No. 24-1770

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

B.B., by and through her mother, Chelsea Boyle,

Plaintiffs – Appellants,

v.

Capistrano Unified School District; Jesus Becerra, an individual in his individual and official capacities; Cleo Victa, an individual in her individual and official capacities,

Defendants – Appellees.

On Appeal from the United States District Court
for the Central District of California
Honorable David O. Carter, District Judge

Appellants' Opening Brief

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Rule of Court

Other Authorities

JURISDICTIONAL STATEMENT

The district court had subject-matter jurisdiction over this action under 28 U.S.C. §§ 1331 and 1343. The district court's order and judgment granting the Defendants' Motion for Summary Judgment are final decisions over which this Court has appellate jurisdiction. *See* 28 U.S.C. § 1291. The district court's order was entered on February 22, 2024, and judgment was entered on March 6, 2024. Plaintiff-Appellant B.B. filed a notice of appeal on March 22, 2024. *See* ER-132. The appeal is timely under Federal Rule of Appellate Procedure 4(a)(1)(A).

STATEMENT OF THE ISSUES

The issues on appeal are:

1. Whether B.B. was punished for her speech in violation of the First Amendment under *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969).

2. Whether Defendant-Appellee Becerra retaliated against B.B. for her speech in violation of the First Amendment.

STATEMENT OF THE CASE

A. B.B. Is Punished for Her Innocent Speech

In 2021, Plaintiff-Appellant B.B. was a first-grade student at Viejo Elementary School in Mission Viejo, California. ER-20, 22–23; ER-93. In

March of that year, B.B.'s teacher read a book to the class about Martin Luther King, Jr. ER-94, 96. The book introduced B.B. to the concept of "Black Lives Matter." ER-95–97; ER-102–03. The school also had a picture displayed that included the phrase "Black Lives Matter," along with a clinched fist, that B.B. saw every day. ER-102–03. While B.B. did not understand what the phrase meant, ER-96–97, the book had the effect of making B.B. feel bad for a classmate of color (M.C.); B.B. then drew a picture for M.C. to help her feel included. ER-94–95; ER-86–87.

B.B.'s picture contained the phrase "Black Lives Mater" (sic) drawn in black marker. ER-23, ER-8. Below that was the phrase "any life" written in a lighter color marker. *Id*. Below "any life" were four circles of different colors which B.B. drew to represent three classmates and herself holding hands. *Id*. After receiving the drawing, M.C. thanked B.B., put it in her backpack, and took it home without comment. ER-98–99; ER-75.

Upon finding the picture at home, M.C.'s mother contacted the school's principal, Defendant-Appellee Jesus Becerra, to express concern that her daughter was being singled out for her race. ER-77–78, ER-80–81. After investigating, Becerra expressed that writing "any life" on the

drawing was inconsistent with values taught in the school but acknowledged that B.B.'s motives were "innocent." ER-82–85. Because M.C.'s parents agreed that B.B. innocently drew the picture, they informed Becerra that they did not want her punished. ER-88.

Declining to heed M.C.'s parents' wishes, Becerra punished B.B. for her drawing, deeming it "racist" and "inappropriate." ER-108–09; ER-8 n.1. First, he instructed B.B. to apologize to M.C. for the drawing. ER-99–101. Upon being apologized to, M.C. expressed confusion about what B.B. was apologizing for. ER-65. B.B. shared M.C.'s confusion about the need for an apology but did as she was told. ER-101, ER-109. Second, Becerra banned B.B. from drawing and giving pictures to classmates while at school—a particularly harsh punishment for a first-grade child who loved to draw. ER-92, ER-106–07; ER-66. Third, after receiving her punishment from Becerra and returning to class, B.B.'s teachers told her that she was not permitted to participate in recess for two weeks.[1] ER-105, ER-62. During those two weeks where she was banned from recess, B.B. was forced to sit on a bench and watch her classmates play without

[1] The district court correctly noted that a reasonable jury could infer that the "close temporal proximity" between punishments established the connection between the drawing and the recess punishment. ER-11 n.2.

her. ER-63. B.B.'s parents were not informed about the drawing or punishment until about a year later. ER-24.

B. Procedural History

When B.B.'s mother, Chelsea Boyle, learned that B.B. was punished so harshly for her innocent drawing, she sought an explanation and apology. She eventually pursued internal complaints with Becerra and Defendant-Appellee Capistrano Unified School District. ER-24–28. After those administrative measures proved unsatisfactory, Ms. Boyle initiated this action in federal court on her and B.B.'s behalf.

The original complaint, filed in February 2023, included several causes of action. Multiple motions to dismiss and discovery followed. The operative complaint (ER-18–49) maintains B.B. as the Plaintiff and includes four causes of action. On January 12, 2024, Defendants (collectively "School District") moved for summary judgment on B.B.'s remaining claims. Relevant to this appeal, the School District argued that Becerra had qualified immunity against B.B.'s First Amendment and First Amendment retaliation claims. On February 22, 2024, the district court granted the motion as to B.B.'s First Amendment and retaliation claims, but only addressed the first prong of the qualified

immunity test: whether a constitutional right was violated. ER-14 ("Giving great weight to the fact that the students involved were in first grade, the Court concludes that the Drawing is not protected by the First Amendment."). The court also declined to exercise supplemental jurisdiction over B.B.'s two state law claims. ER-17. This appeal followed. ER-132.

SUMMARY OF ARGUMENT

After introducing a controversial social topic on race to first graders, school officials within Capistrano Unified School District severely punished B.B. for her entirely innocent message. School officials believed B.B.'s innocent drawing was a hotly charged political message that was not in conformity with their views. But all B.B. did was give a drawing to a classmate to make her feel included. There was no disruption, and even M.C.'s parents understood the drawing to be entirely innocent. For this, B.B. was forced to apologize, lost recess for two weeks, and was banned from drawing pictures for friends at school.

In the seminal case of *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, the Supreme Court explained that "First Amendment rights … are available to teachers and students" in school. 393 U.S. 503, 506 (1969).

Tinker's now-famous line, that neither students nor teachers "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate," is a bedrock First Amendment principle. *See id*. Yet in granting summary judgment to the School District, the district court denied First Amendment protection to B.B. for her "pure speech." ER-11, ER-14.

According to the district court, B.B.'s innocent drawing crossed the line of protected speech in school because it interfered with M.C.'s right "to be let alone." ER-14–15. To reach that conclusion, the district court relied on a *New York Times* article discussing the controversy surrounding the phrase "All Lives Matter" and deferred to Becerra's judgment. ER-14–15.

Nothing in or beyond the record for this case supports granting summary judgment to the School District. The evidence here (primarily deposition testimony) confirms that B.B.'s drawing was innocent and that her classmate, M.C., did not understand the drawing as anything other than a nice gesture. Without evidence showing substantial disruption in school resulting from certain speech, or that particular

students were targeted with "inflammatory" or tortious speech, school officials have no basis to limit a student's "pure speech."

The age of B.B. and M.C. do not require a different result. Overlooking foundational First Amendment law on student speech rights, *see, e.g.*, *West Virginia St. Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943), and relying on a slapdash amalgam of out-of-circuit and overruled authority, the district court held that B.B.'s speech could be restricted simply because she was a young elementary school student. ER-14 ("Giving great weight to the fact that the students involved were in first grade …."). While B.B.'s age is not irrelevant to the analysis, the district court plainly erred in placing near-dispositive weight on that fact.

The district court also shirked its duty to provide an important check on government power when the speech rights of students are limited by public school officials. Out of concern that the courts should not be needed to referee "schoolyard dispute[s]," ER-11, the district court deferred to Becerra's decision to severely punish B.B. for her innocent drawing. *But see LaVine v. Blaine Sch. Dist.*, 257 F.3d 981, 988 (9th Cir. 2001) (deference to school officials "does not mean abdication; there are

situations where school officials overstep their bounds and violate the Constitution").

Because the district court held that B.B.'s First Amendment rights were not violated, it granted summary judgment to the School District as to B.B.'s retaliation claim against Becerra as well. However, as B.B.'s First Amendment rights were plainly violated, it was premature to grant the School District's motion. This Court should proceed to analyze the remaining retaliation factors, which based on the record of this case establish that Becerra's punishment was impermissible retaliation.

ARGUMENT

I. STANDARD OF REVIEW

A district court's grant of summary judgment is reviewed *de novo*. *Animal Legal Def. Fund v. U.S. Food & Drug Admin.*, 836 F.3d 987, 988 (9th Cir. 2016) (en banc). This Court must "view the evidence in the light most favorable to the nonmoving party, determine whether there are any genuine issues of material fact, and decide whether the district court correctly applied the relevant substantive law." *Id.* at 989 (citing *Olsen v. Idaho St. Bd. of Med.*, 363 F.3d 916, 922 (9th Cir. 2004)).

II. B.B.'S FIRST AMENDMENT RIGHTS WERE VIOLATED

For more than 100 years, courts have recognized that students possess First Amendment rights in school. *See Tinker*, 393 U.S. at 506 (citing, e.g., *Meyer v. Nebraska*, 262 U.S. 390 (1923)). Indeed, "[s]tudents in school … are 'persons' under our Constitution" and "entitled to freedom of expression of their views." *Id.* at 511. *Cf. Wynar v. Douglas Cty. Sch. Dist.*, 728 F.3d 1062, 1068 (9th Cir. 2013) (The Ninth Circuit "definitely did not say … that an individual's free speech rights are diminished simply by virtue of being a student.").

This Court expressly recognizes three categories of student speech, with each subject to a unique analysis when the speech is restricted by public school officials: (1) "vulgar, lewd, obscene, and plainly offensive speech" is governed by *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 683–85 (1986); (2) "school-sponsored speech" is governed by *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988); and (3) "all other speech" is governed by *Tinker*, 393 U.S. at 508. *See Chandler v. McMinnville Sch. Dist.*, 978 F.2d 524, 529 (9th Cir. 1992). The parties and the district court agreed that this case concerns "pure speech" to be analyzed under *Tinker*. *See* ER-11; ER-84–85; ER-104.

A. *Tinker*

In *Tinker*, three teenagers wore black armbands to their respective high school and junior high school to protest the United States' involvement in the Vietnam War. 393 U.S. at 504. All three students were suspended due to the schools' policy of prohibiting the wearing of armbands. *Id.* Upon review, the Supreme Court held that because the students' passive display of armbands in silent protest did not "materially disrupt[] classwork or involve[] substantial disorder or invasion of the rights of others," the schools' suspension of the students violated their First Amendment rights. *Id.* at 513–14.

The Supreme Court's test set out in *Tinker* requires evidence of "interference, actual or nascent, with the schools' work or collision with the rights of other students to be secure and to be let alone," before a student's speech may be restricted. *Id.* at 508, 514. More precisely, evidence that speech "materially disrupts classwork or involves *substantial disorder or invasion* of the rights of others" is needed. *Id.* at 513 (emphasis added). Establishing such evidence means a school must show that restricting or punishing speech "was caused by something more than a mere desire to avoid the discomfort and unpleasantness that

always accompany an unpopular viewpoint." *Id.* at 509. In the absence of sufficient evidence, a student's speech cannot be restricted or punished. *See id.* at 508–09.

B. There Is No Evidence of Substantial Disruption

Like *Tinker*, this case "does not concern aggressive, disruptive action or even group demonstrations." *See* 393 U.S. at 508. The record reflects, and all parties and the district court agreed, that this case does not concern interference or disruption of schoolwork. ER-12, 14–15; ER-71–72. For B.B. to have thus been constitutionally punished for her drawing, the School District must show that B.B.'s drawing "substantial[ly] … inva[ded] … the rights of" B.B.'s classmate, M.C. *See Tinker*, 393 U.S. at 513.

C. B.B. Did Not Infringe on M.C.'s Right to Be Let Alone

The district court correctly observed that the majority of cases applying *Tinker* concern disruptions in school. ER-12. As a result, "[t]he precise scope of *Tinker*'s 'interference with the rights of others' language is unclear." *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 217 (3d Cir. 2001) (Alito, J.). Nevertheless, as then-Judge Alito noted, "it is certainly not enough that the speech is merely offensive to some listener" to satisfy *Tinker*. *Id. See also Wynar*, 728 F.3d at 1072. The Eighth Circuit agreed

in *Kuhlmeier v. Hazelwood Sch. Dist.*, 795 F.2d 1368, 1376 (8th Cir. 1986), *rev'd on other grounds*, 484 U.S. 260, 273 n.5 (1988) ("We … agree that school officials are justified in limiting student speech, under [*Tinker*'s rights of others language], only when publication of that speech could result in tort liability for the school."). *See also Slotterback ex rel. Slotterback v. Interboro Sch. Dist.*, 766 F. Supp. 280, 289 n.8 (E.D. Penn. 1991) ("For student speech to invade 'the rights of others,' it must … be tortious."). The First Circuit has also applied *Tinker* to cases of bullying. *L.M. v. Town of Middleborough*, 103 F.4th 854, 868 (1st Cir. 2024) (citing *Doe v. Hopkinton Pub. Schs.*, 19 F.4th 493, 507–09 (1st Cir. 2021)).

This Court has provided helpful guidance in two cases. First, in *Harper v. Poway Unified Sch. Dist.*, 445 F.3d 1166, 1171, 1175–84 (9th Cir. 2006), *vacated as moot by*, 549 U.S. 1262 (2007), it applied *Tinker*'s rights-of-others prong in a dispute over a T-shirt worn by a high school student that declared "HOMOSEXUALITY IS SHAMEFUL 'Romans 1:27.'" Because the record showed that the shirt was "inflammatory" and directed at homosexual students on the "Day of Silence" organized by the school's Gay-Straight Alliance, this Court held that the message served as a "verbal assault" attacking students "on the basis of a core identifying

characteristic such as race, religion, or sexual orientation." *Id.* at 1171–72, 1178. Importantly, this Court limited its holding affirming the restriction of speech "to instances of derogatory and injurious remarks directed at students' minority status." *Id.* at 1183.

Second, in *C.R. v. Eugene Sch. Dist. 4J*, 835 F.3d 1142, 1153 (9th Cir. 2016), this Court noted that the age of a student targeted by speech is relevant to a *Tinker* analysis. There, this Court considered the punishment of a seventh-grade student for subjecting two disabled sixth-grade students to sexually harassing comments. *Id.* at 1146, 1152–53. Because "overtly sexual speech 'could well be seriously damaging to its less mature audience,'" *id.* at 1153 (quoting *Fraser*, 478 U.S. at 683), and because sexually harassing comments go well beyond being "merely offensive," *id.* at 1152 (quoting *Wynar*, 728 U.S. at 1072), the student's punishment was upheld as interfering with the rights of others, *id.* at 1153.

Here, "giving great weight to the fact that the students involved were in first grade," the district court held that B.B.'s drawing was unprotected speech because it interfered with M.C.'s right "to be left alone." ER-14. But in so holding, the district court made inferences

contradicted by the record, over-relied on the age of B.B. and M.C., and inappropriately deferred to school officials.

1. Viewing the evidence in the light most favorable to B.B., M.C.'s right to be left alone was not violated

The district court concluded that M.C.'s right to be let alone was interfered with because B.B.'s drawing "included a phrase similar to 'All Lives Matter,'" a phrase "that is widely perceived as racially insensitive and belittling when directed at people of color," ER-14, and because M.C.'s mother testified that phrases like that "hurt," ER-88. Viewing the record evidence in the light most favorable to B.B., as this Court must, *Animal Legal Defense Fund*, 836 F.3d at 989, M.C.'s rights were plainly not interfered with by B.B.'s innocent drawing.

First, M.C.'s mother testified that upon quizzing M.C. about the drawing, M.C. "asked [her] what the picture was about." ER-76. M.C.'s mother responded by telling M.C. not to worry about it. ER-76. Later, when B.B. apologized to M.C. for the drawing, M.C. did not understand why B.B. was apologizing. ER-87, 89; ER-65. Taken together—and in the light most favorable to B.B.—the record does not show that M.C. was offended by B.B.'s inclusion of the phrase "any life" in the drawing or even hurt by it. And there is no evidence that B.B. "interfered" with her in any

meaningful way. The School District cannot show that punishing B.B. for her drawing "was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint." *See Tinker*, 393 U.S. at 509. *See also Wynar*, 728 F.3d at 1072 (speech that "is merely offensive to some listener" does not interfere with the rights of another); *Nuxoll ex rel. Nuxoll v. Indian Prairie Sch. Dist. #204*, 523 F.3d 668, 676 (7th Cir. 2008) (holding that T-shirt worn by student to school with phrase "Be Happy, Not Gay" was "only tepidly negative," not "derogatory" or "demeaning," and so could not be banned).

Second, Becerra objected to the inclusion of the phrase "any life" in B.B.'s drawing because of its similarity to the controversial "All Lives Matter" phrase. ER-79–80, ER-82. There is nothing in the record that demonstrates the phrases are similar in any meaningful way (they don't even share a single word). Nor is there anything in the record expounding on the controversy surrounding the phrase "All Lives Matter." Rather than cite record evidence that the phrases are similar—or record evidence that the phrase is controversial to first graders—the district court found an outside-the-record *New York Times* article that notes some individuals find "All Lives Matter"—not the phrase B.B. used—

offensive. ER-14 n.4. In any event, that some may view "All Lives Matter" as offensive is insufficient to restrict B.B.'s innocent use of "any life." *See Tinker*, 393 U.S. at 511 (prohibiting "expression of one particular opinion, at least without evidence that it is necessary to avoid material and substantial interference with schoolwork or discipline, is not constitutionally permissible"). *See also Nuxoll*, 523 F.3d at 675–76 ("context is vital" in determining whether school speech is sufficiently derogatory to warrant limitation).

Third, there is no evidence in the record that B.B. had any awareness of the controversy or used "any life" in a controversial manner. ER-97–98. And while B.B.'s motives are not dispositive, there is no evidence that including "any life" in the drawing affected M.C. despite Becerra's statement that it was "racist" and "inappropriate." ER-108–09. *See also* ER-71–72.

In sum, this case is thus nothing like *Harper*, where this Court expressly limited the reach of *Tinker*'s rights-of-others protection "to instances of derogatory and injurious remarks directed at students' minority status such as race, religion, and sexual orientation." 445 F.3d at 1183. There is simply no evidence that B.B.'s inclusion of "any life" in

her drawing was derogatory, nor that M.C. was injured by the inclusion of the phrase.

2. Elementary school students have First Amendment rights

The district court primarily relied on the age of B.B. and M.C. to hold that punishing B.B. for her drawing was not a First Amendment violation. ER-14. That decision is plainly wrong. Regardless of B.B.'s and M.C.'s ages, elementary school students possess First Amendment speech rights in school.

In *West Virginia St. Bd. of Educ. v. Barnette*, 319 U.S. at 626, 629–30, a group of school children challenged a state policy requiring them to salute the American flag and recite the pledge of allegiance each day in school. Among those children were Marie and Gathie Barnette, who were eight- and eleven-years-old at the time the controversy began. *West Virgina State Board of Education v. Barnette (1943)*, National Constitution Center.[2] That the group included young elementary school students did not concern the Supreme Court when it held that the state policy violated their First Amendment rights. 319 U.S. at 642. *Cf. Tinker*,

[2] *Available at* https://constitutioncenter.org/the-constitution/supreme-court-case-library/west-virginia-board-of-education-v-barnette.

393 U.S. at 504 (Mary Beth Tinker was a thirteen-year-old in junior high school when she wore her armband in protest).

The district court primarily relied on a Seventh Circuit case for the proposition that elementary school students' speech rights can be curtailed far more than older students. ER-13. *See Muller by Muller v. Jefferson Lighthouse Sch.*, 98 F.3d 1530 (7th Cir. 1996). But *Muller* was overruled on that point. *N.J. by Jacob v. Sonnabend*, 37 F.4th 412, 424–25 (7th Cir. 2022). And *Walker-Serrano ex rel. Walker v. Leonard*, 325 F.3d 412, 416–17 (3d Cir. 2003), expressly confirmed that elementary school students enjoy First Amendment protections while recognizing that *Tinker*'s flexible framework permit an appropriate consideration of age in determining whether speech is likely to be disruptive in school or interfere with other children's rights.

Under *Tinker*'s flexible framework, the district court erred in not taking the facts relevant to B.B.'s and M.C.'s ages in the light most favorable to B.B. A proper consideration of the record shows that *because of* B.B.'s and M.C.'s ages, M.C.'s rights were not interfered with. In other words, because both children were unaware of the adult controversy surrounding the "All Lives Matter" phrase, neither of them understood

B.B.'s inclusion of "any life" in her drawing to carry any negative connotations. Becerra and M.C.'s mother confirmed that B.B.'s motives were innocent, that M.C. did not take offense to the drawing, and that no disruptions at school resulted from the drawing. ER-71–72; ER-76, ER-84–85, ER-87, ER-89.

The district court cited *C.R. v. Eugene Sch. Dist. 4J* to point out that "[t]he *targeted* student's age is also relevant," 835 F.3d at 1153 (emphasis added), when receiving "messages based on a protected characteristic," ER-13. But to hold that M.C. was "targeted" here—in the sense that is meant by *C.R.*—is nonsensical. In *C.R.*, two sixth-grade students were surrounded on a back field after school by older children and directly sexually harassed. 835 F.3d at 1146. Analogizing B.B.'s innocent drawing to "insults" directed toward impressionable young children, and giving the drawing no First Amendment protection as a result, ER-13–14, is neither supported by the record nor the law.[3]

[3] Perhaps on a different record, or even at a different stage of these proceedings, the age of B.B. and M.C. will justify less First Amendment protection than that given to older students. But on this record and at this stage of the proceedings, B.B.'s and M.C.'s ages do not justify withholding First Amendment protection from B.B. for her drawing.

3. School officials do not have free rein over student speech

The Constitution "protects the citizen against the State itself and all of its creatures—Boards of Education not excepted." *Barnette*, 319 U.S. at 637. Students' constitutional rights must be "scrupulous[ly] protect[ed] … if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes." *Id.*

Although the Supreme Court is explicit in *Barnette* that public school officials cannot trample on the rights of students, the district court abdicated its role and deferred to Becerra's decision to punish B.B. ER-15 ("whether Becerra was right or wrong, the decision is his"). The district court declined to "second-guess" Becerra's decision out of concern that judicial review "would unduly interfere with school administration and overwhelm the judiciary." ER-15. But that is the precise rationale that the Supreme Court rejected in *Barnette*. *See* 319 U.S. at 637 (overruling *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586, 598 (1940), where concern was that judicial review of school decisions would make courts "the school board for the country."); *id.* at 638 ("The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes

of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts."). *See also LaVine*, 257 F.3d at 988 (Deference to school officials "does not mean abdication; there are situations where school officials overstep their bounds and violate the Constitution."). In performing their constitutional duty, courts need not "identify[] when speech crosses the line from harmless schoolyard banter to impermissible harassment."[4] *See* ER-14. Rather, what courts must do is enforce the burden of proof necessary to justify punishing speech deemed to cross the line. *Tinker*, 393 U.S. at 508–09, 513.

The district court's deference to Becerra and the School District here erroneously cedes B.B.'s First Amendment rights to the whims of school officials. Given that Becerra's view of whether punishment was necessary was swayed by a parent, *compare* ER-77–78; ER-80–81; ER-108–09, *with* ER-71–72, deference to Becerra is wholly unwarranted.

[4] That the district court equated B.B.'s innocent drawing to "harassment," ER-14–15, is yet another instance of the court not viewing the record in the light most favorable to B.B. and is wholly inconsistent with *Tinker*.

Deference to that decision is particularly egregious when the decision to punish B.B. conflicted with M.C.'s parents' own wishes. *See* ER-88.

The record—when viewed in the light most favorable to B.B.—does not support the district court's conclusion that B.B's innocent drawing trampled M.C.'s right to be let alone. There is essentially no evidence for that conclusion at all. In addition, the district court overemphasized B.B.'s and M.C.'s ages in holding that B.B.'s innocent speech was not entitled to First Amendment protection. And the district court deferred to local officials in a way that abdicated its duty to supervise public officials' restriction of First Amendment rights. For all these reasons, the entry of summary judgment for the School District must be reversed.

III. B.B. Was Retaliated Against in Violation of the First Amendment

A First Amendment retaliation claim requires a plaintiff to show that: (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." *Ariz. Students' Ass'n v. Ariz. Bd. of Reg.*, 824 F.3d 858,

867 (9th Cir. 2016) (collecting cases). Success on a retaliation claim only requires a plaintiff to "show that the defendant 'intended to interfere' with the plaintiff's First Amendment rights and that it suffered some injury as a result; the plaintiff is not required to demonstrate that its speech was actually suppressed or inhibited." *Mendocino Env't Ctr. v. Mendocino Cnty.*, 192 F.3d 1283, 1300 (9th Cir. 1999).

The district court considered only whether B.B. engaged in constitutionally protected activity with her drawing,[5] and because the court concluded that she did not, it granted summary judgment to Becerra on her retaliation claim. ER-15. As detailed above, B.B.'s drawing for M.C. was constitutionally protected, thus the district court erred in granting summary judgment to Becerra on B.B.'s retaliation claim.

While this Court could simply remand to the district court for analysis on the remaining retaliation factors, this Court can—and

[5] In the district court, B.B.'s First Amendment retaliation claim derived from the punishment she received for her drawing, as well as events later that year on the school playground involving Becerra and Defendant-Appellee Cleotilde Victa. ER-15; ER-47–49. On appeal, B.B. only pursues her retaliation claim against Becerra for punishing her for her drawing.

should—proceed to consider them here in the first instance. *Singleton v. Wulff*, 428 U.S. 106, 121 (1976); *United States v. Patrin*, 575 F.2d 708, 712 (9th Cir. 1978). In cases where the court of appeals is presented with a purely legal issue passed on by the district court—that is, "one for which the factual record is so fully developed as to render any further development irrelevant," *Planned Parenthood of Greater Wash. and N. Idaho v. U.S. Dep't of Health & Human Serv.*, 946 F.3d 1100, 1111 (9th Cir. 2020), the appellate court "can exercise its equitable discretion to reach an issue in the first instance." *Id.* at 1110.

Here, the district court considered only one of three factors in analyzing B.B.'s retaliation claim against Becerra. The remaining factors are "purely legal" and require no further factual development. Nor will Becerra be prejudiced by this Court's full analysis of B.B.'s retaliation claim, given that the parties fully briefed the issue on the motion for summary judgment in the district court. *See Dream Palace v. Cnty. of Maricopa*, 384 F.3d 990, 1005 (9th Cir. 2004); *Ulrich v. City and Cnty. of San Francisco*, 308 F.3d 968, 979 (9th Cir. 2002).

A. Punishing First Graders for Their Drawings Chills Future Speech

B.B.'s free speech rights were chilled due to Becerra's punishment. "[T]he test for determining whether the alleged retaliatory conduct chills free speech is objective; it asks whether the retaliatory acts 'would lead ordinary student[s] ... in the plaintiffs' position' to refrain from protected speech." *Ariz. Students' Ass'n*, 824 F.3d at 868 (quoting *O'Brien v. Welty*, 818 F.3d 920, 933 (9th Cir. 2016)).

As discussed above, Becerra made B.B. apologize to M.C. for her drawing and told her she could no longer draw and give pictures to classmates at school. ER-99–101, ER-106–07. She was also banned from participating in recess for two weeks. ER-105, ER-64. As a result of her punishment, B.B. testified that she stopped giving her drawings to friends. ER-107, ER-67.

"Given the inherent power asymmetry between" Becerra as the school's principal and B.B. (a first-grade student), "it is highly likely that [Becerra's] alleged retaliation would chill and discourage a student … of similar fortitude and conviction from exercising [her] free-speech rights." *Ariz. Students' Ass'n*, 824 F.3d at 869. And while B.B. need not show that her speech was actually limited by Becerra's punishment, *see Mendocino*

Env't Ctr., 192 F.3d at 1300, she did stop giving drawings to her friends and therefore limited her speech.

Should this Court have concerns that holding that B.B.'s speech was chilled would deprive school administrators of the ability to appropriately respond to times when stopping children from voicing particular speech is warranted, those concerns are easily resolved. Simply, where a need to restrict speech complies with *Tinker*, *Fraser*, or *Kuhlmeier*, then school officials need not worry about potential chilling effects from restricting speech. But as here, "[o]therwise lawful government action may nonetheless be unlawful if motivated by retaliation for having engaged in activity protected under the First Amendment." *O'Brien*, 818 F.3d at 932. Because Becerra punished B.B. because of the message expressed in her drawing, and because that punishment was not permissible under *Tinker*, Becerra unlawfully retaliated against B.B. And even though the degree of punishment was relatively small, the constitutional violation is not lessened. *Hyland v. Wonder*, 972 F.2d 1129, 1135 (9th Cir. 1992) (speech chilled where volunteer was removed from unpaid position after writing memorandum about San Francisco's juvenile justice system).

B. B.B.'s Drawing Was the Reason for Her Punishment

On the record of this case, there is no reasonable argument that B.B. was punished for any reason other than her drawing. *See Ulrich*, 308 F.3d at 979 (motivation factor of retaliation claim may be shown with "direct or circumstantial evidence"). B.B.'s testimony shows that solely because of the drawing, she was directed to apologize to M.C., ER-99–101, to stop drawing and giving pictures to her classmates, ER-92, ER-106–07, ER-66, and was suspended from recess for two weeks, ER-105, 62. The district court did not call B.B.'s testimony into doubt. Therefore, because "a plaintiff need only offer 'very little' direct evidence of motivation to survive summary judgment on this element," *Ulrich*, 308 F.3d at 980 (citing cases), the record here more than suffices for B.B. to prevail on the School District's motion for summary judgment as to her retaliation claim against Becerra.

CONCLUSION

The district court's order and judgment granting summary judgment to the School District on B.B.'s First Amendment claim, and to Becerra on B.B.'s First Amendment retaliation claim, should be reversed.

DATE: July 15, 2024.

Respectfully submitted,

Pacific Legal Foundation

s/ Caleb R. Trotter
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CERTIFICATE OF SERVICE

I hereby certify that on July 15, 2024, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Caleb R. Trotter
CALEB R. TROTTER

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