681).

Whatever the outer boundary might be of *Tinker*'s interference inquiry, these cases establish that students have the right to be free of online posts that denigrate their race, ethnicity or physical appearance, or threaten violence. They have an equivalent right to enjoy an education in a civil, secure, and safe school environment. C.E., Philip Shen, Kevin Chen, the *Doe* plaintiff, Rick Roe, and Paul Poe impermissibly interfered with those rights.

Some of the plaintiffs have tried to minimize their culpability by saying that their likes were made casually and thoughtlessly. *See, e.g.*, Dkt. No. 54-5 in *Roe*. But a plaintiff's subjective state of mind is irrelevant. Under *Tinker*, the inquiry is whether the speech at issue interfered with the rights of other students to be secure and let alone. The District has established that it did.

While AUSD was within its rights to discipline most of the students here, the four remaining plaintiffs stand in a different position. The record does not show that plaintiffs Kormi, Bales, Nick Noe, and plaintiff Doe in the *Roe* action either approved of or adopted any content targeting specific individuals at AHS. For example:

- Nima Kormi commented on one post, "This account is racism solely directed at black people" with an emoji of a laughing face. Set 1 at ECF p.27. The post itself is a close-up of the face of a white male. The comment is

ambiguous and the District has not presented any evidence as to why Kormi's comment would have invaded the rights of a specific student.

- Michael Bales commented, "Pls tell me who's the owner to this amazing account" on the post titled "things the world wouldn't have if black people didn't exist." Set 2 at ECF pp.7-8. Although Bales admitted to also liking some posts, those posts are not identified.

- Nick Noe followed the account but, as discussed, there is no evidence that he did anything more.

- Plaintiff Doe in the *Roe* action commented "Stupid nibber" on the post about auto-correcting "nigger" to "nibber." Set 2 at ECF p.13. On the post about going "back to the old way," he commented, "I hope I never end up on this account." Set 1 at ECF p.17.

On this evidence, a reasonable jury could not find that Kormi, Bales, or plaintiffs Noe or Doe in the *Roe* action interfered with the rights of other students. Endorsement or encouragement of speech that is offensive or noxious at a general level differs from endorsement or encouragement of speech that specifically targets individual students. The former is much more akin to the "merely" offensive speech that is beyond the scope of *Tinker*. Although some of these plaintiffs' conduct may have been experienced as hurtful and unsettling by classmates, the Court cannot

say that their involvement affirmatively infringed the rights of other students to be secure and to be let alone.

For similar reasons, these plaintiffs did not create a substantial risk of disruption from their conduct. The District has not tendered any evidence showing that Kormi, Bales, or Noe or Doe of the *Roe* action contributed to the disruptions at AHS, and so has failed to carry its burden on summary judgment as to those four plaintiffs.

IV. *Doe* plaintiff's punishment for additional speech

The *Doe* plaintiff initially received a two-day suspension on March 23. Dkt. No. 16 at 3 in *Doe*. On March 24, the *Doe* plaintiff's friend -- the student he showed the @yungcavage account to on March 18 -- asked the *Doe* plaintiff if he had any other racist conversations to send her. The *Doe* plaintiff sent her a screenshot of a group chat.

The *Doe* plaintiff was suspended for three more days for sending the screenshot, which AUSD administrators justified because the screenshot "tossed gasoline on the fire." Dkt. No. 16-1 ¶ 2 in *Doe*. In its consolidated reply, the District did not address the *Doe* plaintiff's argument about his second suspension or present any responsive evidence. Dkt. No. 55-4 in *Roe*. On that basis, the District's motion for summary judgment as to the second suspension of the *Doe* plaintiff is denied.

V. Plaintiffs' "heckler's veto" claims and *Doe* plaintiff's 56(d) motion

Some plaintiffs have raised a "heckler's veto" claim. They argue that the District punished them in part because it wanted to appease outraged Albany community members. Dkt. No. 42 at 7 in *Roe*; Dkt. No. 16 at 10 in *Doe*. "The term 'heckler's veto' is used to describe situations in which the government stifles speech because it is 'offensive to some of [its] hearers, or simply because bystanders object to peaceful and orderly demonstrations." *Dariano*, 767 F.3d at 778 n. 7.

This is not a well-taken argument. The Ninth Circuit has definitively rejected the heckler's veto doctrine in school speech cases. "We recognize that, in certain contexts, limiting speech because of reactions to the speech may give rise to concerns about a 'heckler's veto.' But the language of *Tinker* and the school setting guides us here. Where speech 'for any reason . . . materially disrupts classwork or involves substantial disorder or invasion of the rights of others,' school officials may limit the speech." *Id.*, 767 F.3d at 778 (citing *Tinker*, 383 U.S. at 513). If that was not clear enough, Judge O'Scannlain, dissenting from a denial of a petition for rehearing en banc, characterized the panel's opinion as holding that "the heckler's veto doctrine does not apply to schools." *Id.* at 772.

That disposes of plaintiffs' heckler's veto argument. The *Doe* plaintiff's Rule 56(d) motion, which is based on his stated need for additional discovery on the heckler's veto issue, is denied. Dkt. No. 20 in *Doe*.

VI. Disciplinary records

Some plaintiffs have argued that even if their suspensions were constitutional, recording those suspensions in their permanent academic records is not. Dkt. No. 43 at 16; Dkt. No. 13 at 19 in *C.E.* They rely on *LaVine v. Blaine School Dist.*, 257 F.3d 981, 992 (9th Cir. 2001). In *LaVine*, plaintiff LaVine wrote a poem where the narrator kills 28 people in a school shooting. He then gave the poem to his English teacher for feedback. The school expelled LaVine on an emergency basis. Later, LaVine was evaluated by a psychiatrist who recommended after three meetings that LaVine be allowed to return to school. The school placed a letter in LaVine's record explaining that he had been expelled for safety reasons, but the letter did not refer to LaVine's successful psychiatric evaluations, which had "satisfied [the school] that James was not a threat to himself or others." *Id.* at 990-992. The court found that because the disciplinary record did not refer to "later, ameliorating events," the letter "went beyond the school's legitimate documentation needs." *Id.* at 992.

Unlike in *LaVine*, plaintiffs have pointed to no "later, ameliorating" events that would justify updating or removing their disciplinary records. There is no indication that their records of suspension or expulsion are incomplete or mischaracterize the facts. The request to remove the disciplinary records is denied.

VII. The California Education Code Claims

Some of the plaintiffs mention, in quite cursory fashion, that California Education Code Sections

48950(a) and 48907(a) provide independent speech protections. Section 48950(a) provides that schools may not discipline pupils "solely on the basis of conduct that is speech or other communication that, when engaged in outside of the campus, is protected from governmental restriction by the First Amendment to the United States Constitution or Section 2 of Article I of the California Constitution." Cal. Educ. Code § 48950(a). Section 48907(a) provides in relevant part that public school students "shall have the right to exercise freedom of speech and of the press." Cal. Educ. Code § 48907(a).

Plaintiffs barely briefed these statutes, and the case law on the scope of protection offered by Sections 48950(a) and 48907(a) is quite sparse. The Court would be well within its discretion not to address this underdeveloped argument at all, but notes that both statutes seem readily distinguishable from the facts of this case. Section 48950(a) mentions speech that is protected if "engaged in outside of the campus," but as previously discussed in detail, the online communications in this case were closely tied to the school and its students. Plaintiffs add the somewhat odd argument under Section 48950(a) that Instagram is "a full public and not a limited public platform, and strict scrutiny, should nonetheless apply." Dkt. No. 43 at 18; *see also* Dkt. No. 13 at 20 in *C.E.* The forum analysis plaintiffs propose applies only to government restrictions on speech on public property. *Lopez v. Tulare Joint Union High Sch. Dist.*, 34 Cal. App. 4th 1302, 1328 (1995) (forum analysis weighs "government's interest in limiting the use of its property to its intended purpose" against "interest of

those wishing to use the property for other purposes"). As plaintiffs themselves emphasize, the speech at issue here took place on a "non-governmental, non-school related" platform. Dkt. No. 43 at 17.

Similarly, the legislative history of Section 48907(a) indicates that it is "a statutory embodiment of the *Tinker* and related First Amendment cases at that time." *Lopez*, 34 Cal. App. 4th at 1318. While Section 48907(a) may go beyond the Constitution and Section 48950(a) in guaranteeing particular rights to students publishing in school-sponsored publications such as school newspapers, those extended protections are not relevant here.

CONCLUSION

In light of the multiplicity of overlapping motions, the Court offers this substantive guide to the holdings in this order:

Summary judgment is granted in favor of Nima Kormi, Michael Bales, Nick Noe, and John Doe of the *Roe* action. Summary judgment is granted in favor of the District with respect to plaintiffs C.E., Philip Shen, Kevin Chen, Rick Roe, and Paul Poe. Summary judgment is also granted in favor of the District with respect to the *Doe* plaintiff except on the issue of his additional suspension time, for which summary judgment is granted in his favor. All remaining summary judgment motions are denied, as is the *Doe* plaintiff's Rule 56(d) motion.

As a final note, the District appended to its main arguments a cursory reference to qualified immunity. The reference is underdeveloped legally and factually,

and the District did not differentiate between the conduct of the ten different plaintiffs for immunity purposes. The Court declines to take up qualified immunity on this inadequate record. The parties are directed to meet and confer about whether any qualified immunity issues remain after this order, and if so, to jointly propose to the Court a schedule for resolving them.

IT IS SO ORDERED.

Dated: November 29, 2017

JAMES DONATO
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

Case Nos. 3:17-cv-02478-JD (lead case)
3:17-cv-02767-JD
4:17-cv-03657-JD

[Filed August 24, 2018]

PHILIP SHEN, et al.,
Plaintiffs,

v.

ALBANY UNIFIED SCHOOL DISTRICT, et al.,
Defendants.

RICK ROE, et al.,
Plaintiffs,

v.

ALBANY UNIFIED SCHOOL DISTRICT, et al.,
Defendants.

C.E.,
Plaintiff,

v.

ALBANY UNIFIED SCHOOL DISTRICT, et al.,

Defendants.)
_____)

ORDER RE MOTION TO DISMISS CONSOLIDATED COMPLAINT

Re: Dkt. No. 128

These related cases arise out of disciplinary actions taken by Albany Unified School District ("AUSD" or "the District") in response to racist and derogatory content posted on an Instagram account by several students at Albany High School ("AHS"). The factual background is discussed in detail in the Court's summary judgment order, which provides the context for this motion to dismiss order. *Shen v. Albany Unified Sch. Dist.*, No. 3:17-CV-02478-JD, 2017 WL 5890089 (N.D. Cal. Nov. 29, 2017). To summarize, plaintiff C.E. created the account in November 2016 and gave access to a group of AHS students. In March 2017, the AHS student body and school personnel discovered the account and its contents. AUSD expelled C.E. and suspended the other students involved. AUSD also sponsored a variety of events in response to the situation, including a "restorative justice" session that culminated in threats, and in some cases physical assaults, against the disciplined students and their families.

Ten disciplined students filed four separate lawsuits alleging violations of free speech and due process under the federal constitution and California state law, and sued the District and its officials to set aside the disciplinary actions, among other relief. The lawsuits were related, and the parties agreed to resolve their

First Amendment and related state law claims through early summary judgment motions. On summary judgment, the Court examined each plaintiff's involvement in the Instagram account and found that some, but not all, had been appropriately disciplined. One plaintiff settled with defendants while the motions were under consideration. *See* Dkt. No. 34 in Case No. 17-3418.

After the Court ruled on the free speech issues, plaintiffs filed two separate amended complaints. Philip Shen, Nima Kormi, Michael Bales, Kevin Chen, Nick Noe, and C.E. filed a first amended complaint, Dkt. No. 112, and John Doe, Rick Roe, and Paul Poe filed a second amended complaint, Dkt. No. 84 in Case No. 17-2767. Soon thereafter, six of the nine settled with the District and dismissed their claims. *See* Dkt. Nos. 160, 161, 162 (Nima Kormi, Michael Bales, and Nick Noe); Dkt. No. 119 (Case No. 17-2767) (John Doe, Rick Roe, and Paul Poe).

Three plaintiffs now remain in the case: Philip Shen, Kevin Chen, and C.E. The operative complaint is the consolidated first amended complaint filed at Dkt. No. 112 in the lead case. The District has moved to dismiss the complaint. Dkt. No. 128. The motion is granted in part and denied in part.

LEGAL STANDARDS

Straightforward standards govern the application of Rule 12(b)(6). To meet the pleading requirements of Rule 8(a) and to survive a Rule 12(b)(6) motion to dismiss, a claim must provide "a short and plain statement . . . showing that the pleader is entitled to

relief," Fed. R. Civ. P. 8(a)(2), including "enough facts to state a claim . . . that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A claim is plausible on its face if, accepting all factual allegations as true and construing them in the light most favorable to the plaintiff, the Court can reasonably infer that the defendant is liable for the misconduct alleged. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). The plausibility analysis is "context-specific" and not only invites but "requires the reviewing court to draw on its judicial experience and common sense." *Id.* at 679.

DISCUSSION

The complaint alleges seventeen distinct causes of action against the District, various AHS and AUSD officials in their personal and official capacities, the AUSD Board of Education (BOE), and members of the BOE in their personal and official capacities.

I. The Federal Constitutional Claims

Claims 1, 3, 5, 7, and 9 allege that defendants violated plaintiffs' federal constitutional rights. Only Claim 1 is pleaded as a Section 1983 claim, and the remaining claims do not mention Section 1983. The parties in their filings appear to treat all five claims as predicated on Section 1983, and the Court will do the same.

As an initial matter, none of these claims survive against the District, the BOE, or the individual defendants in their official capacities. These defendants cannot be held liable for money damages or prospective relief under Section 1983 unless plaintiffs identify a

municipal policy, long-standing custom or practice, or decision by a "final policymaker" that caused their injuries. *Ellins v. City of Sierra Madre*, 710 F.3d 1049, 1066 (9th Cir. 2013); *Los Angeles Cty., Cal. v. Humphries*, 562 U.S. 29, 34 (2010); *see Monell v. Dep't of Soc. Servs. of City of New York*, 436 U.S. 658, 694 (1978). Nor can the individual defendants be held liable in their official capacities unless plaintiffs establish that a municipal "policy or custom . . . played a part in the violation of federal law." *Kentucky v. Graham*, 473 U.S. 159, 166 (1985). Plaintiffs must plausibly allege a municipal policy, custom or practice, or decision by a final policymaker at the pleading stage. *AE ex rel. Hernandez v. Cty. of Tulare*, 666 F.3d 631, 637 (9th Cir. 2012). They have not done so. Nor have plaintiffs meaningfully pursued in the amended complaint a ratification theory against the public entities, or argued for one in their motion papers. *Christie v. Iopa*, 176 F.3d 1231, 1239 (9th Cir. 1999) (ratification requires "knowledge of an unconstitutional act" as well as approval). These claims are dismissed without prejudice, and the rest of the order addresses the Section 1983 claims against only the individual defendants in their personal capacities.

A. Claim 1: First Amendment

Claim 1 alleges violations of plaintiffs' First Amendment rights. The Court found on summary judgment that the District did not infringe Chen's, Shen's, or C.E.'s federal or state speech rights by disciplining them. Claim 1 is dismissed with prejudice.

B. Claims 3 and 9: Procedural Due Process

In Claim 3, Shen and Chen allege that defendants violated their federal due process rights by arbitrarily extending their suspensions beyond the term set out in AUSD's disciplinary policies. In Claim 9, C.E. alleges that his federal due process rights were violated because his expulsion hearing was tainted by apparent and actual bias.

Because plaintiffs do not allege that they have exhausted administrative and judicial remedies, these claims will be dismissed. C.E. appealed his expulsion to the Alameda Board of Education, which upheld the BOE's expulsion decision. But C.E. admits that he "has pursued no further appeals or lawsuits in State Court related to his expulsion." Dkt. No. 112 at 17. The Ninth Circuit recently determined that the failure to exhaust judicial remedies precludes a Section 1983 claim in the circumstances of this case. *Doe v. Regents of the Univ. of California*, 891 F.3d 1147, 1154 (9th Cir. 2018). This court must "give preclusive effect to a state administrative decision if the California courts would do so. In California, ... [a] party must exhaust judicial remedies by filing a § 1094.5 petition, the exclusive and 'established process for judicial review' of an agency decision." *Id.* at 1155 (quoting *Johnson v. City of Loma Linda*, 24 Cal. 4th 61, 70 (2000)). A school's disciplinary decisions are precisely "the sort of 'adjudicatory, quasi-judicial decision' that is subject to the judicial exhaustion requirement." *Id.* (quoting *Y.K.A. Indus., Inc. v. Redev. Agency of San Jose*, 174 Cal. App. 4th 339, 361 (2009)).

Shen and Chen do not allege that they appealed their suspensions to the Alameda Board of Education, and they appear to concede that they in fact did not appeal. Dkt. No. 134 at 5. Their claims are dismissed without prejudice because the time to file a writ appears to be open. *See Doe v. Regents of the Univ. of California Regents*, 891 F.3d at 1155. n.8.

C. Claim 5: Fourth Amendment

In Claim 5, Shen alleges that defendants violated the Fourth Amendment by: (1) forcing him to "march through the high school" and "line[] up in full view of all or most of the student body where the student body was allowed to hurl obscenities, scream profanities, and jeer at the Plaintiffs;" and (2) "lur[ing] [him] to a 'restorative justice session' while AUSD . . . . emailed the student body and the general public inciting a demonstration immediately outside. . . . [and] failed to provide any means of crowd control or protection." Dkt. No. 112 at 23-24. Shen alleges that he "had to escape in fear for [his] safety" and that he was "punched in the head and torso and sustained bruising and lacerations to his head and face" in the process. *Id.*

Shen has stated a plausible claim for unreasonable seizure. "It is clear that the Fourth Amendment applies in the school environment. . . . [and] extends to seizures by or at the direction of school officials." *Doe ex rel. Doe v. Hawaii Dep't of Educ.*, 334 F.3d 906, 908 (9th Cir. 2003). A seizure takes place "when there is a restraint on liberty to the degree that a reasonable person would not feel free to leave" and "violates the Fourth Amendment if it is objectively unreasonable under the circumstances. In applying the Fourth Amendment in

the school context, the reasonableness of the seizure must be considered in light of the educational objectives [the school] was trying to achieve." *Id.* at 909 (internal citations omitted).

Shen says that defendants compelled him to parade through school while schoolmates shouted and verbally abused him, and "lured" him to a "restorative justice session" during which a crowd of protestors physically threatened and in fact injured him. The facts as alleged plausibly indicate that a reasonable student in Shen's position would not have felt free to disregard defendants' instructions, and that defendants' orchestration of these restorative justice events was objectively unreasonable under the circumstances. Dismissal is denied.

D. Claim 7: Substantive Due Process

Claim 7 relies on many of the same factual allegations as Claim 5. Shen contends that AUSD violated his federal substantive due process rights under a theory of "state-created danger." He adds that AUSD created "a dangerous situation by promoting the student demonstration, inciting the demonstrators with false stories of a 'noose,' notifying demonstrators when and where Plaintiffs were participating in a restorative justice section [sic], then failing to protect the Plaintiffs' identities and their safety." Dkt. No. 112 at 26.

It is well-established that state officials may be liable under the Fourteenth Amendment's substantive due process clause "in a variety of circumstances, for their roles in creating or exposing individuals to danger

they otherwise would not have faced." *Kennedy v. City of Ridgefield*, 439 F.3d 1055, 1062 (9th Cir. 2006). Recently, our circuit found that attendees of a Trump political rally stated a plausible substantive due process claim for state-created danger where San Jose police officers allegedly "directed them into [a] mob of violent [anti-Trump] protestors" and "were beaten, victimized by theft, and/or had objects such as bottles and eggs thrown at them" as a result. *Hernandez v. City of San Jose*, 897 F.3d 1125, __, 2018 WL 3597324, at *2 (internal quotations and modifications omitted).

Like the plaintiffs in *Hernandez*, Shen states a plausible substantive due process claim by alleging that defendants acted with deliberate indifference, and possibly even malice, in exposing him to danger he would not have otherwise faced by riling up the community, publishing the time and location of the restorative justice meeting, and failing to protect him from demonstrators who became physically violent and struck him. Dismissal is denied.

II. The California Constitutional Claims

Claims 2, 4, 6, 8, and 10 are predicated on the same factual allegations and legal theories as Claims 1, 3, 5, 7, 9, restated under the California state constitution. Claim 2 is dismissed with prejudice for the same reasons that Claim 1 is dismissed with prejudice: the Court found on summary judgment that the District did not violate Shen's, Chen's, or C.E.'s federal or state free speech rights by disciplining them. Claims 4 (federal Claim 3) and 10 (federal Claim 9) are dismissed for the same reason of failure to allege exhaustion of administrative and judicial remedies.

Claim 6 is based on the same factual allegations as Claim 5 (the Fourth Amendment claim), and invokes Article I, Section 7(a) of the California Constitution, which provides, "A person may not be deprived of life, liberty, or property without due process of law." Section 7(a) appears ill-suited to support an unreasonable seizure theory. Unreasonable seizures are covered by Section 13 of the California constitution. Section 7(a) on its face protects against the deprivation of liberty without due process of law, and the Ninth Circuit has cautioned that school-related claims for excessive force are appropriately brought as Fourth Amendment claims and not as substantive due process claims. *Doe ex rel. Doe v. Hawaii Dep't of Educ.*, 334 F.3d at 908-09. Claim 6 is dismissed without prejudice.

Claim 8 is based on the same factual allegations as Claim 7 (the claim for substantive due process), and also invokes Section 7(a). Defendants argue that Section 7(a) does not support an action for money damages under the facts alleged. In *Katzberg v. Regents of Univ. of California*, 29 Cal. 4th 300, 317-18 (2002), the California Supreme Court determined that Section 7(a) neither affirmatively authorizes nor affirmatively forecloses a damages action. Whether a plaintiff can recover money damages under Section 7(a) turns on "the 'constitutional tort' analysis adopted by *Bivens* and its progeny." *Id.* at 317. That inquiry looks to "whether an adequate remedy exists, the extent to which a constitutional tort action would change established tort law, and the nature and significance of the constitutional provision," as well as "the existence of any special factors counseling hesitation in recognizing a damages action, including deference to

legislative judgment, avoidance of adverse policy consequences, considerations of government fiscal policy, practical issues of proof, and the competence of courts to assess particular types of damages." *Id.*

As this language indicates, the analysis under *Katzberg* is a complicated issue. Defendants have not done it justice by making what is effectively a passing reference to it in their briefs, and the Court declines to take it up in that underdeveloped form. If warranted, defendants may this argument again on a subsequent occasion.

III. Common Law Claims

Claims 11 through 16 allege common law claims for negligence, negligent supervision, intentional infliction of emotional distress, false arrest/false imprisonment, negligent training and supervision, and negligent infliction of emotional distress.

To the extent that these claims seek to impose direct liability on the public entity defendants (the District and the BOE), they must be dismissed because they do not specify any applicable statutory or constitutional duties. Under the California Torts Claim act, "A public entity is not liable for an injury, whether such injury arises out of an act or omission of the public entity or a public employee or any other person," except as provided by statute. Cal. Gov't Code § 815.

To the extent that these claims allege vicarious liability for the public entity defendants, or direct liability for the individual defendants, they are subject to dismissal because plaintiffs fail to show that their causes of action "lie[] outside the breadth of any

applicable statutory immunity." *Keyes v. Santa Clara Valley Water Dist.*, 128 Cal. App. 3d 882, 886 (Ct. App. 1982). The individual defendants' direct liability and the public entity defendants' vicarious liability turns on whether the individual defendants' actions were discretionary or not. *See* Cal. Gov't Code § 815.2 ("A public entity is liable for injury proximately caused by an act or omission of an employee of the public entity within the scope of his employment if the act or omission would, apart from this section, have given rise to a cause of action against that employee or his personal representative," but "[e]xcept as otherwise provided by statute, a public entity is not liable for an injury resulting from an act or omission of an employee of the public entity where the employee is immune from liability"); Cal. Gov't Code § 820.2 ("Except as otherwise provided by statute, a public employee is not liable for an injury resulting from his act or omission where the act or omission was the result of the exercise of the discretion vested in him, whether or not such discretion be abused"). Section 820.2 "protects 'basic policy decisions,' but does not protect 'operational' or 'ministerial' decisions that merely implement a basic policy decision." *Martinez v. City of Los Angeles*, 141 F.3d 1373, 1379 (9th Cir. 1998) (quoting *Johnson v. State of California*, 69 Cal.2d 782, 796 (1968)). Nowhere in the pleadings or the papers do either of the parties discuss whether individual defendants' actions were discretionary or not for purposes of Section 820.2. *Compare with Giraldo v. Dep't of Corr. & Rehab.*, 168 Cal. App. 4th 231, 240 (2008) (prisoner plaintiff alleged correctional officers were performing non-discretionary, ministerial functions under Section 820.2).

Because claims 11 through 16 are predicated only on non-statutory and non-constitutional duties, and because plaintiffs do not allege that individual defendants' actions were merely "operational" or "ministerial" in nature for purposes of Section 820.2, they are dismissed with leave to amend.

Claim 17 is dismissed with prejudice pursuant to the parties' stipulation. Dkt. No. 175.

CONCLUSION

These claims are dismissed with prejudice: 1, 2, and 17. These claims are dismissed with leave to amend: 3, 4, 6, 9, 10, 11-16. Dismissal is denied for these claims: 5 and 7, only to the extent that Claims 5 and 7 are alleged against the individual defendants in their personal capacities, and 8. An amended complaint is due by **September 14, 2018**. Failure to amend by that date will result in dismissal with prejudice under Federal Rule of Civil Procedure 41(b).

IT IS SO ORDERED.

Dated: August 24, 2018

/s/ James Donato
JAMES DONATO
United States District Judge

APPENDIX D

THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

Lead Case No.: 3:17-cv-02478-JD
Related Case Nos.: 3:17-cv-02767-JD
3:17-cv-03418-JD
4:17-cv-03657-JD

[Filed July 27, 2020]

PHILIP SHEN, et al.
Plaintiffs,

vs.

ALBANY UNIFIED SCHOOL DISTRICT, et al.
Defendants.

RICK ROE, a minor et al.
Plaintiffs,

vs.

ALBANY UNIFIED SCHOOL DISTRICT, et al.
Defendants.

JOHN DOE, a minor,
Plaintiffs,

vs.

ALBANY UNIFIED SCHOOL DISTRICT, et al.)
Defendants.)
_____)
C.E., through his guardian, C.E.,)
Plaintiff,)
)
vs.)
)
ALBANY UNIFIED SCHOOL DISTRICT, et al.)
Defendants.)
_____)

~~[PROPOSED]~~ ENTRY OF JUDGMENT

Judge: Hon. James Donato

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CHARLES BLANCHARD, JACOB CLARK and KIM TRUTANE

Having reviewed Defendants' Request for Entry of Judgment under Rule 58(d), and based on the fact that the Court has dismissed with prejudice all claims brought by Plaintiffs Kevin Chen and C.E. against all Defendants (see ECF Nos. 191 & 198), the Court hereby enters Judgment as follows:

JUDGMENT IS HEREBY ENTERED against Plaintiffs Kevin Chen and C.E. and in favor of Defendants Albany Unified School District, Albany Unified School District Board of Education, Valerie Williams, Jeff Anderson, Melisa Pfohl, Charles Blanchard, Jacob Clark, and Kim Trutane in the above-captioned consolidated actions.

IT IS SO ORDERED.

Date: July 27, 2020

/s/ James Donato
Hon. James Donato
Judge of the United States District Court
Northern District of California

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 20-16541
D.C. No. 3:17-cv-03657-JD
Northern District of California,
San Francisco

[Filed January 31, 2023]

CEDRIC EPPLE,
Plaintiff-Appellant,

v.

ALBANY UNIFIED SCHOOL DISTRICT; ALBANY HIGH SCHOOL; VALERIE WILLIAMS, in her personal and official capacities as Superintendent of the Albany Unified School District; JEFF ANDERSON, in his personal and official capacities as Principal of Albany High School; MELISA PFOHL, in her personal and official capacities as Assistant Principal of Albany High School; CHARLES BLANCHARD; JACOB CLARK; KIM TRUTANE; ALBANY UNIFIED SCHOOL DISTRICT BOARD OF EDUCATION,
Defendants-Appellees.

ORDER

Before: GOULD and COLLINS, Circuit Judges, and SILVER,[*] District Judge.

The panel has voted unanimously to deny Plaintiff-Appellant's petition for panel rehearing. Judges Gould and Collins have voted to deny the petition for rehearing en banc, and Judge Silver so recommends. The full court has been advised of the petition for rehearing en banc, and no judge has requested a vote on whether to rehear the matter en banc. *See* FED. R. APP. P. 35. Accordingly, the petition for panel rehearing and rehearing en banc (Dkt. Entry 57) is **DENIED**.

[*] The Honorable Roslyn O. Silver, United States District Judge for the District of Arizona, sitting by designation.

APPENDIX F

SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF ALAMEDA

Case No. RG18922005

[Filed October 1, 2020]

CEDRIC EPPLE, Petitioner, v. ALAMEDA COUNTY BOARD OF EDUCATION, Respondent.	)

ORDER DENYING
PETITION FOR WRIT OF MANDATE

Petitioner Cedric Epple seeks a writ of mandate commanding respondent, the Alameda County Board of Education ("ACBE"), to set aside its Order of August 8, 2017 affirming a June 22, 2017 decision of Real Party in Interest, Albany Unified School District ("AUSD"), expelling Epple under Education Code section 48915, subdivision (e). AUSD and ACBE oppose the petition.

ACBE correctly identified and applied the applicable legal standard, *Nasha v. City of Los Angeles* (2004) 125 Cal.App.4th 470 ("*Nasha*"), in affirming AUSD's expulsion order. The administrative record

reflects that ACBE considered petitioner's contentions that AUSD Trustee Kim Trutane ("Trutane") had engaged in conduct evidencing improper bias, and correctly rejected those contentions. That Trutane engaged in conduct supporting general statements regarding the importance of inclusivity and condemning racism did not require her recusal.

There is no evidence that Trutane made any comments regarding petitioner, his Instagram account, his specific conduct, the possibility of disciplinary proceedings, or the likely or desired outcome of any such hearings. Accordingly, the Petition is **DENIED.**

I. BACKGROUND

A. The Lawsuit

Petitioner was a student at Albany High School ("AHS") until his expulsion in June 2017. Three members of the AUSD held hearings in June 2017 before voting to expel him. Petitioner timely sought review from respondent, the ACBE, which held a hearing on the matter in August 2017. In his appeal to the ACBE, petitioner contended, inter alia, that he was denied a fair hearing because AUSD Trustee Trutane was biased against him. On or about September 11, 2017, seven members of the ACBE upheld the expulsion.

In the operative Second Amended Petition for Writ of Administrative Mandate ("SAP"), petitioner contends that ACBE failed to apply the law correctly regarding impartial decisionmakers, citing *Nasha.* (SAP, ¶ 8; see also Pet. Mot., p. 17:6-8 ["The Alameda County Board of Education made an error of law in that it did not

apply the law correctly to the underlying proceedings regarding impartial decisionmakers."] [citing *Nasha*].) More specifically, the Petition asserts that that the ACBE either did not "adequately consider" or "wholly ignor[ed]" Trutane's bias and involvement. (SAP,¶ 8.) Petitioner's moving papers assert more broadly that ACBE applied the wrong legal standard and that ACBE erred in finding no bias on the undisputed material facts of the case.

B. Events Leading to Petitioner's Expulsion

The following facts are undisputed except as noted.

Petitioner created a private Instagram account that contained images, texts, and comments from himself and other AHS students. (See Administrative Record ("AR"), pp. 99-124.) The Instagram account was followed by 13 people, including 12 AHS students. District administrators learned of the account when a student, who was not a follower of the account, photographed images on a follower-student's cell phone. The Instagram account contained, among other things, two images in which an African-American student's image was juxtaposed with a historical image of a lynching, and an image in which petitioner drew nooses around the necks of a student and an AUSD staff member. Petitioner also posted an image of a text message chain between himself and an African-American student and commented: "Holy shit I'm on the edge of bringing my rope to school on Monday." Other images included comparisons of students to animals or cartoon characters based on racial stereotypes. The AHS administration also learned that

petitioner had engaged in racially harassing conduct at school, including use of the "n" word directed at other students, and told a student that "You should be lynched," allegations that petitioner disputed below. (See AR, pp. 26-28.) After the facts came to light, there was a significant impact in the school environment, leading some students to miss classes and attend counseling. Petitioner ultimately deleted the Instagram account and posted an apology.

C. Expulsion Order and Appeal

After several days of hearings, AUSD's Governing Board issued its Findings of Fact, Decision, and Expulsion Order. (AR, pps.7-11.) AUSD found that petitioner had intentionally engaged in harassment, threats, or intimidation directed at school personnel or pupils that was sufficient to have disrupted classwork, creating substantial disorder, and invading the rights of school personnel or pupils. (AR, p. 7.) AUSD found a sufficient nexus between the conduct and the school to support discipline. (AR, p. 3.) Three trustees, Blanchard, Trutane, and Clark, voted unanimously in favor of expulsion. (AR, p. 11.)

Petitioner appealed to the ACBE. (See AR, pp. 4-5.) Petitioner challenged his expulsion on two primary grounds: (1) he was denied a fair hearing because Trutane had a demonstrable personal interest in the outcome of the hearing, citing, inter alia, *Nasha*; (2) AUSD exceeded its jurisdiction in rendering the expulsion order that was not sufficiently school-related, in violation of section 48915, subdivision (e) of the Education Code. (See AR, pp. 12-23.) In support of his

appeal, petitioner included "new evidence" relating to Trutane's bias. (AR, pp. 37-44.)

The new evidence of alleged bias is as follows:

- A cover page for a slideshow of the African American Parent Engagement Committee, dated March 22, 2017. (AR, p. 39.)

- An email from Darien Dabner to the African American/Black Parent Engagement Team, dated March 22, 2017, following the meeting. (AR, p. 40.) The email thanks the addressees for their participation, and asserts "[a]s a next step, the group has committed to putting out a statement of concern, support and commitment to making sure student safety is a priority." As emphasized by petitioner, the email also states that "[t]here were several commitments made from teachers, board members and administration on making this issue and student climate a priority." (AR, p. 40.)

- An email from Carla L. Swan to the African American/Black Parent Engagement Team and other third parties, dated March 23, 2017. (AR, p. 41.) The email asserts that "Kim Trutane, the board member who came to the meeting yesterday, is sending the following letter to the girls who were targeted." It is followed by a "personal message" allegedly authored by Trutane that, inter alia, expresses "concern[]" regarding the "impact of Monday's incident on you"; expresses the "tremendous support in the Albany community for you"; and acknowledges

the "pain[]" of "be[ing] targeted." Finally, it states "[a]s a school board member, I will support efforts to eliminate racism in our schools and build a safe, inclusive environment for every student." (AR, p. 41.) This email was not actually sent by Trutane to any student(s).

- A screenshot of Facebook page for #albany4all, regarding a "Gathering for Solidarity" to take place on March 26, 2017, in front of Albany High School, as a "show of solidarity against racism and social justice." (AR, p. 43.) There is a comment from Trutane as follows: "Has this been conceived in coordination with the Black/African American Parents Engagement Group." There is a second comment: "I am definitely going to both events. Looking forward to sending a strong message of support tomorrow and next Friday that we will not tolerate racism, Albany is for everyone." (AR, p. 43.)

- A photograph from sfgate.com that depicted Trutane at the March 26, 2017 event with a sign stating "WE are DIVERSE & GREAT." (AR, p. 44.)

The ACBE upheld petitioner's expulsion. (AR, pp. 688-689.) Although ACBE's Statement of Decision lacks sufficient analysis on its own to support review, the parties have stipulated that the ACBE adopted the reasoning set forth in a staff memorandum prepared on or about August 8, 2017, and that the letter be part of the administrative record. (AR, pp. 660-676; Joint Stip. of Facts [filed June 4, 2020].)

Initially, the ACBE found a sufficient nexus between Petitioner's conduct and the school to support imposition of discipline. (AR, pp. 664-670.) This determination is not challenged in the present proceedings.

The ACBE considered and denied petitioner's claims that he was denied a fair hearing because of bias by Trutane. (AR, pp. 671-673.) The ACBE recognized that, as a foundational matter, Petitioner was entitled to an "impartial tribunal," and that "a board member in an expulsion proceeding may have such a prior involvement with the case so as to acquire a disqualifying bias." (AR, pp. 671-672.) Relying on *Nasha*, the ACBE concluded that disqualification is required only where there is evidence of concrete bias, personal interest, or malice. (AR, p. 673 & n.11.)

Applying these legal principles, ACBE found that the conduct set forth in petitioner's new evidence "did not create an objective appearance of bias or establish Trustee Trutane's personal interest in the outcome of the expulsion proceedings." (AR, p. 673.) ACBE stated that Trutane did not voice "any specific public statements regarding Appellant or his case." (AR, p. 673.) Rather, the ACBE stated that, as "an elected official and community leader it is expected that individuals like Trustee Trutane will attend community meetings, gatherings and make public statements that reassure concerned constituents that she is committed to upholding the ideals of her office." (AR, pp. 672-73.) Accordingly, the ACBE found that petitioner's arguments amounted to "speculation" that

was insufficient to meet his burden to demonstrate that he was denied a fair hearing. (AR, p. 673.)

II. STANDARD OF REVIEW

When reviewing an agency's decision on writ of administrative mandate, the court's inquiry is limited to "whether the respondent has proceeded without, or in excess of, jurisdiction; whether there was a fair trial; and whether there was any prejudicial abuse of discretion." (Code Civ. Proc., § 1094.5, subd. (b).) "Abuse of discretion is established if the respondent has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence." (*Id.*) If the court grants the writ, it may only order the agency to set aside its order or decision and to take mandatory actions and may not limit the agency's discretion on remand. (*Id.*, § 1094.5, subd. (f).)

Petitioner appears to contend that ACBE abused its discretion in (1) failing to apply the correct legal standard in upholding respondent's expulsion; and (2) erroneously finding that petitioner received a fair hearing from AUSD on the facts of this case. Both these asserted errors present questions of law that the court reviews de novo. (*Stewart Enterprises, Inc. v. City of Oakland* (2016) 248 Cal.App.4th 410, 420-421 [questions of law subject to de novo review]; *Nasha*, *supra*, 125 Cal.App.4th at p. 482 ["A challenge to the procedural fairness of the administrative hearing is reviewed de novo on appeal because the ultimate determination of procedural fairness amounts to a question of law."].) To the extent that respondent's determination of fairness rests on factual findings, the

court reviews whether the respondent's findings were supported by substantial evidence. (*Bixby v. Pierno* (1971) 4 Cal.3d 130, 140, 143-145 [review of administrative findings is subject to either substantial evidence standard or independent judgment standard, depending on whether administrative decision impacts a fundamental vested right.]; *M.N. v. Morgan Hill Unified Sch. Dist* (2018) 20 Cal. App.5th 607, 616 [substantial evidence standard applied because the right to a free education does not encompass the right to attendance at the school of the pupil's choice]; cf. *Doe v. Univ. of S. California* (2018) 29 Cal.App.5th 1212, 1231 ["A university disciplinary proceeding concerning sexual misconduct [resulting in expulsion] does not involve a fundamental vested right."].) However, because virtually no material facts are in dispute relating to the evidence on which petitioner relies to demonstrate Trutane's purported bias, the result in this case would be the same were ACBE's findings reviewed under the less deferential "independent judgment test."

III. DISCUSSION

Petitioner contends that ACBE committed legal error when it applied the wrong legal standard in reviewing whether he received a fair hearing before the AUSD, and in concluding that the hearing was not infected by bias requiring the recusal of Trutane. Petitioner's arguments rely, in the main, on unsupported contentions that Trutane actively demonstrated against him and his Instagram account. Because ACBE applied the correct legal standard, and because the record does not demonstrate an

unacceptable probability of bias by the members of the AUSD that ordered his expulsion, the Petition is **DENIED.**

"Procedural due process in the administrative setting requires that the hearing be conducted before a reasonably impartial, noninvolved reviewer." (*Nasha*, *supra*, 12 Cal.App.4th at p. 482 [internal quotations omitted].) The requirement of a neutral decision maker is inherent in the concepts of a "fair trial" codified in Code of Civil Procedure section 1094.5, subdivision (b). (See *Clark v. City of Hermosa Beach* (1996) 48 Cal.App.4th 1152, 1170; *see also Haas v. County of San Bernardino* (2002) 27 Cal.4th 1017, 1025 ["When due process requires a hearing, the adjudicator must be impartial."].) On appeal, the ACBE was authorized to consider whether petitioner received "a fair hearing before the governing board." (Educ. Code, § 48922, subd. (a)(2).)

Impartiality does not mean indifference. (*Andrews v. Agricultural Labor Relations Bd.* (1981) 28 Cal.3d 781, 790 ["The right to an impartial trier of fact is not synonymous with the claimed right to a trier completely indifferent to the general subject matter of the claim before him."].) It is expected that persons in decisionmaking authority may have attitudes and preconceptions to political and social issues with which they may come in contact. (*Id.*; see also *Nasha*, *supra*, 125 Cal.App.4th at p. 483; *City of Fairfield v. Superior Court* (1975) 14 Cal.3d 768, 780.) What is significant is whether the decisionmaker harbors bias toward the party, as distinct from views that the decisionmaker may have about the subject matter in general.

(*Andrews v. Agricultural Labor Relations Bd.*, *supra*, 28 Cal.3d at p. 790 ["[T]he word bias refers to the mental attitude or disposition of the judge towards a party to the litigation, and not to any views that he may entertain regarding the subject matter involved."] [internal quotations omitted].)

Nasha sets forth the legal standard for analyzing disqualifying bias by a decisionmaker in administrative proceedings. The Court of Appeal explained that, although administrative hearing officers must be reasonably impartial and noninvolved, they are not held to the judicial standard. (125 Cal.App.4th at p. 483; see also *Hass v. City of San Bernardino*, *supra*, 21 Cal.4th at p. 1027.) For disqualification to be warranted, petitioner must demonstrate "an unacceptable probability of actual bias on the part" of the decisionmaker, and must prove it with "concrete facts." (*Nasha*, *supra*, 12 Cal.App.4th at p. 483 [quoting *BreakZone Billiards v. City of Torrance* (2000) 81 Cal.App.4th 1205, 1236] [internal quotations omitted].) "Bias and prejudice are never implied and must be established by clear averments." (*Id.* [internal quotations omitted].)

The record reflects that ACBE correctly identified *Nasha* as the governing legal standard. (AR, pp. 672-673.) ACBE's denial of petitioner's appeal was based on its determination that Trutane did not voice any specific statements regarding petitioner or his case, and that no concrete bias, personal interest, or malice was shown to exist. (AR, p. 673 & n.11.) ACBE did not wholly ignore or fail to consider the allegations of Trutane's bias and involvement as alleged in the

Petition. *(Id.*) Petitioner's contention that it did, while unsupported, is understandable, as the parties did not stipulate until after the case was filed that the staff review memorandum (AR, pp. 660-676) would be considered the reasoning of the ACBE for purposes of this case.

The ACBE also correctly found that that Trutane's involvement in various community activities related to supporting impacted students and eliminating racism in the schools during time period at issue did not establish the "concrete bias, personal interest, or malice" necessary to require her recusal. Trutane indisputably took an active role in communicating the general message of inclusivity and condemning racism following disclosure of materials in Petitioner's Instragram account. Unlike *Nasha*, however, this is not a case in which the decisionmaker expressed or published comments advocating for a particular outcome on a matter subject to a hearing over which she was to preside. Trutane's comments remained generalized and there is no evidence that she commented about Petitioner, his account, his conduct, or the likely or desired outcome of any eventual disciplinary proceedings, to the African American/ Black Parent Engagement Team or anyone else. Similarly, generalized expressions of support for members of the community who may have felt targeted by racism is not a statement regarding the nature or outcome of any future disciplinary proceedings that might occur involving petitioner. The statement "WE are DIVERSE & GREAT," carried on a sign, is a general affirmation that, again, cannot reasonably be

construed as a statement about whether or how petitioner should be disciplined.

In arguing to the contrary, petitioner repeatedly asserts that Trutane demonstrated specifically against him and his Instagram account. (Pet. Mot., p. 14:6 ["demonstrating at a rally held in protest to his account"]; id. at p. 14:13 ["active protest to Petitioner's account"]; id. at p. 15 ["actively participating in a rally held in protest to Petitioner's account"]; id. at p. 16 ["attending a political rally protesting Petitioner's conduct"]; Pet. Reply at p. 4:7 [a demonstration against Petitioner himself and his acts"]; id. at p. 8:8 ["express purpose of protesting Petitioner's conduct"].") Had Trutane in fact participated in demonstrations directed at petitioner in specific, her recusal likely would have been required as a matter of law, but that is not what the evidence shows.

The Petition is therefore **DENIED**

Dated: October 1, 2020 /s/ Karin Schwartz
Karin Schwartz
Judge of the Superior Court

SUPERIOR COURT OF CALIFORNIA
COUNTY OF ALAMEDA

Case Number: RG18922005

Case Name: Epple vs. Alameda County Board of Education

1. Order Denying Petition for Writ of Mandate

DECLARATION OF SERVICE BY MAIL

I certify that I am not a party to this cause and that on a true and correct copy of the **Order Denying Petition for Writ of Mandate** was mailed first class, postage prepaid, in a sealed envelope, addressed as shown below by placing it for collection, stamping or metering with prepaid postage, and mailing on the date stated below, in the United States mail at Alameda County, California, following standard court practices.

I declare under penalty of perjury that the foregoing is true and correct. Executed on 10/02/2020

/s/_____
Executive Officer/Clerk of the Superior Court
By M. Scott Sanchez, Deputy Clerk

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APPENDIX G

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. I

Amendment I. Establishment of Religion; Free Exercise of Religion; Freedom of Speech and the Press; Peaceful Assembly; Petition for Redress of Grievances

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

Amendment XIV. Rights Guaranteed: Privileges and Immunities of Citizenship, Due Process, and Equal Protection

Section 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.

Section 2.

Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the executive and judicial officers of a state, or the members of the legislature thereof, is denied to any of the male inhabitants of such state, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state.

Section 3.

No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any state, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any state legislature, or as an executive or judicial officer of any state, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the

enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4.

The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any state shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5.

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

California Code Civ. Proc., § 1094.5

CODE OF CIVIL PROCEDURE
Part 3. Special Proceedings of a Civil Nature
Title 1. Writs of Review, Mandate, and Prohibition
Chapter 2. Writ of Mandate

§ 1094.5. Inquiry into validity of administrative order or decision

(a) Where the writ is issued for the purpose of inquiring into the validity of any final administrative order or decision made as the result of a proceeding in which by law a hearing is required to be given, evidence is required to be taken, and discretion in the determination of facts is vested in the inferior tribunal, corporation, board, or officer, the case shall be heard by the court sitting without a jury. All or part of the record of the proceedings before the inferior tribunal, corporation, board, or officer may be filed with the petition, may be filed with respondent's points and authorities, or may be ordered to be filed by the court. Except when otherwise prescribed by statute, the cost of preparing the record shall be borne by the petitioner. Where the petitioner has proceeded pursuant to Section 68511.3 of the Government Code and the Rules of Court implementing that section and where the transcript is necessary to a proper review of the administrative proceedings, the cost of preparing the transcript shall be borne by the respondent. Where the party seeking the writ has proceeded pursuant to Section 1088.5, the administrative record shall be filed as expeditiously as possible, and may be filed with the petition, or by the respondent after payment of the costs by the petitioner, where required, or as otherwise

directed by the court. If the expense of preparing all or any part of the record has been borne by the prevailing party, the expense shall be taxable as costs.

(b) The inquiry in such a case shall extend to the questions whether the respondent has proceeded without, or in excess of jurisdiction; whether there was a fair trial; and whether there was any prejudicial abuse of discretion. Abuse of discretion is established if the respondent has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence.

(c) Where it is claimed that the findings are not supported by the evidence, in cases in which the court is authorized by law to exercise its independent judgment on the evidence, abuse of discretion is established if the court determines that the findings are not supported by the weight of the evidence. In all other cases, abuse of discretion is established if the court determines that the findings are not supported by substantial evidence in the light of the whole record.

(d) Notwithstanding subdivision (c), in cases arising from private hospital boards or boards of directors of districts organized pursuant to The Local Hospital District Law, Division 23 (commencing with Section 32000) of the Health and Safety Code or governing bodies of municipal hospitals formed pursuant to Article 7 (commencing with Section 37600) or Article 8 (commencing with Section 37650) of Chapter 5 of Division 3 of Title 4 of the Government Code, abuse of discretion is established if the court determines that the findings are not supported by

substantial evidence in the light of the whole record. However, in all cases in which the petition alleges discriminatory actions prohibited by Section 1316 of the Health and Safety Code, and the plaintiff makes a preliminary showing of substantial evidence in support of that allegation, the court shall exercise its independent judgment on the evidence and abuse of discretion shall be established if the court determines that the findings are not supported by the weight of the evidence.

(e) Where the court finds that there is relevant evidence that, in the exercise of reasonable diligence, could not have been produced or that was improperly excluded at the hearing before respondent, it may enter judgment as provided in subdivision (f) remanding the case to be reconsidered in the light of that evidence; or, in cases in which the court is authorized by law to exercise its independent judgment on the evidence, the court may admit the evidence at the hearing on the writ without remanding the case.

(f) The court shall enter judgment either commanding respondent to set aside the order or decision, or denying the writ. Where the judgment commands that the order or decision be set aside, it may order the reconsideration of the case in the light of the court's opinion and judgment and may order respondent to take such further action as is specially enjoined upon it by law, but the judgment shall not limit or control in any way the discretion legally vested in the respondent.

(g) Except as provided in subdivision (h), the court in which proceedings under this section are instituted

may stay the operation of the administrative order or decision pending the judgment of the court, or until the filing of a notice of appeal from the judgment or until the expiration of the time for filing the notice, whichever occurs first. However, no such stay shall be imposed or continued if the court is satisfied that it is against the public interest. The application for the stay shall be accompanied by proof of service of a copy of the application on the respondent. Service shall be made in the manner provided by Title 5 (commencing with Section 405) of Part 2 or Chapter 5 (commencing with Section 1010) of Title 14 of Part 2. If an appeal is taken from a denial of the writ, the order or decision of the agency shall not be stayed except upon the order of the court to which the appeal is taken. However, in cases where a stay is in effect at the time of filing the notice of appeal, the stay shall be continued by operation of law for a period of 20 days from the filing of the notice. If an appeal is taken from the granting of the writ, the order or decision of the agency is stayed pending the determination of the appeal unless the court to which the appeal is taken shall otherwise order. Where any final administrative order or decision is the subject of proceedings under this section, if the petition shall have been filed while the penalty imposed is in full force and effect, the determination shall not be considered to have become moot in cases where the penalty imposed by the administrative agency has been completed or complied with during the pendency of the proceedings.

(h)

(1) The court in which proceedings under this section are instituted may stay the operation of the administrative order or decision of any licensed hospital or any state agency made after a hearing required by statute to be conducted under the Administrative Procedure Act, as set forth in Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code, conducted by the agency itself or an administrative law judge on the staff of the Office of Administrative Hearings pending the judgment of the court, or until the filing of a notice of appeal from the judgment or until the expiration of the time for filing the notice, whichever occurs first. However, the stay shall not be imposed or continued unless the court is satisfied that the public interest will not suffer and that the licensed hospital or agency is unlikely to prevail ultimately on the merits. The application for the stay shall be accompanied by proof of service of a copy of the application on the respondent. Service shall be made in the manner provided by Title 5 (commencing with Section 405) of Part 2 or Chapter 5 (commencing with Section 1010) of Title 14 of Part 2.

(2) The standard set forth in this subdivision for obtaining a stay shall apply to any administrative order or decision of an agency that issues licenses pursuant to Division 2 (commencing with Section 500) of the Business and Professions Code or pursuant to the Osteopathic Initiative Act or the Chiropractic Initiative Act. With respect to orders or decisions of other state agencies, the standard in this subdivision

shall apply only when the agency has adopted the proposed decision of the administrative law judge in its entirety or has adopted the proposed decision but reduced the proposed penalty pursuant to subdivision (b) of Section 11517 of the Government Code; otherwise the standard in subdivision (g) shall apply.

(3) If an appeal is taken from a denial of the writ, the order or decision of the hospital or agency shall not be stayed except upon the order of the court to which the appeal is taken. However, in cases where a stay is in effect at the time of filing the notice of appeal, the stay shall be continued by operation of law for a period of 20 days from the filing of the notice. If an appeal is taken from the granting of the writ, the order or decision of the hospital or agency is stayed pending the determination of the appeal unless the court to which the appeal is taken shall otherwise order. Where any final administrative order or decision is the subject of proceedings under this section, if the petition shall have been filed while the penalty imposed is in full force and effect, the determination shall not be considered to have become moot in cases where the penalty imposed by the administrative agency has been completed or complied with during the pendency of the proceedings.

(I) Any administrative record received for filing by the clerk of the court may be disposed of as provided in Sections 1952, 1952.2, and 1952.3.

(j) Effective January 1, 1996, this subdivision shall apply to state employees in State Bargaining Unit 5. This subdivision shall apply to state employees in State

Bargaining Unit 8. For purposes of this section, the court is not authorized to review any disciplinary decisions reached pursuant to Section 19576.1 or 19576.5 of the Government Code.

(k) This section shall not apply to state employees in State Bargaining Unit 11 disciplined or rejected on probation for positive drug test results who expressly waive appeal to the State Personnel Board and invoke arbitration proceedings pursuant to a State Bargaining Unit 11 collective bargaining agreement.