No. _____

In the
Supreme Court of the United States

REBECCA HARTZELL,

Applicant,

v.

MARANA UNIFIED SCHOOL DISTRICT;
ANDREA DIVIJAK; AND JOSEPH DIVIJAK

Respondent.

APPLICATION DIRECTED TO THE HONORABLE ELENA KAGAN FOR AN EXTENSION OF TIME WITHIN WHICH TO FILE A PETITION FOR A WRIT OF CERTIORARI TO THE U.S. COURT OF APPEALS FOR THE NINTH CIRCUIT

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TO: THE HONORABLE ELENA KAGAN, ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES:

Pursuant to 28 U.S.C. § 2101(c) and Supreme Court Rules 13.5, 22, 30.2, and 30.3, Applicant Rebecca Hartzell respectfully requests that the time to petition for a writ of certiorari be extended for 59 days to and including August 1, 2025. The Court of Appeals issued its decision (Appendix B) on March 5, 2025. Without an extension of time, the petition would be due on June 3, 2025. Applicants have not previously sought an extension of time from this Court, and the application is being filed more than 10 days before the petition is due. *See* Sup. Ct. R. 13.5, 30.2.

This Court's justification would be based on 28 U.S.C. § 1254(1). Copies of the opinion of the court of appeals (Appendix B) and the relevant opinion of the district court (Appendix A) are attached to this application.

JUDGMENT SOUGHT TO BE REVIEWED

1. This case raises important and unanswered questions that arise under the U.S. Constitution and this Court's qualified immunity jurisprudence.

First, this case raises an important question about the Constitution's protection of parental rights as a fundamental right; specifically the extent to which a parent's right to control her child's education extends beyond simply choosing whether to send her child to a public or private school.

Second, this case raises two related questions about the application of qualified immunity to school officials: whether there is an obviousness exception to the "clearly established" standard, and, more fundamentally whether qualified immunity should

apply the same way to a school official's reasoned decision as it does to a law enforcement officer's split-second choice in a life-or-death situation.

2. Plaintiff-Applicant is the parent of eight school-aged children, five of whom attended Dove Mountain School during the 2019–20 school year. App. B at 39. In February 2020, the Dove Mountain School held an event in which students made presentations for the parents. When Applicant arrived at school for the event, she discovered that two of her children were scheduled to present in different rooms simultaneously. App. B at 41. Applicant saw Respondent Divijak, principal of Dove Mountain, whom she had spoken with previously about regarding similar scheduling problems. *Id*. During their conversation, Applicant sarcastically thanked Respondent for making her choose which child she could support that day. *Id*. Respondent walked away, but in doing so, had to walk past Applicant to exit the classroom, and, as Respondent Divijak left, Respondent and Applicant made physical contact. App. B at 41-42. Respondent Divijak claimed that Applicant grabbed her arm; she contacted the Marna Police Department because she had been "assaulted." App. B at 42-43.

3. The officer informed Applicant that she was being "trespassed from" [sic] the entire school property—i.e., was indefinitely banned from the school grounds—and would have to arrange for someone else to drop off and pick up her children all at the request of the district. App. B at 42. The order would remain in effect until the district decided otherwise. *Id*.

4. Two weeks later, Applicant met with the Superintendent of Respondent Marana Unified School District and an attorney for Respondent District. App. B at

44. Respondent District repeated that the ban from school grounds was to remain in place indefinitely. *Id*. But Respondent District modified the order to allow her to enter school grounds to retrieve her preschooler—but not her other children—and *only* if she did not speak to anyone. *Id*. The order was not lifted until June 2023, three years later, and two years after the filing of this lawsuit.[1] *Id*.

5. Applicant sued, bringing multiple claims including: (1) a First Amendment retaliation claim against Marana Unified School District and Andrea Divijak, principal of Dove Mountain in her individual capacity; and (2) a procedural due process claim against the District. App. B at 48-49. The procedural due process claim against Respondent District and the First Amendment retaliation claim against Respondent principal will be subject to Applicant's petition to this Court.[2]

6. The district court granted summary judgment on the procedural due process claim for the District because Applicant did not have a constitutionally protected liberty interest in accessing school property. App. B at 48. It also granted partial summary judgment to Respondent Divijak on the defamation claim with respect to the written statements made by Respondent Divijak, but allowed the defamation claim based on *oral* statements made by Respondent to proceed. App. B at 49. The district court finally granted qualified immunity on the First Amendment

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[1] Applicant was charged with assault in Marana Municipal Court on March 30. 2020. At the request of the Senior Assistant Town Attorney that case was dismissed on September 22, 2020. App. B at 44-45.

[2] Applicant also brought a claim under the Arizona Constitution against all Respondents and claims for defamation of false light invasion of privacy against Respondent Divijak—these three claims will not constitute part of the forthcoming petition.

retaliation claim because Respondent Divijak did not have adequate notice that her conduct violated a clearly established right. App. B at 48-49. After trial, the district court granted Respondent District's motion for a judgment as a matter of law on her First Amendment retaliation claim. App. B at 49. Finally, the jury found in Respondent Divijak's favor on the defamation claim. *Id.*

7. Applicant appealed the grant of the Respondent District's motion for judgment as a matter of law with respect to the First Amendment claim against Respondent District, the grant of qualified immunity to Respondent Divijak with respect to Applicant's First Amendment retaliation claim, and the grant of summary judgment to Respondent District on Applicant's procedural due process claim. App. B at 50.

8. The Ninth Circuit reversed the grant of a judgment as a matter of law with respect to the First Amendment retaliation claim, explaining that a reasonable jury could conclude that Hartzell was banned pursuant to Respondent District's expressly adopted official policy. App. B at 64-65. It explained that Applicant had "presented evidence [at trial] from which a reasonable jury could infer that (1) Policy KFA allowed the District to ban those whose speech the District deemed offensive or inappropriate, (2) Divijak found Hartzell's advocacy offensive, and (3) she was banned after criticizing Divijak." App. B at 60.

9. The Ninth Circuit affirmed the conclusion that Divijak was entitled to qualified immunity on Hartzell's First Amendment retaliation claim. App. B at 66. It explained that the special characteristics of the school environment colors the

application of the First Amendment in these situations. App. B at 68. Thus "cases arising outside public schools are of limited use in evaluating the scope of Hartzell's First Amendment rights here." *Id*.

10. Finally, the Ninth Circuit affirmed rejection of Applicant's procedural due process claim, holding that Applicant had no constitutional right to access school property, so no procedure was required before the school banned her. App. B at 70. Applicant argued that she has a fundamental right to direct the education and upbringing of her children, and therefore satisfied the first element of a procedural due process claim. *Id*. The Ninth Circuit disagreed, however, and held that "'once parents make the choice as to which school their children will attend, their fundamental right to control the education of their children is, at the least, substantially diminished.'" *Id*. The Ninth Circuit concluded that because the prohibition did not directly prohibit Applicant from choosing to send her child to a public or private school, no constitutional right was at issue and so no process was due.

11. Applicant only seeks to raise the procedural due process claim against Respondent District and the claim for First Amendment retaliation against the Respondent Divijak before this court. Courts of Appeals are split regarding the extent and meaning of parental rights, with the Ninth Circuit holding that these rights consist only of the right to choose whether to send a child to a public or private school, *Fields v. Palmdale School District*, 427 F.3d 1197, 1206 (9th Cir. 2005), and others seeing parental rights as broader. *See C.N. v. Ridgewood Bd. of Educ.*, 430 F.3d 159,

185 n.26 (3d Cir. 2005) (holding that parental rights as protected by the Fourteenth Amendment includes more than just the choice of whether to send their children to public or private schools, and that parental rights can still be violated by choices a public school makes).

Only this court can resolve this circuit split.

12. Further, the Ninth Circuit's decision to limit parental rights in this way is not supported by this Court's precedent. This Court has recognized for over a century that the right of parents to control and direct the education, upbringing, and healthcare of their children is a fundamental constitutional right. *Meyer v. Nebraska*, 262 U.S. 390, 401 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510, 534–35 (1925); *Troxel v. Granville*, 530 U.S. 57, 65 (2000). None of this Court's decisions limits a parent's rights to control the education of their children as simply a choice between public and private school for a child as evidenced by the fact that *Meyer* struck down a law regarding the teaching of the German language.

13. Applicant's petition will also raise important questions about the application of qualified immunity that only this Court can answer. Many justices on this Court have noted that qualified immunity itself lacks textual standing in 42 U.S.C. § 1983. *See Ziglar v. Abbasi*, 582 U. S. 120, 156-160 (2017) (Thomas, J., opinion concurring in part and concurring in judgment); *Baxter v. Bracey*, 140 S. Ct. 1862 (2020) (Thomas, J., dissenting from denial of certiorari*); Crawford-El v. Britton*, 523 U.S. 574, 611 (1998) (Scalia, J., dissenting) ("[O]ur treatment of qualified immunity under 42 U.S.C. § 1983 has not purported to be faithful to the common-law

immunities that existed when § 1983 was enacted."). This concern has been echoed by scholars and advocates. *See* Baude, *Is Qualified Immunity Unlawful?* 106 Cal. L. Rev. 45, 82 (2018); Reinert, *Qualified Immunity's Flawed Foundation*, 111 Calif. L. Rev. 201 (2023). Given this, some have questioned whether qualified immunity should apply the same way to school officials who have time to engage in reasoned decision making as it does to law enforcement officials who are required to make split-second life-or-death decisions.

Justice Thomas specifically has noted the problem with qualified immunity as "the one-size-fits-all doctrine" as it is "an odd fit for many cases because the same test applies to officers who exercise a wide range of responsibilities and functions." *Hoggard v. Rhodes*, 141 S. Ct. 2421, 2421 (2021). In *Hoggard*, university officials were sued and granted qualified immunity which led Justice Thomas to ask: "why should university officers, who have time to make calculated choices about enacting or enforcing unconstitutional policies, receive the same protection as a police officer who makes a split-second decision to use force in a dangerous setting?" *Id.* at 2422.

Additionally, there is a question as to whether there should be an "obviousness" exception to the clearly established requirement for qualified immunity—that is whether there is some conduct that so obviously violates the Constitution that a case on point is not necessary to hold a government official liable for their rights violating behavior. This Court has twice seemingly recognized an obviousness exception to the clearly established requirement.

First, in *Hope v. Pelzer*, this Court explained that qualified immunity does not preclude liability in "novel factual circumstances" and that the "salient question [is] … whether the state of the law … gave respondents fair warning that their" conduct was unconstitutional. 536 U.S. 730, 741 (2002). This Court then held that "obvious cruelty inherent in this practice should have provided respondents with some notice that their alleged conduct violated Hope's constitutional protection against cruel and unusual punishment." *Id.* at 745. Second, in *Taylor v. Riojas*, this Court summarily reversed the Fifth Circuit's grant of qualified immunity because "no reasonable correctional officer could have concluded that, under the extreme circumstances of this case, it was constitutionally permissible to house Taylor in such deplorably unsanitary conditions for such an extended period of time" irrespective if there was any precedent on point to clearly establish the issue. 592 U.S. 7, 8-9 (2020).

The Ninth Circuit has not adopted such an exception and this Court's pronouncements while explanatory have not risen to a clear precedent that would place all circuits on notice that there is an obviousness exception to qualified immunity's clearly established requirement. Only this Court can make that clear and this case will provide this Court with that opportunity.

10. In sum, this case presents two substantial and recurring questions that only this Court has the power to resolve. First, the extent to which parental rights extend beyond the simple choice of choosing whether to send a child to a public or private school. Second, the extent to which qualified immunity and its clearly

established requirement applies to school officials the same way it applies to law enforcement officers.

REASONS WHY AN EXTENSION OF TIME IS WARRANTED

Good cause exists for an extension of time to prepare a petition for a writ of certiorari in this case. On April 17, 2025, Applicant retained the undersigned as new, *pro bono* representation to file a petition for certiorari. The undersigned were not previously involved in litigating this case, and require additional time to familiarize themselves with the record and prepare the petition.

In addition to this case, undersigned counsel have pressing obligations that are pending in this Court and others, including litigation in:

- *Crowe v. Oregon State Bar*, Sup. Ct. No. 23-35193
- *Lavigne v. Great Salt Bay Community School*, First Cir. No. 24-1509
- *Pomeroy v. Utah State Bar*, Tenth Cir. No. 24-4054
- *Hedrick v. Holiday Island*, Ark. Supreme Court, CV-24-659
- *Center v. Arizona Policy v. Arizona Secretary of State*, Ariz. Supreme Court CV-24-0295-PR
- *Schell v. Oklahoma State Bar*, W.D. Okla. No. 5:19-cv-00281-HE
- *Barth v. Town of Gilbert*, Maricopa County Superior Court No. TX2024-000440

Applicant has not previously sought an extension of time from this Court.

CONCLUSION

Applicant requests that the time to file a petition for a writ of certiorari in the above captioned case be extended 59 days to and including Friday, August 1, 2025.

Respectfully submitted,

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APPENDIX A

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Rebecca Hartzell,

Plaintiff,

v.

Marana Unified School District, et al.,

Defendants.

No. CV-21-00062-TUC-SHR

Order Re: Defendants' Motion for Summary Judgment

Pending before the Court is a Motion for Summary Judgment (Doc. 38) (the "Motion") filed by Defendants Marana Unified School District (the "District") and Andrea Divijak (collectively "Defendants"). This action arises from an interaction between a parent and a principal at a school event and the parent's subsequent ban from the school. For the reasons below, the Motion is granted-in part and denied-in part.

I. FACTUAL AND PROCEDURAL BACKGROUND

The following facts are derived from the parties' statements of facts and are undisputed for the purpose of summary judgment. In August 2019, the District opened Dove Mountain CSTEM K-8 (the "School"), a new kindergarten through eighth grade school. (DSOF ¶ 1, Exh. 1 at 17–18; PCSOF ¶ 1.)[1] Five of Plaintiff Rebecca Hartzell's children were enrolled at the School. (DSOF ¶ 2; PCSOF ¶ 2.) Divijak is the School's

[1]DSOF is Defendants' Statement of Facts and PCSOF is Plaintiff's Controverting Statement of Facts. DSOF is docketed at item 39 in the electronic record (Doc. 39); PCSOF is docketed at item 47 (*See* Doc. 47 at 2–11).

current principal and was the principal during the 2019-2020 academic year. (DSOF ¶ 3, Exh. 1 at 13; PCSOF ¶ 3.)

A. February 7, 2020 School Event

On February 7, 2020, the School hosted an event where students showcased and presented projects to teachers, parents, and other students. (DSOF ¶ 4; PCSOF ¶ 4.) Plaintiff's children participated in this event and two of her children were scheduled to present at the same time in the first of two time slots. (DSOF ¶¶ 5–6; PCSOF ¶¶ 5–6.) At the event, Plaintiff approached Divijak to discuss and complain about the scheduling of her children's presentations. (DSOF ¶ 7; PCSOF ¶ 7.) Divijak spoke to Plaintiff and stated she was not going to discuss the matter at that time. (DSOF ¶ 9, Exh. 3 at 30–31; PCSOF ¶ 9.) Divijak then sought to end the interaction by walking away from Plaintiff. (DSOF ¶¶ 10–11, Ex. 2 ¶¶ 7–8; PCSOF ¶ 10–11.) As Divijak was walking away, Plaintiff said the conversation was not over and that Divijak should not walk away from her. (DSOF ¶ 11, Exh. 2 ¶ 8; PCSOF ¶ 11.) Plaintiff and Divijak then physically made contact,[2] and Divijak told Plaintiff something like, "You will not touch me." (DSOF ¶¶ 12–14, Exh. 2 ¶¶ 9–10, Exh. 3 at 32–33, 37–38; PCSOF ¶¶ 12–14, Exh. 1, Exh. 4 ¶ 6; PRSOF ¶ 10.)[3]

Divijak walked away and subsequently informed the School Associate Principal Bronwyn Sternberg and School Monitor John McKenna of the interaction. (DSOF ¶ 16, Exh. 1 at 112–113; PCSOF ¶ 16, Exh. 3 at 1:44–1:57.) McKenna suggested Divijak call 911 to have a Marana Police Department ("MPD") officer come to the School. (DSOF ¶ 17, Exh. 1 at 113; PCSOF ¶ 17.) Before MPD arrived at the School, McKenna and Sternberg approached Plaintiff and asked her to leave the School. (DSOF ¶ 18, Exh. 3 at 42; PCSOF ¶ 18.) After a brief verbal exchange, Plaintiff complied with the request.

[2]The parties dispute the nature and extent of the physical contact. (*See* Doc. 38 at 9; Doc. 46 at 1.) Plaintiff asserts she did not "grab" Divijak for any amount of time and any touching "was no more than incidental and unintentional" contact caused by Divijak charging toward her. (PCSOF ¶¶ 12–13; PRSOF ¶¶ 1–10, 12.) Defendants claim Plaintiff reached out and grabbed Divijak's left wrist and Divijak pulled her "left arm away from Plaintiff in an effort to break free from Plaintiff's grasp." (DSOF, Exh. 2 ¶¶ 9–10.)

[3]PRSOF is Plaintiff's additional Responsive Statement of Facts filed along with her Controverting Statement of Facts. PRSOF is docketed at item 47 in the electronic record. (*See* Doc. 47 at 11–23.)

(DSOF ¶ 19; PCSOF ¶ 19, Exh. 7 at 1:54:10–1:55:30.) Around this time, MPD officers arrived and began investigating. (DSOF ¶ 20, Exh. 1 at 123; PCSOF ¶ 20.) MPD Officer Jerry Ysaguirre ("Officer Ysaguirre") spoke with Plaintiff. (DSOF ¶ 21, Exh. 4 at 1; PCSOF ¶ 21.) Plaintiff told Officer Ysaguirre she "reached out and put [her] hand on Divijak." (DSOF ¶ 22, Exh. 3 at 37–38, Exh. 4 at 2; PCSOF ¶ 22.) At the conclusion of Plaintiff's interview, Officer Ysaguirre informed Plaintiff she was trespassed from School property and explained what that meant for her. (DSOF ¶¶ 24–25, Exh. 3 at 46, Exh. 4 at 2; PCSOF ¶ 24–25.) The following day, Officer Ysaguirre spoke to the only non-party adult witness who saw the interaction—Mr. Gute. (DSOF, Exh. 4 at 1–2, 4–5; PCSOF ¶ 20, Exhs. 5, 7; PRSOF ¶ 3, Exh. 4 ¶ 2.) The matter was referred to the Marana Town Attorney's Office. (DSOF ¶ 27, Exh. 5; PCSOF ¶ 27.)

B. The February 24, 2020 Meeting and Follow-up

Plaintiff requested a meeting with the District's Superintendent Dr. Doug Wilson. (DSOF ¶ 32, Exh. 3 at 47–48; PCSOF, Exh. 10 at 2–8.) On February 24, 2020, Dr. Wilson met with Plaintiff and her counsel, confirmed Plaintiff's restrictions, and continued Plaintiff's ban from the School. (DSOF ¶¶ 32–33, 36, Exh. 3 at 47–48; PCSOF ¶¶ 32–33, 36; PRSOF ¶¶ 31–32, Exh. 4 ¶¶ 17–18.) Later that evening, Plaintiff sent an email to Dr. Wilson's secretary asking for clarification from Dr. Wilson about her discussion with him. (DSOF ¶ 40, Exh. 3 at 76, Exh. 8 at 1–2; PCSOF ¶ 40, Exh. 10 at 2–3.) No one from the District responded to Plaintiff's email. (DSOF Exh. 3 at 76–77; PCSOF ¶ 40.) Plaintiff did not follow up with anyone from the District after sending this email. (DSOF ¶ 41, Exh. 3 at 77–78; PCSOF ¶ 41.)[4]

During the third week of March 2020, the District's spring break occurred. (DSOF ¶ 42, Exh. 2 ¶ 12; PCSOF ¶ 42.) After spring break, the School began remote instruction due to COVID-19 and this became the method of instruction for the rest of the academic year. (DSOF ¶¶ 43–44, Exh. 1 at 25–26; PCSOF ¶¶ 43–44.) Sometime thereafter, Plaintiff moved and enrolled her children in another school district. (DSOF ¶ 45; PCSOF ¶ 45.)

[4]Plaintiff claims to dispute this fact but cites no evidence to support she followed up with the District. (*See* PCSOF ¶ 41 citing PRSOF ¶ 57.)

C. Criminal Case

Plaintiff's Criminal Case was initiated on March 30, 2020 and Plaintiff was charged with assault pursuant to A.R.S. § 13-1203(A)(3) in Marana Municipal Court Case No. CM202000276 (the "Criminal Case"). (DSOF ¶¶ 27–28, Exh. 5; PCSOF ¶¶ 27–28.) At the request of Senior Assistant Town Attorney Libby Shelton, the Criminal Case was dismissed on September 22, 2020. (DSOF ¶¶ 28–29, Exh. 6; PCSOF ¶ 28–29.)

D. Documents sent in October 2020 and April 2021

Around October 1, 2020, Plaintiff's supervisor informed Plaintiff that a document ("First Document") regarding Plaintiff was delivered to her department—Plaintiff is employed by the University of Arizona (the "University") College of Education.[5] (DSOF ¶¶ 46–47, Exh. 3 at 8, 88; PCSOF ¶¶ 46–47.) This First Document was a printout of the Criminal Case docket with additional statements typed onto the top of the document. (DSOF ¶ 48; PCSOF ¶ 48.) In late April 2021, Plaintiff became aware of an unsigned note ("Second Document") dated April 23, 2021 that was mailed and delivered to the University's Compliance Office. (DSOF ¶ 52, Exh. 3 at 101–102, Exh. 9; PCSOF ¶ 52.)

E. Procedural History

Plaintiff began this action in February 2021 (Doc. 1) and filed her First Amended Complaint ("FAC") in April 2021 (Doc. 16). Plaintiff's FAC raised the following five counts: (1) 42 U.S.C. § 1983 first amendment retaliation against all Defendants; (2) Ariz. Const. art. II, § 6 free speech retaliation against all Defendants; (3) 42 U.S.C. § 1983 denial of procedural due process against the District; (4) defamation per se against Defendant Divijak in her individual capacity; and (5) false light invasion of privacy against Defendant Divijak in her individual capacity. (*Id.* at 11–16.) Defendants filed this Motion (Doc. 38) arguing they are entitled to summary judgment on all five counts and the matter has been fully briefed.[6] (Doc. 46 (Response); Doc. 56 (Reply).)

[5]Plaintiff is employed at the University as the Director of the Master's Program in Applied Behavior Analysis and as an Assistant Professor of Practice. (DSOF ¶ 46; PCSOF ¶ 46.)

[6]Plaintiff requested oral argument. (Doc. 46 at 1.) The Court finds oral argument will not aid in resolution of the issues raised and, therefore, denies this request. *See* LRCiv 7.2(f); Fed. R. Civ. P. 78(a); *Partridge v. Reich*, 141 F.3d 920, 926 (9th Cir. 1998) ("[A]

II. SUMMARY JUDGMENT STANDARD

Under Rule 56 of the Federal Rules of Civil Procedure, upon a party's motion, a 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." A genuine dispute exists if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party," and material facts are those "that might affect the outcome of the suit under the governing law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

The movant bears the initial burden of informing the court of the basis for its motion for summary judgment and of indicating those portions of the record and discovery responses that demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The movant may succeed on a motion for summary judgment by identifying the absence of evidence supporting an element of the non-movant's claim if the non-movant bears the burden of proof on that claim at trial. *Id*. at 322–23. The evidence of the non-movant is to be taken as true and all justifiable inferences are to be drawn in the non-movant's favor. *Anderson*, 477 U.S. at 255.

III. DISCUSSION

A. Counts I and II – Free Speech Retaliation

Defendants argue they are entitled to summary judgment on Counts I and II because Plaintiff cannot satisfy any of the elements required to prevail on a First Amendment retaliation claim. (Doc. 38 at 10.) Specifically, Defendants argue: (1) "physically touching another person is not conduct protected by the First Amendment;" (2) "escorting a parent from a school campus and calling the police to report an alleged assault would not 'chill a person of ordinary firmness' from engaging in protected activity;" and (3) "there is no connection between any of Plaintiff's speech and her removal from campus." (*Id.*) According to Defendants, "Plaintiff cannot produce any evidence that Divijak or any other District employee requested that Plaintiff receive a trespass order from the [MPD] based

district court can decide the issue without oral argument if the parties can submit their papers to the court."); *see also Bach v. Teton Cnty. Idaho*, 207 F. App'x 766, 769 (9th Cir. 2006) ("Due process does not require the district court to hold oral argument before ruling on pending motions.").

on her speech" rather than the contact she made with Divijak. (*Id.* at 9–10.)

Plaintiff argues a reasonable jury could find the ban was substantially motivated by Plaintiff's criticism of the school rather than the physical contact between her and Divijak. (Doc. 46 at 16–18.) Plaintiff also argues a reasonable jury could conclude Divijak told others Plaintiff grabbed and assaulted her "as a pretext to cover up the true reason for which Defendants wanted to get rid of [Plaintiff]: she was 'very opinionated,' and they did not like hearing her opinions." (*Id.* at 17.)

To prevail on a First Amendment retaliation claim under 42 U.S.C. § 1983, a plaintiff must show "(1) [she] engaged in constitutionally protected activity; (2) the defendant's actions would 'chill a person of ordinary firmness' from continuing to engage in the protected activity; and (3) the protected activity was a substantial motivating factor in the defendant's conduct—i.e., that there was a nexus between the defendant's actions and an intent to chill speech." *Arizona Students' Ass'n v. Arizona Bd. of Regents*, 824 F.3d 858, 867 (9th Cir. 2016).[7] "Once a plaintiff has made such a showing, the burden shifts to the [defendant] to show that it would have taken the same action even in the absence of the protected conduct." *O'Brien v. Welty*, 818 F.3d 920, 933 (9th Cir. 2016) (internal quotation marks omitted).

With respect to the first element, the Court finds Plaintiff engaged in constitutionally protected activity. Defendants' contention Plaintiff did not have a First Amendment right to physically touch Divijak (Doc. 38 at 10) is beside the point. The protected activity that supports this retaliation claim is Plaintiff's exercise of her First Amendment right to criticize school officials. Plaintiff argues she was banned from the District's property because she made statements criticizing Divijak and the School for the poor scheduling of School events and expressing her viewpoints about the unwelcoming environment at the

[7]While the Arizona Constitution is considered to be more protective of free speech rights than the Federal Constitution, Arizona courts have not explored or defined the contours of that more expansive right and, therefore, generally rely on federal case law in addressing free speech claims under the Arizona constitution. *See Brush & Nib Studio, LC v. City of Phoenix*, 448 P.3d 890, 902–03 (Ariz. 2019). Because Plaintiff does not cite any case or explain why the analysis should be different under the Arizona Constitution, (Doc. 46) the court will rely on federal law and conduct the same analysis for Counts I and II.

School. (DSOF ¶ 30; PCSOF ¶ 30.) According to Plaintiff, the ban against her was substantially motivated by the District's dislike for her expressed viewpoints "regarding event scheduling, overheated busses, children accessing pornography on school computers, availability of books in the school library, opining that children should be allowed to speak to one another in the cafeteria during lunch, IEP/504 meeting procedures, proper treatment of children with disabilities, special education funding, and the like." (PRSOF ¶ 13, Exh. 4 ¶ 8.)

Speech is generally protected by the First Amendment, with restrictions on only certain types of speech, such as obscenity, defamation, and fighting words, *R.A.V. v. St. Paul*, 505 U.S. 377, 382–83 (1992), none of which is applicable here. Defendants have not pointed to any case from the Supreme Court or the Ninth Circuit Court of Appeals holding that parents criticizing school officials is not protected speech. (*See* Doc. 38 at 8–10; Doc. 56 at 2–4.) Indeed, cases from other courts seems to suggest the right to criticize public officials is protected by the First Amendment. *See e.g.*, *Bloch v. Ribar*, 156 F.3d 673, 678 (6th Cir. 1998) (recognizing First Amendment protects citizen's right to criticize public officials and policies); *Smith v. Allegheny Valley Sch. Dist.*, No. CV 17-686, 2017 WL 6279345, at *10 (W.D. Pa. Dec. 8, 2017) (parent's critique of school district personnel and their behavior is "speech protected by the First Amendment"); *Flege v. Williamstown Indep. Sch.*, No. CIVA 06-47-DLB, 2007 WL 679022, at *1, 10 (E.D. Ky. Mar. 1, 2007) (parents exercised First Amendment rights by criticizing superintendent and school policies).

With respect to the second element, Defendants' banning of Plaintiff would lead ordinary parents in Plaintiff's position to refrain from criticizing school officials in order to be able to enter the school. The ban in this case restricted Plaintiff's access to her children's School which prevented her from being able to attend, among other things, parent-teacher conferences, a science fair, and a school fundraiser. (DSOF ¶ 31; PCSOF ¶ 31; PRSOF ¶¶ 21–23, Exh. 4 ¶¶ 10–12.) It is entirely plausible that a jury could find these actions reasonably likely to deter an ordinary person from engaging in protected speech.

With respect to the third element, Plaintiff submitted enough circumstantial evidence for a reasonable jury to find that the decision to ban Plaintiff from the School was substantially motivated by her criticism of school officials. *See Pinard v. Clatskanie Sch. Dist. 6J*, No. CIV. 03-172-HA, 2008 WL 410097, at *5 (D. Or. Feb. 12, 2008) ("As with proof of motive in other contexts, this element of a First Amendment retaliation suit may be met with either direct or circumstantial evidence, and involves questions of fact that normally should be left for trial.") (quoting *Ulrich v. City & Cnty. of San Francisco*, 308 F.3d 968, 979 (9th Cir. 2002)). As evidence, Plaintiff references various statements District employees made about her on February 7, 2020. (Doc. 46 at 2–4, 16–18.) First, Plaintiff references Divijak's statements to Officer Ysaguirre that Plaintiff had sent her a "pretty hateful email" about a winter performance accusing her of "just going through the motions and not caring about the School" and that she did not reply to one of Plaintiff's email expressing complaints because it "attacked her personally." (PRSOF ¶ 13, Exh. 7 at 57:00–57:40, 58:45–1:00:40.) Second, Plaintiff references statements Divijak's secretary made—heard in the body-camera footage—characterizing Plaintiff's speech as "a problem all year" and "verbal diarrhea." (PRSOF ¶¶ 15–16, Exh. 7 at 36:14–36:55.) Divijak's secretary is seen smiling and giggling while saying this. (*Id.*) Third, Plaintiff produced evidence of text messages from two Assistant Superintendents describing the "back story" of Plaintiff to Superintendent Wilson. (PRSOF ¶¶ 13–14, Exh. 9.) Those text messages said, among other things, that Plaintiff had "sent some pretty scathing emails to [Divijak]," and that Plaintiff was "very opinionated," "not flexible at all," and "very high maintenance." (*Id.*) This evidence in the record suggests there was hostility and antagonism between Defendants and Plaintiff. Other evidence in the record includes Mr. Gute's characterization of the February 7 incident. He told Officer Ysaguirre Divijak looked upset while talking to Plaintiff and Divijak appeared to have an "exaggerated" reaction to what appeared to be a touch of the side of her arm; Mr. Gute stated he did not think it was a hit or a grab. (PRSOF ¶ 4, Exh. 5 at 5:05–10:15.) Video footage of the interaction does not clearly show the extent of the contact.

However, the Court concludes a reasonable jury could find that the characterization of the contact between Plaintiff and Divijak is a material fact that might affect the outcome of the case. A jury could conclude the contact was so marginal based on the video footage and the statement from Mr. Gute that the real reason the District trespassed Plaintiff was due to her speech and not the contact with Divijak. Even if Plaintiff had no entitlement to be on campus, banning her from campus violated her First Amendment rights if Defendants did so with a retaliatory motive. *See O'Brien*, 818 F.3d at 932 ("Otherwise lawful government action may nonetheless be unlawful if motivated by retaliation for having engaged in activity protected under the First Amendment."). Determining Defendants' motives for their banning decision requires resolution of disputed facts, including resolving credibility determinations. Viewing the evidence in the light most favorable to Plaintiff, *Anderson*, 477 U.S. at 255, a reasonable jury could infer Defendants banned Plaintiff because Plaintiff spoke out against and complained about how school officials were running the School.[8] Therefore, the Court will deny Defendants' Motion for Summary Judgment on this argument.

1. Count II is Time Barred

Defendants argue even if Plaintiff could establish the elements needed for a First Amendment retaliation claim, Count II is time barred because "Plaintiff's claim accrued when she had sufficient information to form a belief that the ban was retaliation for her speech" which was "as early as February 7 and no later than February 24, 2020." (Doc. 56 at 8.) Plaintiff argues accrual for Arizona notice-of-claim purposes is a question for the jury and a reasonable jury could conclude she did not become unquestionably aware that the District was not going to lift her trespass ban until a May 2020 meeting. (Doc. 46 at 12–13.) In their Reply, Defendants argue "Plaintiff's claim accrued when she had sufficient information to form a belief that the ban was retaliation for her speech" and "[t]he

[8]Defendants fail to explicitly argue Plaintiff would have been banned from the School regardless of her complaints about School officials. (Doc. 38 at 8–12; Doc. 56 at 2–4.) For example, they do not offer any evidence of other parents being similarly banned from campus for similar conduct to help suggest this ban would have occurred regardless of prior complaints. Instead, they just argue the ban was due to Plaintiff's physical touching. (*See* Doc. 38 at 8–10.)

extent of an injury has no bearing on the existence of the injury." (Doc. 56 at 8.)

Arizona law requires that a notice of claim against a public entity or employee be served within one hundred eighty days after a cause of action accrues. A.R.S. § 12-821.01(A). Under the statute, "a cause of action accrues when the damaged party realizes he or she has been damaged and knows or reasonably should know the cause, source, act, event, instrumentality or condition that caused or contributed to the damage." *Id.* at (B). If the notice of claim is not filed within 180 days after accrual, the claim is barred. *Id.* at (A).

"To determine when a cause of action accrues, an analysis of the elements of [the cause of action] is necessary." *Dube v. Likins*, 167 P.3d 93, 98 (Ariz. Ct. App. 2007). The elements of free speech retaliation are stated above. A defendant is entitled to summary judgment on an untimely claim if there is evidence that the plaintiff "unquestionably [was] aware of the necessary facts underlying [her] cause of action." *Thompson v. Pima Cnty.*, 243 P.3d 1024, 1029 (Ariz. Ct. App. 2010).

Here, Count II of Plaintiff's FAC relates to Defendants' alleged retaliation against Plaintiff in violation of the Arizona Constitution. (Doc. 16 at 13.) The parties agree that 180 days prior to the notice of claim is April 26, 2020. (Doc. 46 at 13; Doc. 56 at 8.) The Court finds Plaintiff unquestionably was aware of the necessary facts underlying her First Amendment Retaliation claim on February 24. There is no dispute the constitutionally protected activity Plaintiff references occurred prior to February 24, 2020.[9] Plaintiff told the investigating MPD officer she had ongoing "conflict" with Divijak "since the beginning." (PRSOF, Exh. 7 at 16:00–16:33.) Plaintiff also admitted during her deposition that she formed a feeling during the February 24 meeting "that there was a First Amendment retaliation [claim] as a result of [her] expressing [her] opinions in the *past*." (DSOF, Exh. 3 at 72 (emphasis added).) Because Plaintiff offers no genuine dispute of material fact to prevent summary judgment on Count II, Defendants are entitled to

[9]Plaintiff does not specifically state when all her relevant complaints against the School were made, but based on the context, they all appear to have occurred prior to the ban. (*See* Doc. 16 ¶¶ 19-32; DSOF, Exh. 12–13 (Dec. 2019 emails).)

summary judgment as to Count II.

2. Qualified Immunity for Divijak in Count I

Defendant Divijak argues even if Plaintiff could survive summary judgment on Count I, she "is immune from liability on [this] claim pursuant to the doctrine of qualified immunity." (Doc. 38 at 10.) Specifically, Divijak argues Plaintiff fails to identify any case putting her on notice that her specific conduct was unlawful. (Doc. 38 at 11–12; Doc. 56 at 12–13.) Plaintiff argues Divijak is not entitled to qualified immunity because the constitutional right to be free from retaliation is clearly established and Divijak admitted she knew it is not appropriate to retaliate against a community member. (Doc. 46 at 18.)

"Qualified immunity shields government actors from civil liability under 42 U.S.C. § 1983 if 'their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Castro v. Cnty. of Los Angeles*, 833 F.3d 1060, 1066 (9th Cir. 2016) (en banc) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). To determine whether qualified immunity applies, courts must consider whether (1) the government official violated the plaintiff's constitutional right and (2) whether that right was clearly established at the time of the events at issue. *Seidner v. de Vries*, 39 F.4th 591, 595 (9th Cir. 2022) (internal citation and quotation marks omitted). "A right is clearly established when it is 'sufficiently clear that every reasonable official would have understood that what he is doing violates that right.'" *Rivas-Villegas v. Cortesluna*, 142 S. Ct. 4, 7 (2021) (quoting *Mullenix v. Luna*, 577 U.S. 7, 11 (2015)). To be clearly established, there must be existing precedent placing the "constitutional question beyond debate." *Id.* at 7–8. "This inquiry 'must be undertaken in light of the specific context of the case, not as a broad general proposition.'" *Id.* at 8 (quoting *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004)). "[T]he plaintiff bears the burden of proof regarding whether the right is clearly established" and the "defendant must prove that his or her conduct was reasonable." *DiRuzza v. Cnty. of Tehama*, 206 F.3d 1304, 1313 (9th Cir. 2000).

The Court concludes Divijak is entitled to qualified immunity for the individual

capacity claim against her in Count I because Plaintiff fails to show the law on this issue is clearly established. Plaintiff points to no authority that would have put a reasonable official on notice that Divijak's conduct was violating a clearly established right. (*See* Doc. 46 at 18.) Instead, Plaintiff only insufficiently and summarily argues the constitutional right to be free from retaliation is clearly established. *See Hirt v. Unified Sch. Dist. No. 287*, No. 2:17-CV-02279-HLT, 2019 WL 1866321, at *18 (D. Kan. Apr. 24, 2019) ("[M]erely asserting the existence of a generic constitutional right is not enough to defeat a claim of qualified immunity."), *aff'd sub nom. Clark v. Unified Sch. Dist. No. 287*, 822 F. App'x 706 (10th Cir. 2020); *cf. Moran v. Washington*, 147 F.3d 839, 847 (9th Cir. 1998) ("Because the underlying determination pursuant to *Pickering* whether a public employee's speech is constitutionally protected turns on a context-intensive, case-by-case balancing analysis, the law regarding such claims will rarely, if ever, be sufficiently 'clearly established' to preclude qualified immunity.") Therefore, Divijak is entitled to summary judgment as to Count I.

B. Count III – Procedural Due Process under Fourteenth Amendment

The District argues, among other things, it is entitled to summary judgment on Count III because Plaintiff did not have a constitutionally protected liberty interest. (Doc. 38 at 12–14.) Specifically, the District argues directing the education and upbringing of one's children does not create a right to access school property. (*Id.*) Plaintiff argues she had a fundamental liberty interest based on "the fundamental right to direct the upbringing and education of her children."[10] (Doc. 46 at 4, 7–8.) According to Plaintiff, a reasonable jury could conclude the District's conduct in prohibiting Plaintiff from participating in parent-teacher conferences and an orientation and placement assessment for her

[10]Plaintiff also argues her due process claim relates to her fundamental liberty interest based on the First Amendment and First Amendment speech retaliation. (Doc. 46 at 4.) However, as the District points out in its Reply, Plaintiff is raising these claims for the first time on her response to a motion for summary judgment. (Doc. 56 at 5.) Plaintiff's FAC clearly states her procedural due process claim is based on "her fundamental right to direct the education of her children." (Doc. 16 ¶ 111.) Therefore, the Court will limit its analysis to only that liberty interest. *See Coleman v. Quaker Oats Co.*, 232 F.3d 1271, 1293 (9th Cir. 2000) (refusing to allow plaintiff to "turn around and surprise" defendant with a new theory at the summary judgment stage and noting plaintiff should have moved to amend the operative complaint).

preschooler violated this fundamental right. (*Id.* at 7–8.) In its Reply, the District argues Plaintiff cites no binding authority holding the right to direct the care and upbringing of her children encompasses a right to access school property and the Court must decide this issue as a matter of law. (Doc. 56 at 5–6.)

Under the Due Process Clause of the Fourteenth Amendment: "No State shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. "To obtain relief on § 1983 claims based upon procedural due process, the plaintiff must establish the existence of '(1) a liberty or property interest protected by the Constitution; (2) a deprivation of the interest by the government; [and] (3) lack of process.'" *Guatay Christian Fellowship v. Cnty. of San Diego*, 670 F.3d 957, 983 (9th Cir. 2011) (quoting *Portman v. Cnty. of Santa Clara*, 995 F.2d 898, 904 (9th Cir. 1993)). A procedural due process claim only ripens "when it is clear that a distinct deprivation of a constitutionally protected interest in liberty or property has already occurred." *Id.* at 984. In other words, if there is no constitutionally protected interest, no due process is required.

Here, Plaintiff cites general cases holding a family member has a fundamental right to direct the upbringing and education of children under their control. *See Troxel v. Granville*, 530 U.S. 57, 65, 77 (2000); *see also Zelman v. Simmons–Harris*, 536 U.S. 639, 680 n. 5 (2002) (Thomas, J., concurring); *Johnson v. City of Cincinnati*, 310 F.3d 484, 499 (6th Cir. 2002). (Doc. 46 at 7–8.) However, that right is not limitless and Plaintiff fails to cite any binding case holding this fundamental right extends to a parent's ability to be on campus.[11] (*Id.*) Indeed, numerous cases suggest otherwise. *See e.g., T.L. ex rel. Lowry v. Sherwood Charter Sch.*, No. 03:13-CV-01562-HZ, 2014 WL 897123, at *3 (D. Or. Mar. 6, 2014) ("[N]o court has extended a parent's fundamental liberty interest in the care of his or her children to a parental right to physically access a child's school."), *aff'd sub nom. Lowry v. Sherwood Charter Sch.*, 691 F. App'x 310 (9th Cir. 2017); *Flores v. Victory Preparatory Acad.*, 411 F. Supp. 3d 1149, 1162 (D. Colo. 2019) (courts have determined

[11]As mentioned above, the Court is not considering cases cited by Plaintiff related to the First Amendment or First Amendment retaliation (Doc. 46 at 6–7) because Plaintiff's FAC clearly states its procedural due process claim only relates to the right to direct her children's education.

parents do not have constitutional right to access school property). Because Plaintiff had no constitutional right to access school property, no procedural due process was required before Plaintiff was banned from the property. *See T.L. ex rel. Lowry*, 2014 WL 897123, at *3 (finding no procedural due process required regardless of purpose of parent's visit). Therefore, Plaintiff cannot successfully bring a § 1983 violation of due process claim as a matter of law and the District is entitled to summary judgment on Count III.

C. Count IV – Defamation Per Se

Defendant Divijak argues she is entitled to summary judgment on Count IV because Plaintiff cannot establish a prima facie case for defamation with convincing clarity. (Doc. 38 at 18.) Specifically, Divijak argues Plaintiff's defamation claims related to the First and Second Documents fail as a matter of law because they are either true, substantially true, or unactionable.[12] (*Id.* at 16–18.) She also argues Plaintiff's alleged defamatory oral statement fails as a matter of law because it is substantially true that Plaintiff assaulted and grabbed Divijak. (Doc. 56 at 10.)

Plaintiff argues a reasonably jury could find there was false and defamatory statements in the First and Second Documents and when Divijak told District "staff members and her husband that [Plaintiff] 'assaulted' and 'grabbed' her." (*Id.* at 18–21.)

Under Arizona law, a defamatory publication or statement "by a private figure on matters of private concern 'must be false and must bring the defamed person into disrepute, contempt, or ridicule, or must impeach [that person]'s honesty, integrity, virtue, or reputation.'"[13] *Sign Here Petitions LLC v. Chavez*, 402 P.3d 457, 462 (Ariz. Ct. App. 2017) (quoting *Turner v. Devlin*, 848 P.2d 286, 288–89 (1993)); *Takieh v. O'Meara*, 497 P.3d 1000, 1006 (Ariz. Ct. App. 2021). "To defeat a defendant's motion for summary

[12]Defendant Divijak also argues there is insufficient evidence that would allow a jury to find she wrote, mailed, or caused the publication and delivery of the First and Second Documents. (Doc. 38 at 16.) For purposes of analysis, the Court will assume, without deciding, that Plaintiff presented sufficient circumstantial evidence that Defendant Divijak wrote the First and Second Documents for Counts IV and V.

[13]Defendant Divijak does not argue she was a public official, public figure, or limited public figure that would be subject to the actual malice standard. *See New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) (heightened pleading standard requiring Plaintiff to show actual malice in certain situations).

judgment in a defamation case, the plaintiff must present evidence 'sufficient to establish a prima facie case with *convincing clarity*.'" *Sign Here Petitions LLC*, 402 P.3d at 462 (emphasis added) (quoting *Read v. Phoenix Newspapers, Inc.*, 819 P.2d 939, 942–43 (Ariz. 1991)). This higher burden is imposed "because the expense of defending a meritless defamation case could have a chilling effect on free speech." *Id.*

Before getting to a jury, the trial court must first determine "whether, *under all the circumstances*, a statement is capable of bearing a defamatory meaning." *Sign Here Petitions LLC*, 402 P.3d at 463–64 (quoting *Yetman v. English*, 811 P.2d 323, 331 (Ariz. 1991)) (emphasis in original). If the statement is capable of such a meaning, it is actionable, and the jury can decide "whether the defamatory meaning of the statement was in fact conveyed." *Id.* (quoting *Yetman*, 811 P.2d at 331) (emphasis omitted).

The key inquiry for the trial court is whether the expression at issue "*would reasonably appear to state or imply assertions of objective fact*." *Yetman*, 811 P.2d at 328. "'In determining whether speech is actionable, courts must additionally consider the impression created by the words used as well as the general tenor of the expression, from the point of view of the reasonable person' at the time the statement was uttered and under the circumstances it was made." *Sign Here Petitions LLC*, 402 P.3d at 463–64 (quoting *Yetman*, 811 P.2d at 328) (emphasis omitted). "[A] statement is not actionable if it is comprised of 'loose, figurative, or hyperbolic language' that cannot reasonably be interpreted as stating or implying facts 'susceptible of being proved true or false.'" *Takieh*, 497 P.3d at 1006.

Furthermore, "[s]ubstantial truth is an absolute defense to a defamation action in Arizona." *Read*, 819 P.2d at 941. A defendant "need not prove the literal truth of every detail" and slight inaccuracies of expression are immaterial if the defamatory charge is true in substance. *Id.* When the underlying facts are undisputed, the determination of substantial truth is a matter for the court. *Id.*

1. First Document: Criminal Case Docket

The First Document is a copy of the docket in Plaintiff's Criminal Case. (DSOF

Exh. 13; PCSOF Exh. 13.) This Document is dated September 14, 2020 and Plaintiff's supervisor viewed it around October 1, 2020. (DSOF ¶¶ 47–48, Exh. 3 at 88; PCSOF ¶¶ 47–48.) Two sentences appear on the top right-hand corner. (DSOF Exh. 13; PCSOF Exh. 13.) The first sentence states, "This occurred at a K-8 school in front of young children." (*Id.*) The second sentence states, "Doesn't seem like this is the kind of person that should be training teachers let alone working with kids." (*Id.*)

Defendant argues Plaintiff's claim regarding this First Document fail as a matter of law because the first sentence is substantially true and the second sentence is an opinion that cannot reasonably be interpreted as stating or implying facts susceptible of being proved true or false. (Doc. 38 at 16–17.) In response, Plaintiff makes several claims related to this First Document. (Doc. 46 at 19–21.)

First, Plaintiff argues the First Document falsely showed the Criminal Case against Plaintiff was still pending because it was delivered after the Criminal Case was dismissed and there was "no occurrence of 'knowingly touch w/intent to inj[ure]/insult/provoke.'" (Doc. 46 at 19–20.) However, regardless of when the First Document was received, it was dated September 14, 2020 and the criminal charges against Plaintiff were still pending at that time. The First Document simply shows what Plaintiff was *charged* with as of that date. Because this is all true, the Court finds Plaintiff's claims on this matter meritless.

Second, Plaintiff argues the first sentence is false because "[n]othing 'occurred . . . in front of young children.'"[14] (Doc. 46 at 18.) The Court finds this portion of the first sentence substantially true based on the evidence in the record. Although there was no classroom of children, Plaintiff admits one child was present and the video footage in the record shows children in the background of the nearby School hallway where this occurred. (PCSOF Exh. 3, Exh. 6 at 130.)

Third, Plaintiff argues a reasonable jury could find the second sentence to be false and defamatory because it is "a character assassinating statement to her employer." (Doc. 46 at 19–20.) The Court finds this statement unactionable because it does not reasonably

[14]Plaintiff does not dispute the portion of the first sentence stating the incident related to the Criminal Case occurred at a K-8 school.

appear to state or imply assertions of objective fact. Based on the context of the First Document, it appears to state a subjective fact related to what type of person should be training teachers and working with kids. Therefore, Divijak is entitled to summary judgment as to any defamatory statements related to the First Document.

2. Second Document: April 23, 2021 Letter to University

The Second Document was an unsigned letter dated April 23, 2021 stating:

> Please be advised that your professor, Rebecca I. Hartzell has, for at least the last two (2) years, been using her **University of Arizona** email account to harass, bully, intimidate and threaten people.
> A full audit of her account will verify these accusations.
> Additionally, I have great concern about her mental health.
>
> I send this without signature for fear of retribution but hope you will take this matter seriously.

(Doc. 47-14 at 4) (emphasis in original).

Defendant Divijak argues the first statement in the Second Document is unactionable because it is subjective and uses language "that 'cannot reasonably be interpreted as stating or implying facts susceptible of being proved true or false' because those words do not 'reasonably appear to state or imply assertions of objective fact.'" (*Id.* at 17.) Specifically, Divijak argues the "statement is not susceptible of being proven true or false because each of those words, in context, merely describe how the author of the Second Document interpreted Plaintiff's communications." (*Id.*) She also argues the statement related to an audit of Plaintiff's account and concerns about Plaintiff's mental health are unactionable because they are opinions incapable of being proven true or false. (*Id.* at 17–18.)

In her Response, Plaintiff argues the statement regarding mental health "was particularly inflammatory given Hartzell's role in the University of Arizona's Disability and Psychoeducational Studies Department, which the author would have known." (Doc. 46 at 20.) Plaintiff does not address any of Defendant's other arguments.[15] (Doc. 46 at

[15]Defendant argues Plaintiff's failure to respond to legal arguments is sufficient for

18–20.)

The Court finds that the statements in the Second Document are not actionable because the "impression created by the words" and "the general tenor of the expression" do not "reasonably appear to state or imply assertions of objective fact." *Yetman*, 811 P.2d at 328. Therefore, Divijak is entitled to summary judgment as to any defamatory statements related to the Second Document.

3. Oral Statements to Husband and District staff

Defendant Divijak contends there is no actionable defamatory oral statement because it is substantially true that Plaintiff grabbed and assaulted her. (Doc. 56 at 10–11.) Specifically, Divijak argues Plaintiff "knowingly touched Divijak and the result was that Divijak was insulted and provoked." (Doc. 56 at 10–11.) Plaintiff argues a reasonable jury could find Divijak's statements are false and defamatory because she never grabbed or assaulted Divijak. (Doc. 46 at 1, 18–19.)

Under Arizona law, a person commits criminal assault by "knowingly touching another person with the intent to injure, insult or provoke such person." A.R.S. § 13-1203(A)(3).

Here, it is undisputed Plaintiff was not convicted of assault and that Plaintiff physically touched Divijak during a heated discussion. Therefore, the dispute centers around whether Plaintiff knowingly touched Divijak and whether she did so with the intention to injure, insult, or provoke her. It is irrelevant Divijak felt insulted or provoked. What is relevant is whether Plaintiff knowingly made physical contact with the requisite intention. Given the factual disputes about the nature of the contact discussed above, the Court cannot conclude the oral statements are substantially true. *Cf. Desert Palm Surgical Grp., P.L.C. v. Petta*, 343 P.3d 438, 450 (Ariz. Ct. App. 2015) (affirming trial court denial of motion for judgment as a matter of law because legitimate questions of fact existed on defamation claims and jury was in best position to resolve material questions of fact). The

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this Court to grant summary judgment in her favor. The Court disagrees but notes that Plaintiff's failure to respond places a burden on this Court and is a practice that should be discouraged.

Court finds sufficient evidence in the record for the jury to determine "whether the defamatory meaning of the statement was in fact conveyed" when Divijak told others Plaintiff grabbed and assaulted her. *See Sign Here Petitions LLC*, 402 P.3d at 463–64. Therefore, the Court will deny Divijak's Motion for Summary Judgment on this argument.

D. Count V – False Light Invasion of Privacy

Defendant Divijak argues she is entitled to summary judgment on Count V because "it is undisputed that [the First and Second Documents were] delivered to only one person: Plaintiff's supervisor in the first instance and the University's Compliance Office in the second." (Doc. 38 at 19.) Divijak also argues Plaintiff has not produced facts to show Divijak's oral statements "were made to a sufficient number of people that they were certain to become public knowledge." (Doc. 56 at 12.) According to Divijak, "This limited publication is insufficient to establish a false light invasion of privacy claim." (Doc. 38 at 19.)

Plaintiff argues there was widespread publication because these statements were "promulgated widely within [the District] and to the public University," and a District "employee also stated, 'I'm sure it's all over Facebook already.'" (Doc. 46 at 20.) In her Reply, Defendant Divijak argues Plaintiff's claim is "general and unsupported" and is not sufficient to overcome summary judgment because Plaintiff has not produced any facts to show that any comments were made to enough people. (Doc. 56 at 11–12.)

Under Arizona law, the tort of false light invasion of privacy occurs when:

> One who gives publicity to a matter concerning another that places the other before the public in a false light is subject to liability to the other for invasion of his privacy, if
>
> (a) the false light in which the other was placed would be highly offensive to a reasonable person, and
>
> (b) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed.

Godbehere, 783 P.2d at 784 (quoting Restatement (Second) of Torts § 652(E) (1977)).

In order to establish publicity in a false light claim, the matter at issue must be made

public "by communicating it to the public at large, or to so many persons that the matter must be regarded substantially certain to become one of public knowledge." *Hart v. Seven Resorts Inc.*, 947 P.2d 846, 854 (Ariz. Ct. App. 1997) (emphasis omitted) (quoting Restatement (Second) of Torts §§ 652(D), (E)). Plaintiff must produce evidence that would allow a reasonable juror to find in her favor on the issue to survive summary judgment. *Id.* at 855.

To establish the publicity element, Plaintiff relies on Divijak's deposition testimony and the investigating officer's body-camera footage where Divijak admits telling Ms. Sternberg, Mr. McKenna, and her husband that Plaintiff assaulted and intentionally grabbed her. (*See* Doc. 46 at 18–20 (citing PRSOF ¶¶ 7, 66–68).) Plaintiff also references a statement—heard in the body-camera footage—of a District employee saying, "I'm sure its all over Facebook already." (*See* Doc. 46 at 18–20 (citing PRSOF ¶¶ 7, 66–68, 70).) However, as Defendant points out, other than this statement, Plaintiff produced no evidence showing news of this incident was all over Facebook or any other social media. Plaintiff also does not identify anyone within the University who learned of this matter other than Plaintiff's employer who received the First Document and the University employee who looked at the Second Document. The Courts finds Plaintiff's evidence insufficient to establish that the matter at issue was communicated to so many people that the "matter must be regarded substantially certain to become one of public knowledge." Because Plaintiff fails to meet the publicity element as a matter of law, Defendant is entitled to summary judgment as to Count V.

IV. CONCLUSION

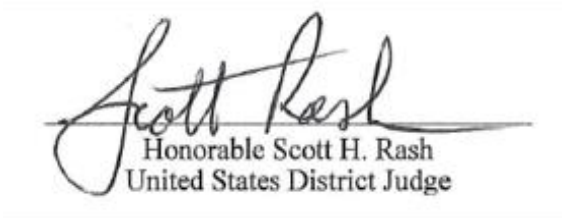
Accordingly,

IT IS ORDERED Defendants' Motion for Summary Judgment (Doc. 38) is GRANTED as to Counts II, III, and V and GRANTED in-part as to Counts I and IV. Defendant Divijak is entitled to summary judgment on the individual capacity claim against her in Count I based on qualified immunity. She is also entitled to summary judgment on any defamation claims in Count IV related to the First and Second Documents.

IT IS FURTHER ORDERED Defendants' Motion for Summary Judgment (Doc. 38) is DENIED in-part as to Count I and IV. Count I remains against the District and the defamatory oral statements in Count IV remain against Defendant Divijak.

IT IS FURTHER ORDERED the parties shall file a Joint Proposed Pretrial Order within 30 days of this Order. (*See* Doc. 24 (Scheduling Order).)

Dated this 8th day of March, 2023.



APPENDIX B

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REBECCA HARTZELL, Ph.D., BCBA-D, wife,

Plaintiff - Appellant,

v.

MARANA UNIFIED SCHOOL DISTRICT, a governmental entity organized and existing under the laws of the State of Arizona; ANDREA DIVIJAK, in her individual capacity, and Marital Community; JOSEPH DIVIJAK, husband, Marital Community,

Defendants - Appellees,

and

DOVE MOUNTAIN CSTEM K-8,

Defendant.

No. 23-4310

D.C. No. 4:21-cv-00062-SHR

OPINION

Appeal from the United States District Court
for the District of Arizona
Scott H. Rash, District Judge, Presiding

Submitted October 21, 2024
Phoenix, Arizona

Filed March 5, 2025

Before: A. WALLACE TASHIMA, MILAN D. SMITH, JR., and BRIDGET S. BADE, Circuit Judges.

Opinion by Judge Milan D. Smith, Jr.

SUMMARY*

First Amendment/Schools

The panel affirmed in part and reversed in part the district court's judgment in favor of the Marana Unified School District and school principal Andrea Divijak in an action brought by Rebecca Hartzell, pursuant to 42 U.S.C. § 1983 and state law, alleging that she was banned from the premises of her children's school in retaliation for her protected speech.

The District and Divijak asserted that Hartzell was banned because of her conduct; specifically, they allege that she assaulted Divijak.

Addressing Hartzell's First Amendment retaliation claim against the District, the panel held that the district court did not abuse its discretion in excluding Hartzell's attempt to

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

prove her *Monell* claim against the District based on a "final policymaker" theory because she did not adequately identify this theory in the joint pretrial statement. The panel also rejected Hartzell's *Monell* claim against the District based on a "custom or practice" theory. The panel nevertheless reversed the district court's judgment for the District on Hartzell's First Amendment retaliation claim because the District's official policy of barring speech that was "offensive or inappropriate" was unconstitutional and a reasonable jury could conclude that Hartzell was banned from the school grounds based on this policy, rather than because of her alleged assault on Divijak.

The panel affirmed the district court's holding that Divijak was entitled to qualified immunity with respect to Hartzell's First Amendment retaliation claim against Divijak. Although a reasonable jury could determine that Divijak banned Hartzell in violation of a constitutional right, that right was not clearly established given the lack of persuasive authority addressing First Amendment retaliation in light of the special characteristics of the school environment.

The panel affirmed the district court's judgment for the District on Hartzell's claim that the District violated her procedural due process right to direct the education of her children because Hartzell's ban from the school premises did not implicate her right to direct her children's education. The district court also did not abuse its discretion in denying Hartzell's motion, made two months after the district court's summary judgment ruling, to amend her First Amended Complaint to add a First Amendment theory to her procedural due process claim.

Finally, the panel reversed in part the district court's judgment in Divijak's favor on Hartzell's state law defamation claim, alleging that Divijak sent two defamatory documents to Hartzell's employer, because the defamation claim was viable to the extent it was based on one of the documents.

COUNSEL

Jacob C. Jones (argued), Snell & Wilmer LLP, Phoenix, Arizona; Jeffrey Willis, Snell & Wilmer LLP, Tucson, Arizona; for Plaintiff-Appellant.

Lisa A. Trudinger-Smith (argued) and Tyler H. Stanton, DeConcini McDonald Yetwin & Lacy PC, Tucson, Arizona, for Defendants-Appellees.

OPINION

M. SMITH, Circuit Judge:

Following an incident on February 7, 2020, at Dove Mountain K-CSTEM school (Dove Mountain), Plaintiff-Appellant Rebecca Hartzell was banned from the school premises. Hartzell claims that she was banned from the school in retaliation for her protected speech. Defendants-Appellees, the Marana Unified School District (the District) and Andrea Divijak, the principal at Dove Mountain, assert that Hartzell was banned because of her conduct; specifically, they allege that Hartzell assaulted Divijak. Hartzell sued the District and Divijak pursuant to 42 U.S.C. § 1983 for violations of her First Amendment and procedural due process rights. Hartzell also sued Divijak for defamation.[1]

The district court granted summary judgment in the Defendants' favor on the procedural due process claim, on the § 1983 claim against Divijak, and on the defamation claim to the extent it was based on two documents sent to Hartzell's employer. The district court also denied Hartzell's request to amend her procedural due process claim to include a First Amendment theory.

At trial, the district court precluded questioning or argument regarding Hartzell's First Amendment *Monell* claim against the District to the extent it relied on a "final policymaker" theory.[2] At the close of trial, the district court granted judgment as a matter of law in the Defendants' favor

[1] Hartzell also brought additional claims not relevant to this appeal.

[2] *See Monell v. Dep't of Soc. Servs.*, 436 U.S. 658 (1978).

on the First Amendment claim against the District. The jury rejected the balance of Hartzell's defamation claim, which was the only cause of action submitted to it.

Hartzell appeals each of the district court's determinations. We reverse in part and affirm in part.

FACTUAL AND PROCEDURAL BACKGROUND

Hartzell is the parent of eight school-aged children, five of whom attended Dove Mountain during the 2019–20 school year. Divijak was serving as the principal of Dove Mountain at that time. In August 2019, the District opened Dove Mountain, a new kindergarten through eighth grade school. Dove Mountain is a part of and run by the District.

I. Hartzell's Advocacy

Hartzell has a master's degree in special education and a doctorate focusing on applied behavioral analysis and autism. She also became an associate professor of practice at the University of Arizona, and a director of the master's program in applied behavioral analysis at that institution.

Since approximately 2008, Hartzell has been advocating for improved services in the District. Prior to February 7, 2020, Hartzell had expressed, both orally and via e-mail, numerous concerns to District personnel, including concerns related to school event scheduling, overheated buses, children accessing pornography on school computers, the availability of books in the school library, restrictions on children's ability to speak to one another in the cafeteria during lunch, procedures for meetings regarding Individualized Education Programs, the treatment of children with disabilities, and special education funding.

At trial, Hartzell testified that the District reacted negatively to her advocacy. For example, in 2011, a District employee said that Hartzell was "asking for the moon!!!" Hartzell also identified an occasion in 2016 when Hartzell sent a strongly worded e-mail and, after sending the e-mail, was no longer welcome to volunteer at an elementary school where she had previously been permitted to do so. Hartzell also identified an occasion two years later, in 2018, when a District employee told Hartzell that the District instructed the employee not to allow Hartzell to volunteer. Around the same time, Hartzell also met with one of the District's assistant superintendents who told Hartzell she was not welcome at schools within the district other than those attended by her children. Hartzell attributed these decisions to her advocacy. Hartzell identified an instance in 2018 when a teacher said she was "pissed" after being criticized by Hartzell and said she had developed "nicknames" for Hartzell. This teacher also called Hartzell her "first nasty parent."

In 2019, in the weeks before Dove Mountain opened as a new school in August of that year, and as Divijak transitioned from her position at a different school to become principal of Dove Mountain, Hartzell began directing her advocacy to Divijak. In May 2019, Hartzell sent an e-mail to Divijak expressing concern that she and other parents had not received adequate notice of a meeting about elective courses. Hartzell spoke to Divijak and offered to help at Dove Mountain. Hartzell testified that Divijak responded abruptly that Dove Mountain was "not interested in help." During the fall of 2019, Hartzell sent another e-mail to Divijak expressing her concern about second graders being instructed "they had to be quiet before they could go out to recess." During that same semester, Hartzell also expressed

concerns to Divijak that Dove Mountain's library was too small.

On December 10, 2019, Hartzell e-mailed Divijak, expressing concerns about a school event where her children were scheduled to perform simultaneously in different locations. Hartzell was concerned that she would be unable to watch all her children perform, and she was also concerned about parking and childcare issues. At Divijak's invitation, Hartzell subsequently provided additional suggestions for the school.

II. The February 7, 2020 Incident

On February 7, 2020, Dove Mountain hosted an event where students presented projects they had been working on for a few months. Two of Hartzell's children were scheduled to present in different rooms simultaneously. While attending the event, Hartzell saw Divijak in a classroom and approached her. Hartzell was accompanied by one of her children, who attended preschool at Dove Mountain. No other children were present. Hartzell "sarcastically" thanked Divijak for "making [her] choose which kid [she was] going to support again today." Hartzell testified that she began to walk away, but Divijak responded that she was "sorry that [Hartzell was] just never happy." Hartzell testified that she turned back around and explained her proposed solution to the scheduling conflicts. According to Hartzell, Divijak refused to speak with her further and began to walk away while Hartzell was speaking. Hartzell says she responded that it seemed she and Divijak were never able to have a conversation. However, Hartzell denies doing anything to stop Divijak from walking away and specifically denies grabbing Divijak's wrist. Even so, Hartzell acknowledges that she accidentally touched

Divijak's arm as she walked by and that she said "stop, I'm talking to you." Hartzell recalls that Divijak shouted, "Don't touch me." Hartzell testified that Divijak continued walking away and that Hartzell said, "Forget it. I'll just contact the District."

After her interaction with Divijak, Hartzell went to the room where one of her daughters was giving a presentation. Hartzell testified that she was approached by a hall monitor, who ordered Hartzell to leave immediately, informed her that the police would be called if she did not leave, and escorted her out of the building. Hartzell went to the parking lot and was approached by Marana Police Department Officer Jerry Ysaguirre.

According to Ysaguirre, Hartzell admitted placing her hand on top of Divijak's wrist to stop her so they could continue speaking. Hartzell said she immediately regretted this action and removed her hand. Hartzell insisted to Ysaguirre that she never grabbed Divijak's wrist.

Ysaguirre advised Hartzell about the procedures for investigating "an assault" involving a teacher. He told her that she was "trespassed from" the entire school property and that, while her children could continue to attend Dove Mountain, Hartzell could not enter school property and would have to arrange for someone else to drop off and pick up her children. Ysaguirre explained that Hartzell could be arrested for trespassing if she returned. Ysaguirre told Hartzell that the order would remain in effect until the District decided otherwise.

In an incident report, Ysaguirre wrote that "he was advised that the school want[ed Hartzell] trespassed from the property." In an e-mail, Greg Roehm, the District's Safety and Security Coordinator, stated that he met with Ysaguirre

who "indicated that Ms. Hartzell was given the trespass warning at [Divijak's] request" and that Ysaguirre said it "remains in effect until the district advises him to revoke the trespass alert."

Ysaguirre next spoke to Divijak. According to Ysaguirre, Divijak said she began to walk around Hartzell, who allegedly yelled out "Dam[n] it," said the conversation was not over, and demanded that Divijak stop walking away. Divijak said Hartzell reached out and grabbed Divijak's left wrist with her right hand, fully wrapping her hand around Divijak's wrist and holding on. Divijak told Ysaguirre that she had to pull her arm away to release Hartzell's grasp. Ysaguirre did not observe marks on Divijak's arms, and Divijak said she did not need medical attention.

Ysaguirre reviewed the school's security camera footage and determined that, although the actual grab was not seen on the video, Divijak's reaction to the contact was more consistent with her own description of the incident. That same day, Roehm reviewed the surveillance video and reported to the District Superintendent, Doug Wilson, and the Assistant Superintendents, Carolyn Dumler and Kristin Reidy, that the "wrist grab is not clear."

Ysaguirre also spoke to Paul Gute, a parent who was in the room during the encounter between Hartzell and Divijak. Although Gute could not see the actual physical contact, Gute testified that Hartzell reached out and touched Divijak. Gute also testified at trial that Hartzell touched Divijak but did not hit or grab her. Gute further testified that Hartzell did not hold Divijak, who pulled away quickly. Gute was not interviewed by the District.

III. After the Incident

Later that same day, Wilson, Dumler, Reidy, and Roehm discussed the incident in a group text. In response to Wilson's request for the "back story," Reidy described Hartzell as "opinionated" and "not flexible at all." Dumler described Hartzell as "[v]ery high maintenance."[3] Principal Divijak's secretary, Sarah Wilson, called Hartzell "one of them" and indicated Hartzell had "been like this all year." Wilson also described one of Hartzell's e-mails as "verbal diarrhea."

On February 24, 2020, Hartzell met with Superintendent Wilson and an attorney for the District. Hartzell's husband and her attorney were also present. Hartzell testified that the District said the decision to ban her from school grounds was final and would remain in place indefinitely. Hartzell testified that the District would not lift the ban because the District "would have an upset assistant superintendent and principal." Later in the conversation, the District agreed to permit Hartzell to enter school grounds to retrieve her preschooler, as long as she did not speak to anyone. The District's attorney told Hartzell that she would receive a letter in the mail stating the conditions of her exclusion. Hartzell did not receive any further communications from the District regarding the "trespass" order. In June 2023, the District's counsel told Hartzell that the order was lifted.

On March 30, 2020, the state filed misdemeanor assault charges against Hartzell in Marana Municipal Court for

[3] At trial, Dumler testified that high maintenance is "a term to describe parents who are very involved and take some time, but they want the best for their kids." When asked if these parents "ruffle feathers within the district," she said "you could say that, but at the same time they are parents that add a lot, so we work with them."

"knowingly touching another person with the intent to injury, insult of provoke such person," in violation of Ariz. Rev. Stat. § 13-1203(A)(3). At the request of the town prosecutor, the charges were dismissed on September 22, 2020.

IV. District Policy KFA

Hartzell contends that the District's exclusion order was issued pursuant to a District policy. Specifically, Hartzell relies on the policy regarding public conduct on school property, District Policy KFA, which prohibits "[a]ny conduct intended to obstruct, disrupt, or interfere with" a school's operations, "[p]hysical or verbal abuse or threat of harm to any person on property owned or controlled by the District," and "[u]se of speech or language that is offensive or inappropriate to the limited forum of the public school educational environment." The policy provides that "[a]ny member of the general public considered by the Superintendent, or a person authorized by the Superintendent, to be in violation of these rules shall be instructed to leave the property of the District," and that "[f]ailure to obey the instruction may subject the person to criminal proceedings pursuant to A.R.S. 13-2911 [for trespassing.]"[4]

[4] The cited statute provides that "[t]he chief administrative officer of an educational institution or an officer or employee designated by the chief administrative officer to maintain order may order a person to leave the property of the educational institution if the officer or employee has reasonable grounds to believe either that: 1. Any person or persons are committing any act that interferes with or disrupts the lawful use of the property by others at the educational institution [or] 2. Any person has entered on the property of an educational institution for the purpose of

At trial, Assistant Superintendent Dumler was asked if the District's policies allowed a person to be banned from schools based on their speech. Dumler responded as follows:

> Q. In fact, does one of the [D]istrict's own policies allow someone to be banned due to speech?
> A. Yes, it does. Well, not due to speech. Well, due to offensive or belligerent or disorderly conduct. There's a couple of different phrases in the policy.
> Q. The kind of offensive speech that's in the ear of the hearer, like you said earlier, right?
> A. I would – I would say that before the district would ban someone, we would probably consult our legal counsel. That would be our typical practice. We have banned someone because of aggressive, belligerent, obnoxious cursing and swearing at referees and coaches and things like that. So it can be – there are times when it can be done.
> Q. And that case you're talking about, about a parent being temporarily trespassed from a sporting event for being belligerent and swearing and cursing and going on and on, is

committing any act that interferes with or disrupts the lawful use of the property by others at the educational institution." Ariz. Rev. Stat. Ann. § 13-2911(C). It also punishes "[i]ntentionally or knowingly refusing to obey a lawful order given pursuant to subsection C of this section." *Id.* § 13-2911(A)(3).

> that anything like what Professor Hartzell was doing?
> A. Well, it's different. And part of what makes it different is that law enforcement was involved in this one. So because there was an ongoing law enforcement investigation, we probably did not do all of the things in the same order or the same way that we normally would. Typically, it just is a principal who brings a situation to us, and then we consult legal counsel.

V. The Allegedly Defamatory Documents

In October 2020, Hartzell's supervisor at the University of Arizona advised her that a document "regarding [Hartzell] was delivered to her department." This document was a printout of the docket from the criminal case brought against Hartzell. In the upper right-hand corner of the copy of the docket sheet, there was a typed note reading: "This occurred at a K-8 school in front of young children. Doesn't seem like this is the kind of person that should be training teachers let alone working with kids."

In April 2021, someone also sent an unsigned note to the Compliance Office at Hartzell's employer. The note read as follows:

> Please be advised that your professor, Rebecca I. Hartzell has, for at least the last two (2) years, been using her **University of Arizona** email account to harass, bully, intimidate and threaten people.
> A full audit of her account will verify these accusations.

> Additionally, I have great concern about her mental health.
> I send this without signature for fear of retribution but hope you will take this matter seriously.

The district court assumed without deciding there was sufficient circumstantial evidence Divijak sent both documents. Divijak does not challenge that assumption on appeal and instead argues that the district court correctly concluded that the statements were not defamatory.

VI. Procedural History

On February 4, 2021, Hartzell sued the District and Divijak.[5] As relevant here, Hartzell brought a First Amendment retaliation claim against both the District and Divijak, a procedural due process claim against the District, and a defamation claim against Divijak. After the close of discovery, the district court granted partial summary judgment against Hartzell. Three parts of that decision are relevant. First, the district court granted summary judgment on the procedural due process claim against the District because Hartzell did not have a constitutionally protected liberty interest in accessing school property. The district court considered only Hartzell's Fourteenth Amendment right to direct the education of her children in determining whether Hartzell had a protected liberty interest because the relevant portion of Hartzell's First Amended Complaint cited only that right. Second, the district court concluded that Divijak was entitled to qualified immunity on the First

[5] Hartzell also sued Divijak's husband, Joseph Divijak, solely "for collection and judgment enforcement purposes" against their marital community.

Amendment retaliation claim because Divijak did not have adequate notice that her conduct violated a clearly established right. Third, the district court granted partial summary judgment in favor of Divijak on the defamation claim, concluding that the statements in the two documents sent to Hartzell's employer were substantially true or unactionable. The district court allowed the defamation claim to proceed based on certain oral statements made by Divijak.

After losing her procedural due process claim, Hartzell sought to amend her pleadings to state that this claim also arose out of the First Amendment. The district court denied Hartzell's request for leave to amend.

At trial, the district court precluded questioning or argument regarding Hartzell's theory that the District was liable for the violation of her First Amendment rights under *Monell v. Department of Social Services*, 436 U.S. 658 (1978), using a "final policymaker" theory. The district court reasoned that, even if this theory had been adequately pled, it was not contained in the joint proposed pretrial order. That order only identified "[w]hether the District has a custom, policy, or practice which was the moving force behind the alleged First Amendment retaliation" as a contested issue of fact and law.

At the close of Hartzell's case in chief, the Appellees moved for judgment as a matter of law pursuant to Fed. R. Civ. P. 50(a). The district court granted the motion on Hartzell's First Amendment retaliation claim against the District. As a result, only Hartzell's defamation claim against Divijak was submitted to the jury. The jury found in Divijak's favor.

Hartzell now appeals (i) the grant of the District's motion for judgment as a matter of law with respect to the First Amendment claim against the District; (ii) the exclusion of her "final policymaker" theory; (iii) the grant of Divijak's motion for summary judgment with respect to the First Amendment claim against Divijak; (iv) the grant of summary judgment with respect to her due-process claim (and the related denial of her motion for leave to amend); and (v) the exclusion of certain of her defamation theories at the summary-judgment stage.

JURISDICTION AND STANDARD OF REVIEW

We have jurisdiction pursuant to 28 U.S.C. § 1291.

"We review a district court's grant of summary judgment de novo." *Berry v. Valence Tech., Inc.*, 175 F.3d 699, 703 (9th Cir. 1999). We "[v]iew[] the evidence in the light most favorable to the nonmoving party and draw all inferences in its favor[.]" *Id.* Summary judgment is only appropriate "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).

Similarly, "[w]e review de novo an order granting or denying judgment as a matter of law" pursuant to Fed. R. Civ. P. 50(a). *Quicksilver, Inc v. Kymsta Corp.*, 466 F.3d 749, 755 (9th Cir. 2006) (quoting *Lawson v. Umatilla County*, 139 F.3d 690, 692 (9th Cir. 1998)). "Judgment as a matter of law is proper when the evidence permits a reasonable jury to reach only one conclusion." *Id.* (quoting same). As in the summary-judgment context, "we must consider all the evidence and all reasonable inferences drawn from the evidence in a light most favorable to" the non-moving party. *Id.* (quoting *Janich Bros., Inc. v. Am. Distilling Co.*, 570 F.2d 848, 853 (9th Cir. 1977)).

"The district court's alleged evidentiary errors are reviewed for abuse of discretion." *Geurin v. Winston Indus., Inc.*, 316 F.3d 879, 882 (9th Cir. 2002).

"The district court's denial of leave to amend the complaint is reviewed for an abuse of discretion." *Cervantes v. Countrywide Home Loans, Inc.*, 656 F.3d 1034, 1041 (9th Cir. 2011).

ANALYSIS

I. First Amendment Retaliation Claim Against the District

"A government entity may not be held liable under 42 U.S.C. § 1983, unless a policy, practice, or custom of the entity can be shown to be a moving force behind a violation of constitutional rights." *Dougherty v. City of Covina*, 654 F.3d 892, 900 (9th Cir. 2011) (citing *Monell*, 436 U.S. at 694). "In particular, . . . a municipality cannot be held liable *solely* because it employs a tortfeasor—or, in other words, a municipality cannot be held liable under § 1983 on a *respondeat superior* theory." *Monell*, 436 U.S. at 691.

We have identified "three ways" in which "[a] plaintiff can satisfy *Monell*'s policy requirement." *Gordon v. County of Orange*, 6 F.4th 961, 973 (9th Cir. 2021). "First, a local government may be held liable when it acts 'pursuant to an expressly adopted official policy.'" *Id.* (quoting *Thomas v. County of Riverside*, 763 F.3d 1167, 1170 (9th Cir. 2014) (per curiam)). "Second, a public entity may be held liable for a 'longstanding practice or custom.'" *Id.* (quoting same). "Third, 'a local government may be held liable under [Section] 1983 when "the individual who committed the constitutional tort was an official with final policy-making authority" or such an official "ratified a subordinate's

unconstitutional decision or action and the basis for it."'" *Id.* (alteration in original) (quoting *Clouthier v. County of Contra Costa*, 591 F.3d 1232, 1250 (9th Cir. 2010), *overruled on other grounds by Castro v. County of Los Angeles*, 833 F.3d 1060, 1070 (9th Cir. 2016) (en banc)).

A. The "Final Policymaker" Theory

The district court did not abuse its discretion in excluding Hartzell's attempt to prove her *Monell* claim using the "final policymaker" theory.

The district court excluded this theory because Hartzell failed adequately to identify it in the joint pretrial statement.[6] "[P]arties have a duty to advance any and all theories in the pretrial order[] . . . ." *El-Hakem v. BJY Inc.*, 415 F.3d 1068, 1077 (9th Cir. 2005). "Accordingly, a party may not 'offer evidence or advance theories at the trial which are not included in the order or which contradict its terms.'" *Id.* (quoting *United States v. First Nat'l Bank of Circle*, 652 F.2d 882, 886 (9th Cir. 1981)). "A pretrial order, however, should be liberally construed to permit any issues at trial that are 'embraced within its language.'" *Miller v. Safeco Title Ins. Co.*, 758 F.2d 364, 368 (9th Cir. 1985) (quoting *Circle*, 652 F.2d at 886). Even so, "particular evidence or theories which are not at least implicitly included in the order are barred." *Circle*, 652 F.2d at 886.

The "final policymaker" theory is a separate legal theory; the district court did not abuse its discretion by precluding that theory at trial. We have repeatedly identified the methods for proving *Monell* liability as separate legal theories. *See, e.g.*, *Bell v. Williams*, 108 F.4th 809, 818 (9th

[6] It is therefore unnecessary for us to address whether Hartzell also needed to move to amend her pleadings to present this theory.

Cir. 2024) (referring to the plaintiff's three "*Monell* theories of liability"); *Benavidez v. County of San Diego*, 993 F.3d 1134, 1154 (9th Cir. 2021) (rejecting "[e]ach of the [plaintiffs'] three *Monell* theories"). We have treated the "final policymaker" theory as a separate theory from the "policy, practice, or custom" theory. *Pasadena Republican Club v. W. Just. Ctr.*, 985 F.3d 1161, 1172 (9th Cir. 2021) (noting "the constitutional violation must be caused by a 'policy, practice, or custom,' or be ordered by a policy-making official").

In addition, the "final policymaker" theory requires proof that differs significantly from the other two *Monell* theories. *See Lytle v. Carl*, 382 F.3d 978, 982–83 (9th Cir. 2004) (discussing how this court determines whether an employee is a "final policymaker"). Among other things, the "final policymaker" focuses on a specific person or persons, their authority, their knowledge, and what they said and did on a specific occasion to ratify a specific decision. *See, e.g.*, *Christie v. Iopa*, 176 F.3d 1231, 1239 (9th Cir. 1999) (reviewing the actions and state of mind of the policymakers). The other *Monell* theories focus on the municipality's policies, customs, or practices for a class of situations. *See, e.g.*, *Castro*, 833 F.3d at 1075–76 (reviewing what precautions the entity defendants had taken for all prisoners detained in the police station's "sobering cell").

Once a "final policymaker" theory is added, the final policymaker becomes a new central character whose presence significantly affects the scope of the claim. When a plaintiff fails to disclose that the assertion of *Monell* liability is based on a "final policymaker" theory of liability, "the objectives of the pretrial conference to simplify issues and avoid unnecessary proof by obtaining admissions of fact

will be jeopardized if not entirely nullified." *Circle*, 652 F.2d at 886.

The district court did not abuse its discretion in finding Hartzell had not adequately disclosed a "final policymaker" theory. In the joint proposed pretrial order that was later adopted as the final pretrial order, Hartzell identified "[w]hether the District has a custom, policy, or practice which was the moving force behind the alleged First Amendment retaliation" as a contested issue of fact in the proposed pretrial order. Hartzell did not, however, identify as a contested issue whether a district employee, such as Superintendent Wilson, was a final policymaker or whether a final policymaker had ratified Divijak's decision or action. The district court reasonably understood the phrase "custom, policy, or practice" to invoke the first and second theories enumerated in *Gordon*, those based on an expressly adopted official policy or a longstanding practice or custom.

As Hartzell argues, the word "policy," and other phrases containing that word, are sometimes used to encompass all the methods for proving *Monell* liability. *See, e.g.*, *Bidwell v. County of San Diego*, No. 22-55680, 2023 WL 7381462, at *2 (9th Cir. Nov. 8, 2023) ("A policy may consist of an expressly adopted municipal policy, a longstanding practice or custom, or an action taken or ratified by an official with final policymaking authority"). While Hartzell is correct, the authority upon which she relies clarifies that there are three ways in which a plaintiff can satisfy the "policy" element and, again, treats "final policy-making authority" as a separate theory. *Gordon v. County of Orange*, 6 F.4th 961, 973–74 (9th Cir. 2021); *see Scanlon v. County of Los Angeles*, 92 F.4th 781, 811–12 (9th Cir. 2024) (identifying "three ways a plaintiff can satisfy *Monell*'s policy requirement").

Hartzell further argues that the word "policy" is contained in the phrase "final policymaker," but this is not persuasive. The use of the word "policy" does not implicitly include all the legal theories that also include the word "policy." In the pretrial order, Hartzell described the contested issue as "whether the District *has a* custom, policy, or practice which was the moving force behind the alleged First Amendment retaliation." The placement of "has a" before "custom, policy, or practice," supports the district court's conclusion that Hartzell was proceeding under the first two theories of *Monell* liability, as opposed to asserting that a specific person was a "final policymaker." Moreover, Hartzell used "policy" as an alternative to "custom" and "practice," which suggests that she was using "policy" in its narrower sense rather than to refer to the "final policymaker" theory of proving *Monell* liability. Based on these circumstances, and given the district court's familiarity with the parties' positions and the case's history, the district court's understanding of Hartzell's position does not reflect an abuse of discretion.

Hartzell objects that the District and Divijak were permitted to pursue legal theories relating to the timeliness of Hartzell's claims that were not disclosed in the joint pretrial proposed order. Hartzell has not appealed these decisions. Even if she had, the district court did not abuse its discretion in permitting these arguments. These theories were discussed extensively in the district court's summary judgment order, so any risk of prejudice and surprise was limited.

In her reply brief, Hartzell argues for the first time that she timely disclosed a "final policymaker" theory in her trial brief. This argument fails for two reasons. First, Hartzell forfeited it by failing to raise it in her opening brief. *See*

Greenwood v. FAA, 28 F.3d 971, 977 (9th Cir. 1994) ("We review only issues which are argued specifically and distinctly in a party's opening brief."). Second, Hartzell's later disclosures did not cure her breach of the "duty to advance any and all theories in the pretrial order[.]" *El-Hakem*, 415 F.3d at 1077.

B. The "Policy" Theory and District Policy KFA

Notwithstanding the district court's reasonable decision to exclude evidence of the "final policymaker" theory, we conclude that its overall resolution of the First Amendment retaliation claim against the District was erroneous. Specifically, the district court erred in granting the District's Rule 50(a) motion with respect to the First Amendment claim because a reasonable jury could have concluded that Hartzell was unconstitutionally banned based on official District policy. The provision of Policy KFA banning "speech . . . that is offensive or inappropriate" would be unconstitutional if applied to ban Hartzell for criticizing Divijak. And Hartzell presented sufficient evidence for a reasonable jury to conclude that the District relied on this policy, rather than Hartzell's alleged assault on Divijak, to ban Hartzell from the Dove Mountain school premises.

1. Constitutionality of Policy KFA

The District contends that Policy KFA is constitutional because it prohibits only "interference with or disruption of an educational institution." On its own, there would be little doubt that this prohibition is constitutional. However, this sentence does not stand alone; instead, Policy KFA provides an expansive definition of "interference with" and "disruption of" that forms the basis of Hartzell's constitutional challenge. Policy KFA defines "interfer[ing] with or disrupt[ing]" an educational institution to include,

among other things, "[u]se of speech or language that is offensive or inappropriate to the limited forum of the public school educational environment." "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Snyder v. Phelps*, 562 U.S. 443, 458 (2011) (quoting *Texas v. Johnson*, 491 U.S. 397, 414 (1989)). Because Policy KFA allows the District to prohibit speech that it finds "offensive or inappropriate," it runs afoul of this principle. *See id*.

The District defends Policy KFA by arguing that schools nevertheless have substantial authority to regulate speech on school grounds. It is certainly true that "courts must apply the First Amendment 'in light of the special characteristics of the school environment.'" *Mahanoy Area Sch. Dist. v. B.L. ex rel. Levy*, 594 U.S. 180, 187 (2021) (quoting *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 266 (1988)). Even so, for "school officials to justify prohibition of a particular expression of opinion, [they] must be able to show that [their] action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint." *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 509 (1969). "Certainly where there is no finding and no showing that engaging in the forbidden conduct would 'materially and substantially interfere with the requirements of appropriate discipline in the operation of the school,' the prohibition cannot be sustained." *Id.* (quoting *Burnside v. Byars*, 363 F.2d 744, 749 (5th Cir. 1966)); *accord id.* at 513 (using the equivalent phrase "materially disrupts classwork or involves substantial disorder or invasion of the rights of others").

Here, the District has failed to make this showing. First, Hartzell proffered testimony that she did not grab Divijak's arm, but merely accidentally touched Divijak's arm as she walked by. A reasonable jury could infer from this testimony that Hartzell was banned for her speech during her encounter with Divijak as opposed to any physical contact. "'[P]ure speech' . . . is entitled to comprehensive protection under the First Amendment." *Tinker*, 393 U.S. at 505–06.

Second, the District's interest in disciplining and protecting students was not in play. The speaker was a parent rather than a student, the parent was speaking to another adult, and the only child within earshot was the speaker's own. On these facts, the District does not have a special interest in regulating speech because it is not standing "in the place of parents," as sometimes occurs when regulating student speech. *Mahanoy*, 594 U.S. at 187.

Third, to be sure, schools have "an interest in protecting minors from exposure to vulgar and offensive spoken language." *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 684 (1986). But although Hartzell's speech was critical and sarcastic, it was not vulgar or lewd like the speech described in *Bethel*. *See id.* at 678 (use "of an elaborate, graphic, and explicit sexual metaphor" during school assembly). *Bethel* also recognized a school's interest in "prohibit[ing] the use of vulgar and offensive terms in public discourse." *See id.* at 683. However, unlike a "school assembly or a classroom" with an "unsuspecting audience of . . . students," *id.* at 685, the need to teach students the "appropriate form of civil discourse" does not arise when the speech at issue is made by a parent to an administrator outside of the presence of students except for the parent's child. *Id*. at 683, 685.

The Supreme Court has identified a few other categories of speech that schools have a special interest in regulating, but Hartzell's speech fits none of them. *See Mahanoy*, 594 U.S. at 187–88 (identifying properly regulated categories of speech, including speech promoting illegal conduct and speech others may reasonably perceive as being endorsed by the school).

Finally, although Hartzell's speech occurred on school property, Hartzell had been invited to attend the presentations of her children, and Divijak had been speaking with other parents. In that context, it was not disruptive or intrusive for Hartzell to approach Divijak and express concerns related to her children's education.

The District cannot constitutionally prohibit all speech on school property that it finds "offensive or inappropriate." Nor can the District prohibit that speech simply by defining it as disruptive or intrusive. Clearly, the District can prohibit offensive or inappropriate speech if it "materially and substantially interfere[s] with the requirements of appropriate discipline in the operation of the school[.]" *Tinker*, 393 U.S. at 509 (quoting *Burnside*, 363 F.2d at 749). Although "undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression," "facts which might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities" could be different. *Id.* at 508, 514. Such facts are not present here.

As a result, the provision of Policy KFA barring "speech . . . that is offensive or inappropriate" is unconstitutional if the District applied it to ban Hartzell because of her criticism of Divijak.

2. Whether Hartzell was Banned Pursuant to Policy KFA

At trial, the parties presented conflicting testimony and theories to establish the reason Hartzell was banned from Dove Mountain. Based on this conflicting evidence, a reasonable jury could credit the evidence that Hartzell was banned because she intentionally touched or grabbed Divijak. A jury could also credit the testimony that the District did not rely on Policy KFA in banning Hartzell and that Divijak did not have authority under Policy KFA to ban Hartzell from Dove Mountain. But this disputed testimony presents a factual question, and "[a] question of fact may be resolved as a matter of law" only if "reasonable minds cannot differ and the evidence permits only one conclusion." *Quicksilver*, 466 F.3d at 759.

Hartzell presented evidence from which a reasonable jury could infer that (1) Policy KFA allowed the District to ban those whose speech the District deemed offensive or inappropriate, (2) Divijak found Hartzell's advocacy offensive, and (3) she was banned after criticizing Divijak. Thus, as we explain next, Hartzell presented sufficient evidence from which the jury could have concluded that the District banned her for offensive or inappropriate speech pursuant to an official policy in violation of the First Amendment.

We first consider whether Hartzell presented sufficient evidence from which the jury could infer that District policy allowed Divijak or other District employees to ban parents from school premises for offensive speech. The most significant evidence on this point is Policy KFA, which expressly prohibits "speech or language that is offensive or inappropriate to the limited forum of the public school

educational environment." Addressing this policy, Assistant Superintendent Dumler testified, albeit equivocally, that parents could be banned from school premises because of offensive or inappropriate speech. When asked whether the District had a policy of "allow[ing] for someone to be banned due to speech," she responded, "[y]es," but then immediately stated "not due to speech," but "due to offensive or belligerent or disorderly conduct. There's a couple of different phrases in the policy." She then provided one example of the District banning someone "because of aggressive, belligerent, obnoxious cursing and swearing at referees and coaches" at a sporting event. She testified that in her 20 years working in the District's administration, this was the only incident in which a parent was trespassed from any district property.[7] However, the evidence must be viewed in the light most favorable to Hartzell, and a reasonable jury could find that Policy KFA authorized the ban Divijak imposed here.

Next, a jury could infer that Divijak found Hartzell's criticisms offensive from the facts of the February 7, 2020 incident. Hartzell sarcastically thanked Divijak for "making [her] choose which kid [she was] going to support again today[,]" and a reasonable jury could find that Divijak would be offended by this statement. Divijak's reaction to Hartzell's speech would also support a jury finding that she was offended. For example, Divijak walked away from Hartzell while Hartzell was still speaking, and Divijak

[7] Although Dumler did not refer to the policy that she was discussing as the Policy KFA, her description of that policy as including "a couple of different phrases" and as including the word "offensive" tracks with the language of the Policy KFA. Therefore, a reasonable jury could infer that Dumler's testimony referred to Policy KFA.

shouted at Hartzell after Hartzell touched her arm.[8] And after the incident, Divijak was "crying," she requested that Ysaguirre give Hartzell a trespass warning, and she told him that she wanted to press charges against Hartzell.

Finally, Hartzell was banned a short time after the encounter with Divijak. Because a reasonable jury could find that Policy KFA authorized Divijak to ban parents whose speech she found offensive and that Hartzell was banned almost immediately after saying things Divijak could reasonably find offensive, a reasonable jury could also find that Policy KFA was a moving force behind the ban on Hartzell.

Our opinion in *Eagle Point Education Ass'n/SOBC/OEA v. Jackson County School District No. 9*, 880 F.3d 1097 (9th Cir. 2018), further supports Hartzell's theory of the District's *Monell* liability based on an official policy. In that case, a school district adopted policies in anticipation of a teacher's strike that prohibited, among other things, signs and banners at any district facilities without the approval of the district superintendent. *Id.* at 1100. A student filed suit against the district, alleging violations of the First Amendment, after a district security guard prohibited her from parking her car in a school lot with a sign in the back windshield stating that she supported the teachers. *Id*. at 1101. The school district argued "that [a] restriction imposed on [a student's speech] was not an application of the District['s] policies." *Id.* at 1107. "Specifically, it contend[ed] that [the student] was a victim of [a] security guard's own decision, not [the challenged policy]." *Id.* We rejected that argument because

[8] Of course, Divijak's position is that Hartzell grabbed her wrist. However, Hartzell denies this, and the evidence at this stage of the litigation must be viewed in the light most favorable to Hartzell.

the security guard's action "was by no means an implausible interpretation" of the relevant policy. "Moreover, at the time of the incident, the high school's assistant principal did not tell [the student] that the guard had made a mistake." *Id.* at 1107–08. Instead, the assistant principal said the student's conduct was "forbidden." *Id.* at 1108.[9] We found there was "no suggestion that the security officer would have taken any action but for the adoption and enforcement of the policies," and we affirmed a grant of summary judgment in the plaintiff's favor. *Id.* at 1107.

Here, Hartzell contends she was banned pursuant to a District policy prohibiting "offensive speech," while the District denies that Hartzell was banned based on her speech and instead contends that Hartzell was banned for her conduct, alleging that she assaulted Divijak. As explained above, a reasonable jury could conclude that Policy KFA allows members of the public to be banned from schools for offensive or inappropriate speech, Hartzell's speech could be viewed as offensive or inappropriate, and Hartzell was banned. Moreover, a reasonable jury could conclude that Divijak relied on Policy KFA to ban Hartzell, and Divijak's conduct in banning Hartzell would not have been an "implausible interpretation" of the policy. *See id*. at 1107–08. And like the assistant principal in *Eagle Point*, here the superintendent did not revoke the ban as a mistake or suggest that Divijak lacked authority to ban Hartzell. Instead, the superintendent stated that the ban "would remain indefinitely and that the decision was final."

[9] The record in *Eagle Point* did not indicate that the assistant principal or the security guard invoked the policy challenged by the plaintiff. *See id.* at 1101.

The District's arguments that the district court properly granted its Rule 50 motion are not persuasive: they are based on disputed facts, and from these facts a reasonable jury could find that Hartzell was banned pursuant to official District policy. First, although Dumler testified that Divijak had no authority to ban anyone under Policy KFA, a jury could reject this testimony. Moreover, the course of events in this case could support a finding that Divijak had the authority to ban Hartzell. Specifically, there was evidence that Divijak requested the trespass order, and as previously discussed, the District Superintendent did not revoke the ban but instead confirmed that it would remain in effect.

Second, the District argues that Hartzell denied violating the policy and thus could not have been ejected pursuant to it. This argument fails because the District could have banned Hartzell pursuant to Policy KFA for "offensive speech," even though Hartzell denied that she violated the policy. Indeed, Hartzell testified that she believed that she did not violate Policy KFA but was excluded because the District decided she had violated it.

Third, the District argues that various witnesses testified that it did not rely on Policy KFA to ban Hartzell. A jury could credit this testimony and reject Hartzell's claims, but because all reasonable inferences must presently be drawn in Hartzell's favor, this argument does not entitle the District to judgment as a matter of law. There is sufficient evidence in the record to permit a reasonable jury to find that Hartzell was banned pursuant to Policy KFA.

Accordingly, the district court erred in granting judgment as a matter of law to the District on Hartzell's First Amendment claim because a reasonable jury could conclude that Hartzell was banned pursuant to the District's

"expressly adopted official policy." *Gordon*, 6 F.4th at 973 (quoting *Monell*, 436 U.S. at 694).

C. The "Custom and Practice" Theory

Turning to Hartzell's "custom and practice" theory of *Monell* liability, she argues that, even if the evidence she presented at trial was not sufficient, that was because she relied on the district court's statement that she had already established liability under this theory.

At trial, the District objected to the relevance of questions by Hartzell's counsel about whether there was a practice of retaliation for speech in the District. Hartzell's counsel explained that the purpose of his questioning was "to show that there's a custom within the district of similar retaliatory conduct." The district court responded that Hartzell had "established that" but the current question sought "basically an admission by the [testifying witness] that there is a custom or practice."

Although the district court's response lacked precision, read in context, it is clear that the district court was acknowledging that Hartzell had established *why* a custom of retaliatory conduct would be relevant, not that Hartzell had established that this custom *existed*. Indeed, the following day, Hartzell's counsel argued that the district court had ruled that he had established a custom of retaliation and so counsel concluded that he did not need "to keep pushing this anymore." The district court clearly rejected counsel's characterization of its ruling sustaining the relevance objection, stating "You misunderstand my comments, Counsel. I didn't say you'd established custom, policy or practice. That's what the whole case is about, basically. If I had done that, I guess I could have done a directed verdict in your favor."

Moreover, even if the district court had expressed the latter belief, nothing barred the district court from reconsidering its conclusion. "As long as a district court has jurisdiction over the case, then it possesses the inherent procedural power to reconsider, rescind, or modify an interlocutory order for cause seen by it to be sufficient." *City of Los Angeles v. Santa Monica Baykeeper*, 254 F.3d 882, 889 (9th Cir. 2001) (quoting *Melancon v. Texaco, Inc.*, 659 F.2d 551, 553 (5th Cir. Oct. Unit A 1981)). Accordingly, the district court was not bound by any mid-trial determination about the sufficiency of Hartzell's evidence.

In her reply brief, Hartzell also argues that she offered sufficient evidence of a custom of retaliation because there were several instances when Hartzell or others had been banned for their protected speech. However, Hartzell's opening brief argues that the Rule 50(a) motion was improperly granted as to the custom theory only because of the district court's statements. Hartzell thus forfeited this argument. *Miller v. City of Scottsdale*, 88 F.4th 800, 805 n.4 (9th Cir. 2023).

II. First Amendment Claim Against Divijak

The district court did not err in concluding that Divijak was entitled to qualified immunity on Hartzell's First Amendment retaliation claim.

"Qualified immunity shields government actors from civil liability under 42 U.S.C. § 1983 if 'their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Castro v. County of Los Angeles*, 833 F.3d 1060, 1066 (9th Cir. 2016) (en banc) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). "To determine whether [a government actor] is entitled to qualified immunity, a court must evaluate

two independent questions: (1) whether the [government actor's] conduct violated a constitutional right, and (2) whether that right was clearly established at the time of the incident." *Id.* As already noted, a reasonable jury could determine that Divijak banned Hartzell in violation of a constitutional right. The question is whether that right was clearly established.

A right is clearly established "when, at the time of the challenged conduct, the contours of the right are sufficiently clear that every reasonable official would have understood that what he is doing violates that right." *Ashcroft v. al-Kidd*, 563 U.S. 731, 742 (2011) (cleaned up) (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)). "Although the Supreme Court 'does not require a case directly on point for a right to be clearly established, existing precedent must have placed the statutory or constitutional question beyond debate.'" *Evans v. Skolnik*, 997 F.3d 1060, 1066 (9th Cir. 2021) (quoting *Kisela v. Hughes*, 584 U.S. 100, 104 (2018)). The question is beyond debate when "there are 'cases of controlling authority' in the plaintiff['s] jurisdiction at the time of the incident 'which clearly established the rule on which [she] seek[s] to rely,' or 'a consensus of cases of persuasive authority such that a reasonable officer could not have believed that his actions were lawful.'" *Id.* (quoting *Wilson v. Layne*, 526 U.S. 603, 617 (1999)).

"The Supreme Court has 'repeatedly told courts—and the Ninth Circuit in particular—not to define clearly established law at a high level of generality.'" *Id.* at 1067 (quoting *al-Kidd*, 563 U.S. at 742). In the First Amendment context, "the right in question is not the general right to be free from retaliation for one's speech, but the more specific right to be free from" a particular type of government action. *Reichle v. Howards*, 566 U.S. 658, 665 (2012) (focusing on

the "right to be free from a retaliatory arrest that is otherwise supported by probable cause").

Hartzell's reliance on *O'Brien v. Welty*, 818 F.3d 920 (9th Cir. 2016), is misplaced. Although we noted in *O'Brien* that "[t]he constitutional right to be free from retaliation [i]s 'clearly established[,]'" *O'Brien* arose at the pleading stage before "an evidentiary record ha[d] been developed through discovery[.]" 818 F.3d at 936 (quoting *Krainski v. Nevada ex rel. Bd. of Regents*, 616 F.3d 963, 970 (9th Cir. 2010)). Therefore, in *O'Brien* we decided only the narrow point that we could not "determine, based on the complaint itself, that qualified immunity applies." *Id.* (quoting *Groten v. California*, 251 F.3d 844, 851 (9th Cir. 2001)). Thus, *O'Brien*'s holding does not suggest that, especially at summary judgment, the appropriate level of analysis is the general right to be free from retaliation.[10]

Here, qualified immunity applies. "[C]ourts must apply the First Amendment 'in light of the special characteristics of the school environment.'" *Mahanoy*, 594 U.S. at 187 (quoting *Hazelwood*, 484 U.S. at 266). As a result, cases arising outside public schools are of limited use in evaluating the scope of Hartzell's First Amendment rights here. Hartzell has identified one case arising in public schools, *Macias v. Filippini*, Case No. 1:17-CV-1251 AWI EPG, 2018 WL 2264243 (E.D. Cal. May 17, 2018). Even accepting that *Macias* is analogous, one district court case is

[10] *Krainski* does not support Hartzell either. *Krainski* merely held that "the doctrine of qualified immunity protects state actors when the constitutional right at issue was not 'clearly established' at the time of the actions at issue." 616 F.3d at 970 (quoting *Saucier v. Katz*, 533 U.S. 194, 202 (2001), *overruled on other grounds by Pearson v. Callahan*, 555 U.S. 223, 227, 235 (2009)).

neither a case of controlling authority nor a consensus of cases of persuasive authority. *See Evans*, 997 F.3d at 1067.[11]

In her reply brief, Hartzell argues that an Arizona statute regarding misrepresentations to the police establishes that Divijak's conduct violated her clearly established rights and that qualified immunity is inconsistent with the Civil Rights Act of 1871. We do not consider these arguments because Hartzell forfeited them by presenting them for the first time in her reply brief. *See Martinez-Serrano v. INS*, 94 F.3d 1256, 1259-60 (9th Cir. 1996).

Hartzell also argues for the first time in her reply brief that "in a sufficiently 'obvious' case of constitutional misconduct, we do not require a precise factual analogue in our judicial precedents." *See Sharp v. County of Orange*, 871 F.3d 901, 911 (9th Cir. 2017). Hartzell waived this argument twice, first by failing to raise it in her opposition to Appellees' motion for summary judgment and again by failing to raise it in her opening brief here. *See United States v. Robertson*, 52 F.3d 789, 791 (9th Cir. 1994) ("Issues not presented to the district court cannot generally be raised for the first time on appeal.").

For these reasons, the district court's qualified-immunity determination was not erroneous.

III. Procedural Due Process

"The Fourteenth Amendment protects individuals against the deprivation of liberty or property by the

[11] Hartzell does not identify any cases supporting her view that her clearly established rights were violated other than (1) those establishing a general right to be free from retaliation and (2) *Macias v. Filippini*, Case No. 1:17-CV-1251 AWI EPG, 2018 WL 2264243 (E.D. Cal. May 17, 2018), discussed *infra*.

government without due process." *Portman v. County of Santa Clara*, 995 F.2d 898, 904 (9th Cir. 1993). "A section 1983 claim based upon procedural due process thus has three elements: (1) a liberty or property interest protected by the Constitution; (2) a deprivation of the interest by the government; (3) lack of process." *Id.* Here, the district court concluded that Hartzell "had no constitutional right to access school property, [so] no procedural due process was required before [she] was banned from the property."

The only right Hartzell identified in her First Amended Complaint was the "fundamental right to direct the education of her children." Indeed, "the 'liberty of parents and guardians' includes the right 'to direct the upbringing and education of children under their control.'" *Troxel v. Granville*, 530 U.S. 57, 65 (2000) (plurality opinion) (first citing *Meyer v. Nebraska*, 262 U.S. 390, 399, 401 (1923), and then quoting *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 535 (1925)). This is often called the *Meyer-Pierce* right. However, "once parents make the choice as to which school their children will attend, their fundamental right to control the education of their children is, at the least, substantially diminished." *Fields v. Palmdale Sch. Dist.*, 427 F.3d 1197, 1206 (9th Cir. 2005), *opinion amended on denial of reh'g sub nom. Fields v. Palmdale Sch. Dist.*, 447 F.3d 1187 (9th Cir. 2006).

Here, Hartzell was banned from accessing school property. This does not implicate Hartzell's right to direct her children's education. Instead, "what *Meyer-Pierce* establishes is the right of parents to be free from state interference with their choice of the educational forum itself, a choice that ordinarily determines the type of education one's child will receive." *Id.* at 1207. Because Hartzell does not allege that her ability to send her children to the school

of her choice was restricted, the *Meyer-Pierce* right does not apply. Hartzell seeks to distinguish *Fields* on the grounds that her ban extended beyond the schoolhouse itself to the school's parking lot and other facilities. *See Fields*, 427 F.3d at 1207 (suggesting, in now-superseded language, that "the *Meyer-Pierce* right does not extend beyond the threshold of the school door"). Setting aside that the language Hartzell relies on was superseded, Hartzell takes an overly formalistic view of *Fields*. The quoted language merely reiterates that the *Meyer-Pierce* right allows Hartzell to choose what type of school her children attend.

In the alternative, Hartzell argues that her due process claim encompassed a First Amendment theory. However, the district court found that she did not allege a procedural due process claim in her First Amended Complaint. "[A]dding a new theory of liability at the summary judgment stage would prejudice the defendant who faces different burdens and defenses under [the new] theory of liability." *Coleman v. Quaker Oats Co.*, 232 F.3d 1271, 1292 (9th Cir. 2000). Accordingly, "[a]fter having focused on [one theory] in their complaint and during discovery, [plaintiffs] cannot turn around and surprise the [defendant] at the summary judgment stage" with a completely different theory. *Id.* at 1292–93. The plaintiff's claim cannot survive when "the complaint gave the [defendant] no notice of the specific factual allegations presented for the first time in [the] opposition to summary judgment." *Pickern v. Pier 1 Imports (U.S.), Inc.*, 457 F.3d 963, 969 (9th Cir. 2006).

The district court did not err in finding that Hartzell's First Amended Complaint did not adequately disclose this theory. There, after a more thorough discussion of the right to direct the education of her children, Hartzell alleged only that "[t]he Due Process Clause of the Fourteenth

Amendment prohibits the government from censoring speech pursuant to vague standards that grant unbridled discretion." Although this allegation uses the phrase "censoring speech," it does not mention either the First Amendment or retaliation. Also, while this allegation states a legal principle, it does not identify which liberty or property interest Hartzell was allegedly deprived of or what the District did to deprive her of it. "[T]he necessary factual averments are required with respect to each material element of the underlying legal theory . . . ." *Wasco Prods., Inc. v. Southwall Techs., Inc.*, 435 F.3d 989, 992 (9th Cir. 2006) (alteration in original) (quoting *Fleming v. Lind-Waldock & Co.*, 922 F.2d 20, 24 (1st Cir. 1990)). Summary judgment is not "a procedural second chance to flesh out inadequate pleadings." *Id.* (quoting same). Finally, although the First Amended Complaint invoked the First Amendment in a separate § 1983 claim alleging retaliation, First Amendment retaliation and procedural process claims involve different burdens and defenses. Therefore, the District would have been prejudiced if Hartzell were permitted to proceed on a First Amendment theory that she had not pled in the operative complaint.

The district court also did not abuse its discretion in denying Hartzell's motion to amend the First Amended Complaint to add a First Amendment theory to her procedural due process claim. The district court entered a scheduling order with a deadline to amend the pleadings. Hartzell filed her motion after that deadline. Accordingly, Hartzell needed to satisfy Rule 16(b)'s "good cause" standard to be permitted to amend. *See Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 608–09 (9th Cir. 1992). That standard "primarily considers the diligence of the party seeking the amendment," and "[i]f that party was not

diligent, the inquiry should end." *Id.* at 609. Here, Hartzell waited more than two months after the district court's summary judgment ruling before moving to amend the First Amended Complaint. The district court did not abuse its discretion in finding that Hartzell was not diligent.

Even if Hartzell had satisfied Rule 16's "good cause" standard, the district court would not have abused its discretion in concluding that prejudice to the District would provide an independent basis for denying leave to amend. *See Coleman*, 232 F.3d at 1295 (noting that "prejudice to [the defendant], although not required under Rule 16(b), supplies an additional reason for denying" leave to amend). As the district court noted, granting leave to amend would have prejudiced the District by negating its summary judgment victory and potentially requiring another round of summary judgment briefing.

IV. Defamation

The district court erred in granting summary judgment in Divijak's favor on part of Hartzell's defamation claim. In presenting her defamation claim, Hartzell sought to rely on two documents allegedly sent to her employer.[12] A jury could find one of those documents defamatory, but the district court correctly granted summary judgment with respect to the other document. "To support a claim for defamation, a statement about a private figure on a matter of private concern 'must be false' and must bring the subject of

[12] In a footnote, the Appellees suggest that Hartzell may have failed to preserve this ground of appeal by not seeking to admit the two documents at trial. Because the district court ruled at summary judgment that Hartzell could not present a defamation claim using these documents, she was not required to seek their admission at trial to present this argument on appeal.

the statement 'into disrepute, contempt, or ridicule' or impeach the subject's 'honesty, integrity, virtue, or reputation.'" *Takieh v. O'Meara*, 497 P.3d 1000, 1006 (Ariz. Ct. App. 2021) (quoting *Turner v. Devlin*, 848 P.2d 286, 288–89 (Ariz. 1993) (in banc)).

This principle establishes two limits on defamation claims. First, "[w]hile any disparaging statement can cause reputational harm, a true statement cannot support a claim for defamation." *Id.* (citing *Read v. Phoenix Newspapers, Inc.*, 819 P.2d 939, 941 (Ariz. 1991) (in banc)).

Second, "a statement is not actionable if it is comprised of 'loose, figurative, or hyperbolic language' that cannot reasonably be interpreted as stating or implying facts 'susceptible of being proved true or false.'" *Id.* (quoting *Milkovich v. Lorain J. Co.*, 497 U.S. 1, 21 (1990)). "The key inquiry is whether the challenged expression, however labeled by the defendant, would reasonably appear to state or imply assertions of objective fact," which depends on "the impression created by the words used as well as the general tenor of the expression, from the point of view of a reasonable person at the time the statement was uttered and under the circumstances it was made." *Id.* (internal quotation marks omitted) (quoting *Yetman v. English*, 811 P.2d 323, 328 (Ariz. 1991) (in banc); then quoting *Sign Here Petitions LLC v. Chavez*, 402 P.3d 457, 463 (Ariz. Ct. App. 2017)). "[S]tatements cast as subjective beliefs are generally insulated from defamation liability[] . . . ." *Id.* However, statements of opinion are actionable "when they imply a false assertion of fact" or when they "may be proven false[.]" *Id.* (quoting *Turner*, 848 P.2d at 293). They are not actionable when they do not "present 'the kind of empirical question a fact-finder can resolve.'" *Id.* (quoting *Yetman*, 811 P.2d at 333).

We begin our analysis with the first document. That document is a printout of a docket sheet reflecting the criminal charges brought against Hartzell after the February 7, 2020 incident. That printout says Hartzell was charged with knowingly touching someone with intent to injure, insult, or provoke that person. The printout contains a typewritten note reading, "This occurred at a K-8 school in front of young children. Doesn't seem like this is the kind of person that should be training teachers let alone working with kids."

Divijak argues that the first sentence "simply informs the reader that the incident underlying the charged crime occurred at [a] K-8 school." This sentence does not explicitly state that Hartzell had engaged in the conduct identified in the document. However, one reasonable inference from the phrase "this occurred" is that the underlying event actually occurred. The printout indicates that Hartzell was charged with a particular crime. A reasonable person could read the note as an allegation that Hartzell committed that crime. This reading is supported by the rest of the sentence. If "this occurred" meant only that the charges had been brought, it would not make sense to say that the charges were brought at a school or that they were brought in front of young children. A reasonable jury could find that the author meant that the charged crime was what had occurred. Whether Hartzell "knowingly touch[ed Divijak with] the intent to inj[ure]/insult/provoke" is a fact rather than an opinion, and because Hartzell has offered testimony that this fact was false, she has created a triable issue as to whether this document is defamatory.

The second sentence in the note, which opines that Hartzell is not suited for training teachers, would likely not be actionable standing alone. In context, however, that

sentence supports the view that the note could be actionable defamation. That sentence immediately follows, and explains the relevance of, the statement that "this occurred." As a result, the writer implied that "this" was relevant to their view of Hartzell's fitness for her profession. False or unfounded criminal charges would not necessarily affect someone's fitness as a trainer of teachers. True ones would be far more likely to have that effect. As a result, the second sentence suggests that a reasonable person could read this note as claiming that the charges against Hartzell were based on an incident that had actually occurred.

However, a reasonable jury could not find the second document defamatory. That document is a typed, unsigned, one-paragraph note stating that Hartzell had been using her university email account to "harass, bully, intimidate[,] and threaten people." The note also states that "[a] full audit of her account will verify these accusations. Additionally, I have great concern about her mental health."

We agree with Divijak and the district court that, at least in this context, the words "harass," "bully," "intimidate," and "threaten" cannot be actionable because they "merely describe how the author of the Second Document interpreted Plaintiff's communications." Arizona courts have considered dictionary definitions to determine whether certain statements were actionable. *See, e.g.*, *Takieh*, 497 P.3d at 1007. Each of the terms used here has at least one definition that reflects a subjective opinion or belief rather than an objective, provable fact. "Bully" is defined as "to treat (someone) in a cruel, insulting, threatening, or aggressive fashion," or "to use language or behavior that is cruel, insulting, threatening, or aggressive." *Bully*, Merriam-Webster.com, https://www.merriam-webster.com/dictionary/bully [https://perma.cc/WT4N-CFRK]. "Harass"

is defined as "to annoy persistently," or "to create an unpleasant or hostile situation for especially by uninvited and unwelcome verbal or physical conduct." *Harass*, Merriam-Webster.com, https://www.merriam-webster.com/dictionary/harass [https://perma.cc/SB59-9JM6]. "Intimidate" is defined as "to make timid or fearful[;] frighten," or "to compel or deter by or as if by threats." *Intimidate*, Merriam-Webster.com, https://www.merriam-webster.com/dictionary/intimidate [https://perma.cc/DNL9-74MH]. And "threaten" is defined as "to utter threats against," or "to cause to feel insecure or anxious." *Threaten*, Merriam-Webster.com, https://www.merriam-webster.com/dictionary/threaten [https://perma.cc/S9MT-6DRF]. Nothing in the second document suggests that "bully," "harass," "intimidate," or "threaten" is being used to do anything more than describe the author's subjective reaction to Hartzell's e-mails.[13]

Nor does the rest of the second document change the result of our analysis. The statement that the author has "great concern" about Hartzell's mental health is entirely subjective. Although the author indicated that their accusations could be "verif[ied]" by reviewing Hartzell's e-mail account, we do not believe this statement, standing alone, alters the typically subjective meaning of "harass," "bully," "intimidate," or "threaten."

Accordingly, the district court's grant of summary judgment on Hartzell's defamation claim is reversed, but only to the extent that claim rests on the first document.

[13] We express no view on whether these words could be actionable in another context, such as where the plaintiff is accused of engaging in sexual harassment or making criminal threats.

CONCLUSION

For the foregoing reasons, we affirm the district court's ruling that Hartzell may not proceed on a *Monell* claim against the District based on a "final policymaker" theory or a "custom and practice" theory, that the First Amendment retaliation claim against Divijak fails because she has qualified immunity, and that the claim for procedural due process fails. However, we reverse in part because the First Amendment retaliation claim against the District is viable to the extent it is based on District Policy KFA, and because the defamation claim is viable to the extent it is based on one of the documents sent to Hartzell's employer. We remand for retrial of the referenced defamation claim against Divijak, and the § 1983 *Monell* claim against the District based on the theory that Hartzell was banned from school property pursuant to the District Policy KFA.

REVERSED in part, AFFIRMED in part, and REMANDED.

Each side shall bear its own costs on appeal.