No. 23-35288

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RACHEL DAMIANO and KATIE MEDART,
Plaintiffs-Appellants,

v.

GRANTS PASS SCHOOL DISTRICT NO. 7, an Oregon public body; KIRK T. KOLB, Superintendent, Grants Pass School District 7, in his official and personal capacity; THOMAS M. BLANCHARD, Principal, North Middle School, Grants Pass School District 7, in his official and personal capacity; SCOTT NELSON; DEBBIE BROWNELL; BRIAN DELAGRANGE, in their official and personal capacities,
Defendant-Appellees.

On Appeal from the United States District Court for the District of Oregon
No. 1:21-cv-859 - Hon. Mark D. Clarke, Magistrate Judge

BRIEF OF AMICUS CURIAE THOMAS MORE SOCIETY IN SUPPORT OF APPELLANTS AND REVERSAL

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INTEREST OF THE *AMICUS CURIAE*

Amicus Curiae, the Thomas More Society, is a not-for-profit, national public interest law firm, based in Chicago, Illinois, dedicated to restoring respect in law for human life, including unborn children, family integrity and religious liberty. The Thomas More Society advocates and fosters support for these causes by providing *pro bono* legal services at every level—from local trial courts to the U.S. Supreme Court. Consistent with its mission, the Thomas More Society submits this brief in support of Appellants whose religiously motivated speech is "doubly" protected by the First Amendment. *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2421 (2022).[1]

[1] All parties have consented to the filing of this brief. No party's counsel authored this brief in whole or in part, and no person or entity other than *amicus curiae* or their counsel made a monetary contribution intended to fund the brief's preparation or submission.

SUMMARY OF ARGUMENT

This *amicus curiae* brief is filed in support of plaintiff-appellant educators Rachel Sager (Damiano) and Katie Medart ("Rachel and Katie"), who appeal from the district court's grant of summary judgment in favor of defendants-appellees Grant Pass School District No. 7 and various officials sued in both their official and personal capacities (collectively, "District" or "School District").

This brief is submitted to help clarify the standards that must be used when district courts engage in the *Pickering* balancing test at summary judgment. The *Pickering* test asks whether, in balancing the government's interest as an employer, it has a sufficiently compelling administrative interest to make restrictions on a citizen's constitutional rights a condition of employment. *See Pickering v. Board of Education*, 391 U.S. 563 (1968).

Here, the School District fired Rachel and Katie because—off-campus and after-hours—they spoke out against new District policies related to gender identity. Speech on issues of gender identity, especially in children, is unequivocally speech on a matter of public interest and concern—subject to the highest constitutional protection. Nevertheless, the district court, in granting summary judgment to the District, credited the District's administrative interests, without considering at all the value of Rachel and Katie's political speech, and without acknowledging the

existence of disputed facts that should have undermined its finding that *Pickering* balancing favors the School District.

This *amicus curiae* seeks to assist this Court in determining the role of a district court when it engages in the *Pickering* balancing test at the summary judgment stage. In light of the complexity of this area of law, district courts are likely to make conceptual errors in their analyses, like the district court did here, which warrants more fulsome guidance from this Court. *Pickering* balancing involves mixed questions of law and fact—with the plaintiff's interests primarily legal and the defendant's interests primarily factual. Thus, as explained below, when there are disputed facts, granting summary judgment to the defense is premature. Therefore, *amicus* agrees with Rachel and Katie that the underlying district court decision should be reversed.

ARGUMENT

This Court reviews an appeal from the grant of summary judgment de novo, and must determine, viewing the evidence in the light most favorable to Rachel and Katie, as the non-moving parties, whether there are any genuine issues of material fact, and whether the district court applied the relevant substantive law correctly. *Playboy Enterprises, Inc. v. Welles*, 279 F.3d 796, 800 (9th Cir. 2002). Like this Court on appeal, when a district court considers a motion for summary judgment the

court may not weigh the evidence or determine the truth, but rather only determine whether there is a genuine issue of fact for trial. *Id.*

This *amicus* brief in Parts I and II briefly outlines the history of this case, and the basic legal framework for its analysis. In Part III, the brief reviews the district court's significant errors of law, which warrant summary judgment in Rachel and Katie's favor. Part IV then concludes with an analysis of the factual issues that preclude summary judgment in the School District's favor.

I. Brief Procedural History: The District Court Granted the School District's Motion for Summary Judgment

Educators Rachel and Katie were employees of the District during the 2020–2021 academic year. 1-ER-4. Rachel was an Assistant Principal at North Middle School where Katie taught biology. *Id.* In February 2021, the District issued new guidance regarding treatment of transgender and gender diverse students, including on pronoun use, name changes, and bathroom use. *Id.* The District's policy served as a catalyst for Rachel and Katie to reflect their personal political views to the general public, which was contrary to the District's policy. To that end, Rachel and Katie developed a series of resolutions and an explanatory video they posted on YouTube. *Id.*

Notably, the video discussed federal and state legislative policy and created alternative resolutions for alternative policies, which they believed would be neutral for all parties and supportive for students and parents alike. *Id.* The video encouraged

viewers to contact their legislators and representatives at the local, state, and national levels. *Id.* The School District investigated Rachel and Katie's speech and then fired them. 1-ER-08–09. Rachel and Katie sued, claiming violations of their civil rights, including a claim for retaliation in violation of their First Amendment protected freedom of speech. 1-ER-3.

In granting the District's motion for summary judgment on Rachel and Katie's retaliation claims, the district court purported to engage in the "sequential five-step" inquiry from *Eng v. Cooley*, 552 F.3d 1062, 1070-74 (9th Cir. 2009). However, the district court "assume[d], without deciding," that Rachel and Katie provided sufficient evidence for their prima facie case for First Amendment content and view-point-based discrimination and retaliation allegations—the first three steps—and jumped to the fourth step. 1-ER-12; *but see Johnson v. Poway Unified Sch. Dist.*, 658 F.3d 954, 961 (9th Cir. 2011) (stressing that "these are sequential steps").

Under that fourth step, the burden of evidence and persuasion shifted to the government "to show that the balance of interests justified their adverse employment decision." *Eng*, 552 F.3d at 1074 (distilling *Pickering*, 391 U.S. 563). Upon examining the requisite *Pickering* balancing, the district court declared that "the District's legitimate administrative interests outweigh Rachel and Katie's First Amendment rights," and granted summary judgment to the School District on

Rachel and Katie's First Amendment retaliation claims for content and viewpoint-based discrimination. 1-ER-13, 17.

II. Background Legal Principles: The Frameworks of *Pickering*, *Eng*, *Gilbrook*, and *Connick*

In *Pickering*, a school district fired a high school teacher after he sent a letter to a local newspaper. In that letter, Mr. Marvin Pickering argued in favor of the issuance of bonds to raise more education funds, but was critical of the way his school district had dealt with prior bonds. In reversing the lower courts, the Supreme Court held that neither parties' rights were absolute. It ordered reinstatement of Mr. Pickering to his position and held that, in adjudicating similar disputes, courts must "arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968). This is *Pickering* balancing.

In the subsequent fifty years, *Pickering* has added to, distinguished, and clarified. Thus, in condensing and reconciling the various Supreme Court precedents, this Court in *Eng v. Cooley*, 552 F.3d 1062 (9th Cir. 2009), explained that

adjudication of a First Amendment retaliation claim follows the following five-step sequence of inquiries:

> (1) whether the plaintiff spoke on a matter of public concern [*Connick v. Myers*, 461 U.S. 138 (1983)]; (2) whether the plaintiff spoke as a private citizen or public employee [*Garcetti v. Ceballos*, 547 U.S. 410, 421–22 (2006)]; (3) whether the plaintiff's protected speech was a substantial or motivating factor in the adverse employment action [*Freitag v. Ayers*, 468 F.3d 528, 543 (9th Cir. 2006)]; (4) whether the state had an adequate justification for treating the employee differently from other members of the general public [*Pickering v. Board of Education*, 391 U.S. 563 (1968)]; and (5) whether the state would have taken the adverse employment action even absent the protected speech [*Thomas v. City of Beaverton*, 379 F.3d 802, 808 (9th Cir. 2004)].

Eng, 552 F.3d at 1070.

The five-step *Eng* analysis is helpful in reconciling the various cases. *See Clairmont v. South Mental Health*, 632 F.3d 1091 (9th Cir. 2011); *Hernandez v. City of Phoenix*, 43 F.4th 966, 976 (9th Cir. 2022) (applying *Eng*'s five-step analysis). Nevertheless, this Court sometimes applies the underlying cases without engaging in the specific *Eng* analysis. *E.g., Dodge v. Evergreen Sch. Dist. #114*, 56 F.4th 767, 776 (9th Cir. 2022). When doing so, this Court treats the first three steps as essentially undertaking a single analysis (*i.e.*, whether the plaintiff has established a prima facie case for First Amendment retaliation), before proceeding to the fourth step, which is the balancing of interests under *Pickering*. *See id*.

When engaging in the fact-intensive Pickering balancing analysis, on the government's side, the inquiry is limited to a "legitimate administrative interest." *See*

Dodge, 56 F.4th at 781. The government, like any other employer, has a legitimate interest in preventing the disruption of its provision of service. *See id.* at 781-82. The disruption analysis proceeds on a sliding scale: "The government's burden in proving disruption varies with the content of the speech. The more tightly the First Amendment embraces the speech the more vigorous a showing of disruption must be made." *Id.* at 782 (distilling *Connick v. Myers*, 461 U.S. 138, 150 (1983)) (cleaned up).

When engaging in *Pickering* balancing, over twenty years ago, this Court outlined eight non-exclusive factors it "has considered" when balancing the competing interests of the government employer against the value of employee speech. *See Gilbrook v. City of Westminster*, 177 F.3d 839, 867–68 (9th Cir. 1999). As stated in *Gilbrook*:

> In balancing the competing interests, this court has considered a host of factors. We have inquired whether the speech (1) impaired discipline or control by superiors; (2) disrupted co-worker relations; (3) eroded a close working relationship premised on personal loyalty and confidentiality; (4) interfered with the speaker's performance of his or her duties; or (5) obstructed routine office operations.… Moreover, this court has weighed (6) whether the speaker directed the statement to the public or the media, as opposed to a governmental colleague; (7) whether the speaker served in a high-level, policy-making capacity; and (8) whether the statement was false or made with reckless disregard of the truth.

Id. at 867–68 (citations omitted). Considering these factors requires sensitivity to the facts and the "totality of the circumstances." *Id.* Moreover, "no single factor is

dispositive." *Id.*

Lastly, *Pickering* balancing involves a mixed analysis of law and fact: "While the *Pickering* balancing test presents a question of law for the court to decide, it may still implicate factual disputes that preclude the court from resolving the test at the summary judgment stage." *Moser v. Las Vegas Metro. Police Dep't*, 984 F.3d 900, 905 (9th Cir. 2021) (reversing defense summary judgment due to factual disputes regarding the meaning of the speech). Thus, while courts must consider what evidence there is to evaluate the *Pickering* balance, the court must also be cognizant of factual disputes. Notably, it is critical that the court *not weigh* the evidence that would result in a favorable outcome for one party or the other, even as it must view the facts in the light most favorable to the non-moving party. *See, e.g., id.* at 911. This is no easy task.

III. The District Court Engaged in Egregious Jurisprudential Errors that Warrant Not Only Reversal, but Summary Judgment in Rachel and Katie's Favor

A. By Not Following *Gilbrook*, the District Court Ignored Factors that Favor Rachel and Katie

The district court's rather perfunctory analysis rests on Rachel and Katie's "admi[ssion] that their speech 'caused a stir…'" 1-ER-15. The district court did not cite or analyze the *Gilbrook* factors. Though at the summary judgment stage the district court may not weigh the evidence, the court should review the factors and decide *whether the factors are present, and if so, who they favor.* This is assuming

the underlying facts are not in dispute. Of course, a court that does not specifically examine all the *Gilbrook* factors is not necessarily in error, as those factors exist solely to aid courts in examining the totality of the circumstances. However, systematically evaluating each factor is beneficial to determine whether a factual dispute precludes summary judgment.

Here, *Gilbrook* factors six, seven, and eight—ignored by the district court—favor Appellants. *See* 1-ER-3–35. ***First***, Rachel and Katie's "I Resolve" resolutions discussed policy, rather than factual statements, never mentioning the District or the specific school Rachel and Katie were employed at, so the truthfulness of their speech (factor eight) was not at-issue. *Id.*[2]

Second, Rachel was employed as an assistant principal. She served under a school principal. There is no evidence to suggest Rachel was a policy maker for the school itself, or at the District-level.[3] Katie, employed as a biology teacher, played no role in policy making decisions. Hence, factor seven regarding whether the

[2] False speech may still be protected, depending on the context. In such a case, the fact that speech is false is simply one factor that would be weighed in the government's favor. *See Moran*, 147 F.3d at 849.

[3] *See e.g.,* Grants Pass School District 7, "Board Powers and Duties" (Feb. 24, 2004), https://policy.osba.org/grantspass/search.asp?si=75853865&pid=r&nsb=1&n=0&_charset_=windows-1252&bcd=%F7&s=grantspass&query=bba (last visited Sept. 13, 2023) ("In regular or special public meetings, after open discussion and after the votes of members are recorded, the Board will establish rules or policy to govern the conduct of its members and the proceedings of the Board").

employee is a policy maker also favors Rachel and Katie. *Keyser v. Sacramento City Unified Sch. Dist.*, 265 F.3d 741, 750 (9th Cir. 2001) (finding high-level administrator employees criticizing their government employers would weigh against plaintiffs, if their speech was on an issue relevant to their higher position).

Regardless, even if assistant principal Rachel were considered a high-level administrator, she did not have the authority at her level to make the legislative and policy decisions she was advocating for. This was shown through her (and Katie's) messaging itself. Rachel and Katie asked listeners to take action to make their *own* voices heard by contacting state or federal legislators, or both, who have policy-making authority. *E.g.*, 2-ER-196 (¶34); 2-ER-300.[4] Thus, *Gilbrook* factor seven also favors Rachel and Katie.

Third, likewise in Rachel and Katie's favor is the fact they directed their speech to the general public and not to any particular individual, which is the consideration for factor six. *See* 1-ER-20. Indeed, their same proposals to address the Oregonian debate on pronoun use, name changes, and bathroom policies, could be applied throughout the nation.

By not systematically addressing each of the eight *Gilbrook* factors, the district court was free to make its own broad-brush determinations. This Court

[4] "State and federal rules govern everything we do at the Oregon Department of Education." Oregon Dept. of Ed., https://www.oregon.gov/ode/rules-and-policies/pages/default.aspx (last visited Sept. 13, 2023).

should reiterate that district courts must take a more systematic approach in their *Pickering* balancing.

B. The District Court Missed that it Must Balance the "Stir" Against the Value of the Speech under *Connick*

As stated above, the district court's conclusion rested entirely on its finding that Rachel and Katie's speech "caused a stir." 1-ER-15. By not systematically following *Gilbrook*, the district court missed factor eight—concerning whether the speech is directed at the public at large—which naturally leads into the necessary analysis of the sliding scale. *See Dodge v. Evergreen Sch. Dist. #114*, 56 F.4th 767, 781-82 (9th Cir. 2022).

The "highest-rung" of speech for First Amendment protection is political or viewpoint-specific speech. *Connick v. Myers*, 461 U.S. 138, 145 (1983) (citing *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982)) ("speech on public issues occupies the 'highest rung of the hierarchy of First Amendment values,' and is entitled to special protection."). Indeed, "the First Amendment affords the broadest protection to political expression," *Dodge*, 56 F.4th at 782, such that discussion about issues of "gender identity" is "entitled to special protection." *Riley's Am. Heritage Farms v. Elsasser*, 32 F.4th 707, 716, 727 (9th Cir. 2022).

"Speech that lies at the First Amendment's heart" is always valuable. *See United States v. Alvarez*, 567 U.S. 709, 733 (2012) (false speech). Whether a public employee's expressive conduct addresses a matter of public concern is a question of

law. *Alpha Energy Savers, Inc. v. Hansen*, 381 F.3d 917, 924 (9th Cir. 2004) (citing *Connick v. Myers,* 461 U.S. 138, 148 n. 7 (1983)). This determination is made in light of "the content, form, and context" of the expressive conduct "as revealed by the whole record." *Id.* at 147-48. "Speech that concerns issues about which information is needed or appropriate to enable the members of society to make informed decisions about the operation of their government merits the highest degree of first amendment protection." *Id.* (quoting *Coszalter v. City of Salem*, 320 F.3d 968, 973 (9th Cir. 2003)).

Stated differently, because "[p]olitical speech is the quintessential example of protected speech, and it is inherently controversial," the government must show more than "the disruption that necessarily accompanies controversial speech." *Dodge*, 56 F.4th at 782-83. Thus, more valuable speech can counter whatever *Gilbrook* factors the School District highlights to throw the *Pickering* balancing test to Rachel and Katie's side. For example, whistleblowing about problems in a government agency is indeed very practically disruptive to the agency's provision of services. Yet, whistleblowing speech is so valuable that the government's administrative interests cannot overcome the speech's weight. *See Hufford v. McEnaney*, 249 F.3d 1142, 1150 (9th Cir. 2001).

Here, "I Resolve"—Rachel and Katie's speech at-issue—addressed matters of the utmost public concern in the greater nationwide discourse. Modern gender

ideology has far-reaching implications because it demands action in the way of "affirmation" by the average speaker.

School policies addressing gender are encountering challenges from parents, students, and others regarding school policies across the country. The following are only a few examples: in Pennsylvania, *Tatel v. Mt. Lebanon Sch. Dist.*, 637 F.Supp.3d 295 (W.D. Pa. 2022), *recons. denied*, No. CV 22-837, 2023 WL 3740822 (W.D. Pa. May 31, 2023) (denying motion to dismiss § 1983 challenge based on parental rights to policy to teach transgender topics to first-grade students without allowing opt-out); in Maryland, *John & Jane Parents 1 v. Montgomery Cnty. Bd. of Educ.*, No. 22-2034, 2023 WL 5184844 (4th Cir. Aug. 14, 2023) (dismissing for lack of standing similar § 1983 challenge based on parental rights to school policy to withhold "gender support plans" for students from parents), *id*. at *10 (Niemeyer, J., dissenting) (contending policy should be struck down on the merits); in Tennessee, *D.H. by A.H. v. Williamson Cnty. Bd. of Educ.*, 638 F. Supp. 3d 821, 824 (M.D. Tenn. 2022) (denying preliminary injunction to minor child challenging school bathroom policy for use according to anatomical sex); in Florida, *Adams by & through Kasper v. Sch. Bd. of St. Johns Cnty.*, 57 F.4th 791, 817 (11th Cir. 2022) (en banc) (upholding district bathroom policy because "the plain and ordinary meaning of "sex" in 1972, Title IX allows schools to provide separate bathrooms on the basis

of biological sex … Whether Title IX should be amended to equate "gender identity" and "transgender status" with "sex" should be left to Congress.").

Regardless of which position any one school district takes on gender-related issues, challenges are likely and further political discourse is inevitable. As the Eleventh Circuit suggested, some of these issues, such as the Title IX definition of "sex" as it relates to gender is something for Congress—the legislative branch of government—Americans have the right to petition, as Rachel and Katie suggested in their speech.

Perhaps most importantly, in weighing the First Amendment interests against the government's administrative interests, the Supreme Court has also clarified that "speech by public employees on subject matter related to their employment holds special value precisely because those employees gain knowledge of matters of public concern through their employment." *Lane v. Franks*, 573 U.S. 228, 240 (2014). In *Lane*, the Supreme Court would continue on by citing *Pickering*, and its observation that teachers are "the members of a community most likely to have informed and definite opinions" on policies and operations of schools, such that it is "essential that they be able to speak out freely on such questions without fear of retaliatory dismissal." *Id.* (quoting *Pickering*, 391 U.S. at 572). Here, the public has the right to hear *teachers'* views on schools' gender identity policies. The opinions of teachers—those directly dealing with the issues—are the single most important opinions for

the public debate. Yet the district court allowed the School District to shut down that debate by firing Rachel and Katie.[5]

C. The District Court's Endorsement of a "Heckler's Veto" Threatens to Chill Valuable Political Speech of Government Employees

In finding that Rachel and Katie's speech caused a "stir," 1-ER-15, the district court held that issues of proximate causation were absolutely irrelevant. In addressing their argument that any disruption was actually caused by other staff members protesting against their speech, the district court held that "whether the disturbance was 'caused' by Plaintiffs' speech or by the staff … reaction to the speech is a distinction without a difference. In either case, Plaintiffs' speech was still the catalyzing factor. In other words, 'but for' the Plaintiffs conduct, there would have been no … backlash." 1-ER-16.

This is a horrifying holding—and contrary to this Court's precedent. In *Eng*, this Court rejected the governmental employer's argument that its adverse employment action against Mr. David Eng would have happened regardless of his

[5] Further, the fact that Rachel and Katie's speech at issue was spoken off-campus and after-hours weakens Defendants' claimed interests. *Riley's*, 32 F.4th at 726. Rachel and Katie filmed the "I Resolve" video while seated on a couch at a local church on March 23, 2021, which was during Spring Break for the District. 2-ER-173; 2-ER-197. The video was finished and published on YouTube on March 25, 2021, which was also during Spring Break. 2-ER-197. Courts "give less weight to the government's concerns about the disruptive impact of speech outside the workplace context." *Riley's*, 32 F.4th at 726. Perhaps physical remoteness of the speech to workplace should be added to *Gilbrook*'s "host of factors" for balancing competing interests. *See Gilbrook*, F.3d at 867-68.

speech—due to allegations of misconduct and an investigation of him—because that ignored the fact that the investigation itself was motivated by the employer's reaction to his protected speech. *Eng*, 552 F.3d at 1074.

Moreover, if the district court's "distinction without a difference" reasoning is permitted to stand, it takes no leap in logic to the perverse outcome of excusing and enabling governmental employers to manufacture "community backlash" by soliciting numerous complaints in order to justify quashing otherwise protected speech. This would inevitably chill speech from governmental employees, including teachers whose speech has special value on matters related to their employment due to their knowledge and experience. *Lane*, 573 U.S. at 240; *Pickering*, 391 U.S. at 572.

Governmental employers must be careful not to simply discriminate against speech they find unfavorable. "Vigilance is necessary to ensure that public employers do not use authority over employees to silence discourse, not because it hampers public functions but simply because superiors disagree with the content of employees' speech." *Rankin v. McPherson*, 483 U.S. 378, 384 (1987).

The district court's decision allows a "heckler's veto" and threatens to remove a segment from the marketplace of ideas, and to deprive everyone else the benefit of hearing the opinions and ideas of those in a strong position to "have informed and definite opinions" about matters of public policy that impacts everyone. "[T]he best

test of truth is the power of the thought to get itself accepted in the competition of the market." *NIFLA v. Becerra*, 138 S. Ct. 2361, 2375 (2018) (citing *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting)). The District's actions against Rachel and Katie raise the specter that they were not trying to advance legitimate operations of the District, but rather were attempting to "suppress unpopular ideas or information or manipulate the public debate through coercion rather than persuasion." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641 (1994).

Indeed, if a government employer can succeed on summary judgment based solely (if not primarily) on the pure quantity of complaints, then savvy government employers need only drum up complaints to tip the scale in their favor. No employee would be able to vindicate their free speech rights against such a standard.

D. The District Court's Reference to the Unique Context of Schools Actually Supports Rachel and Katie, not the School District

After its finding that Rachel and Katie's speech caused a "stir," 1-ER-15, the district court also stated, without elaboration, that the unique context of "schools" supports "the District's evaluation that Plaintiffs' speech caused an unacceptable disturbance." 1-ER-16.

However, Rachel and Katie's speech was, in fact, not antithetical to the educational function of a school. The governmental purpose of a public school, such as North Middle School, or the Defendant District in which their school was located, is to educate students such that they are prepared to meet a plurality of views. As the

U.S. Supreme Court has explained, in a case examining First Amendment protections for student speech, the purpose of American public schools is to "prepare pupils for citizenship in the Republic.... It must inculcate the habits and manners of civility as values in themselves conducive to happiness and as indispensable to the practice of self-government in the community and the nation." *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 681 (1986) (quoting C. Beard & M. Beard, New Basic History of the United States 228 (1968)). The Supreme Court went on to say:

> The process of educating our youth for citizenship in public schools is not confined to books, the curriculum, and the civics class; schools must teach by example the shared values of a civilized social order. Consciously or otherwise, teachers—and indeed the older students—demonstrate the appropriate form of civil discourse and political expression by their conduct and deportment in and out of class. Inescapably, like parents, they are role models.

Id. at 683. More recently, the Supreme Court has explained:

> America's public schools are the nurseries of democracy. Our representative democracy only works if we protect the "marketplace of ideas." This free exchange facilitates an informed public opinion, which, when transmitted to lawmakers, helps produce laws that reflect the People's will. That protection must include the protection of unpopular ideas, for popular ideas have less need for protection."

Mahanoy Area Sch. Dist. v. B.L., 141 S. Ct. 2038, 2046 (2021). And finally, this Court itself has just reiterated that:

> While it cannot be overstated that anti-discrimination policies certainly serve worthy causes—particularly within the context of a school setting where students are often finding themselves—those policies may not

> themselves be utilized in a manner that transgresses or supersedes the government's constitutional commitment[s]….

Fellowship of Christian Athletes v. San Jose Unified Sch. Dist. Bd. of Educ., No. 22-15827, 2023 WL 5946036, at *3 (9th Cir. Sept. 13, 2023) (en banc).

Thus, the School District and the district court were incorrect in insisting that Rachel and Katie's speech—though it was public, outside the classroom, outside the school, and off-hours—was contrary to the pedagogical purpose of the District. To the contrary, their speech actually *furthered* the School's pedagogical purpose to educate youth as role models for citizenship.

IV. Both the Legitimacy and Strength of the School District's Interests in Suppressing Rachel and Katie's Speech Is Plagued with Factual Disputes Which Preclude Summary Judgment in its Favor

In their opening brief, Rachel and Katie request that this Court reverse with instructions to the district court to enter summary judgment in their favor. In light of the above, and the relevant case law, *amicus* fully supports this result. *See, e.g., Dodge v. Evergreen Sch. Dist. #114*, 56 F.4th 767 (9th Cir 2022) (reversing on basis that speech was protected, and remanding for trial solely on question of whether adverse action was factually taken in retaliation for speech, which is not at issue here); *Clairmont v. South Mental Health*, 632 F.3d 1091 (9th Cir. 2011) (same); *accord Moonin v. Tice*, 868 F.3d 853 (9th Cir. 2017) (affirming summary judgment for plaintiff).

However, at the very least, the Court should reverse with instructions to the district court to deny the School District's motion for summary judgment because of factual disputes concerning the administrative interests it asserted. *See, e.g., Nichols v. Dancer*, 657 F.3d 929 (9th Cir. 2011) (reversing because of factual dispute as to whether there was actual disruption); *Posey v. Lake Pend Oreille Sch. Dist. No. 84*, 546 F.3d 1121, 1128 n.3 (9th Cir. 2008) (noting that actual disruption may be a factual issue).

Even disregarding the strong protections that the Supreme Court has required for political speech (as the district court did), factual disputes regarding the causation of any disturbance related to Rachel and Katie's speech, as well as the nature and extent of disturbance could entirely overthrow the *Pickering* balancing equation in this case. This is because *Gilbrook* interest factors four and five—inquiring into whether the "speech interfered with the speaker's performance of his or her duties," or "obstructed routine [school] operations," respectively—may not carry much weight for the District, if the factual disputes were actually decided favorably to Rachel and Katie. *See Gilbrook*, F.3d at 867–68; *Rankin v. McPherson*, 483 U.S. 378, 388 (1987) (holding that employee speech was too far removed from inhibiting the purpose of the government employer because "the state interest element of the test focuses on the effective functioning of the public employer's enterprise.").

The district court reached its *Pickering* balancing decision below by disregarding several genuine issues of factual dispute regarding the complaints the District received about the speech. These issues are *first*, whether disturbance to the District was caused by Rachel and Katie's speech's or by the District itself; *second*, the quantity and nature of the complaints; and *third*, whether accusations Rachel and Katie's speech would cause students to feel unsafe was a genuine forecast of disruption to the School.

First, as hinted at above, there is evidence that District employees solicited complaints about Rachel and Katie's speech. *See* 2-ER-152; 2-ER-220. In his email, Defendant Kolb referenced Rachel and Katie's speech, claimed it opposed district values, and invited recipients to raise "additional concerns" or state if they "needed support." 2-ER-152; 2-ER-220; 2-ER-214–15; 2-ER-238. Rejecting the relevance of this, the district court declared "whether the disturbance was 'caused' by Plaintiffs' speech or by the staff, student, and community reaction to the speech is a distinction without a difference." 1-ER-16. As stated above, this is incorrect. Thus, the lower number of bona fide complaints and their content, could lead a jury to decide that disturbance to the school was insignificant.

Second, there is a dispute about the *number* of complaints the District received. The District asserted that it received approximately 75–100 complaints, but the District only produced 23 to Rachel and Katie in discovery. 1-ER-15. The

district court disregarded this dispute and assumed that the existence of a number of complaints, no matter their nature or source, was sufficient to entirely throw the *Pickering* balance in the School District's favor. 1-ER-15; *but see Riley's*, 32 F.4th at 726-27 (summary judgment inappropriate because "there is a genuine issue of historical fact about the degree of controversy arising from the speech (i.e., the extent of actual and predicted disruption in the learning environment)," and stressing that "where *hundreds* of parents threatened to remove their children from school," due to "a public school teacher who was active in a pedophile association," the school district's legitimate interests in running a school could prevail over the teacher's right to freedom of association) (emphasis added). Schools routinely handle complaints concerning many issues from a variety of parties, but that does not mean numerous complaints are a disturbance. The School District here is no different, and has a policy governing public complaints, anticipating active community interaction with the district.[6]

Third, concerns expressed by the School District raising the possibility that some students might "feel unsafe" if they learned of Rachel and Katie's speech, *e.g.*, 2-ER-118, is insufficient to support the District's interests, as mere speculation is insufficient to substantiate disruption: "The government can meet its burden by

[6] Grants Pass School District 7, Public Complaints (Sept. 10, 2019), https://policy.osba.org/grantspass/KL/KL%20D1.PDF (last visited Sept. 13, 2023).

showing a 'reasonable prediction[ ] of disruption.' But the government cannot rely on mere speculation that an employee's speech will cause disruption." *Moser*, 984 F.3d at 908–09 (citing *Nichols v. Dancer*, 657 F.3d 929, 933–34 (9th Cir. 2011); *Brewster v. Board of Education*, 149 F.3d 971, 979 (9th Cir. 1998)) (cleaned up); *accord Riley's*, 32 F.4th at 725-27 ("rank speculation or bald allegation" was insufficient). Here, the School District's evidence of students feeling "unsafe" is rank speculation.

CONCLUSION

The *Pickering* balancing test mixes questions of law and fact, which tempts courts to weigh evidence, instead of focusing on the presence and significance of various interest factors—whether enumerated in *Gilbrook* or elsewhere. In addition to its significant legal errors, the district court succumbed to this temptation and erred by failing to make inferences in favor of Plaintiffs Rachel and Katie as the non-moving parties. Those significant legal errors warrant summary judgment in Rachel and Katie's favor but, at the very least, the existence of factual disputes in this case preclude resolution for the School District at the summary judgment stage. *See Moser*, 984 F.3d at 905. This Court should reverse.

Respectfully submitted,

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