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' Reply Brief

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INTRODUCTION

The Defendants-Appellees' (collectively "District") brief conspicuously ignores the key role Viejo Elementary School officials played in introducing controversial political subject matter to first graders like Appellant B.B. and her classmates. *See* ER-95-97; ER-102-03. Instead, the District deflects the blame for B.B.'s punishment onto B.B. herself. The record shows, however, that B.B.'s drawing—offered as an innocent gesture of empathy to a classmate—was made in response to racially charged material taught in B.B.'s first-grade class. Try as it might to falsely portray B.B. as taking it upon herself to "distribute political messages to other students at school," *see* Answering Br. at 2, 6, the record says otherwise.

The District also attempts to paint the facts of this case as a run-of-the-mill exercise of school officials' discretion in regulating student speech. But none of the District's actions here should be met with shrugged shoulders. From introducing controversial political messages to first graders, to punishing B.B. for her predictably innocent response, to taking recess away and banning drawing, to not informing B.B.'s mother,

to the shifting explanations of Principal Becerra, ER-24, ER-50, the District's actions have been outrageous.

The District's primary defense is that it acted to protect a student from being singled out for racially focused messages. *See* Answering Br. at 14. But the evidence in this case shows otherwise. There is no evidence that M.C. was offended by B.B.'s drawing. M.C.'s parents told Becerra expressly that they did not want B.B. punished. School policy even prohibited the punishment. And most egregiously, the racially sensitive subject matter was introduced to B.B. and M.C. *by the school*.

The District cannot satisfy *Tinker*'s "demanding standard" to produce evidence sufficient to justify B.B.'s punishment. *Mahanoy Area Sch. Dist. v. B.L. ex rel. Levy*, 594 U.S. 180, 193 (2021). This is not a close call either. All the record shows is that Becerra and M.C.'s parents took offense to B.B.'s inclusion of "any life" in her drawing, and even though they knew she meant nothing negative by it—and that M.C. was in no way bothered—B.B. was severely punished. That punishment violates the First Amendment under *Tinker*.

REPLY TO THE DISTRICT'S STATEMENT OF THE CASE

The District does not directly contest the facts as set out in B.B.'s Statement of the Case—facts that were mostly found by the district court in the summary judgment proceedings below. *See* ER-8. Nevertheless, the District states that B.B.'s drawing was "not a part of the school curriculum." Answering Br. at 3. The District's statement ignores that the subject matter of B.B.'s drawing was introduced to B.B. at school. *See* ER-95-97; ER-102-03. While B.B.'s teachers may not have instructed her to make the drawing, it was made in direct response to the curriculum taught. ER-94-95.

The District seemingly casts doubt on whether the punishment B.B. received for her drawing ever happened. Answering Br. at 4-5. But as the district court correctly noted in considering the District's motion for summary judgment, B.B.'s testimony must be construed "in the light most favorable to B.B." ER-8. And on appeal, the district court's factual findings are subject to the "clearly erroneous" standard of review. Fed. R. Civ. P. 52(a)(6); *Ambassador Hotel Co., Ltd. v. Wei-Chuan Investment*, 189 F.3d 1017, 1024 (9th Cir. 1999); *Crittenden v. Chappell*, 804 F.3d 998, 1006-07 (9th Cir. 2015). Because the District makes no attempt to satisfy

that standard, this Court must accept the facts as found by the district court.

ARGUMENT

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

The District acknowledges that *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969), governs this case. Answering Br. at 10. As fully discussed in B.B.'s Opening Brief at 10-11, *Tinker* requires school officials to justify the punishment of a student's speech with evidence that the speech "materially disrupts classwork or involves substantial disorder or invasion of the rights of others." 393 U.S. at 513. Evidence of mere "discomfort and unpleasantness that always accompany an unpopular viewpoint" is insufficient. *Id.* at 509.

A. *Tinker*'s Substantial-Disruption Prong Is Not Implicated

While the lower court did not apply *Tinker*'s better known "substantial disruption" prong, ER-12, 14-15, the District erroneously asserts that this Court can affirm by relying on that unaddressed prong. Answering Br. at 31-32. The Supreme Court's application of that prong states that "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." *Tinker*, 393 U.S. at 509 (quoting *Burnside v. Byars*, 363 F.2d 744, 749 (5th Cir. 1966)). That is plainly true here.

Solely relying on M.C.'s mother's (Clay) initial email in which she expressed concern about the drawing, SER-80, the District declares that "Becerra acted in an effort to avoid a substantial disruption or material interference of school activities." Answering Br. at 32. But the District has absolutely no evidence of potential disruption. In addition to there being no disruption when B.B. gifted M.C. the drawing, the evidence shows that there was no likelihood of *any* further disruption (much less substantial disruption). Both Clay and Becerra testified as much. *See* ER-88 (Clay discussing her understanding of innocence behind the drawing). *See also* ER-71-72 (Becerra stating that "I didn't think it was a big deal back then regarding the drawing").

The District also tries to argue that the drawing *could have* caused disruption and that it acted to prevent such disruption. But at issue in this appeal is whether Becerra's *punishment* of B.B. violated her First Amendment rights; this is not a case where a school official sought to stop

speech prior to a potential disruption. Therefore, the District must produce evidence that the *punishment* was necessary to prevent a substantial disruption. *See Karp v. Becken*, 477 F.2d 171, 176 (9th Cir. 1973) ("Absent justification, such as a violation of a statute or school rule, they cannot discipline a student for exercising [First Amendment] rights."). Given that Clay expressly informed Becerra that she and her husband did not want B.B. punished for her drawing that had already been given to M.C., ER-88, and that M.C. had no awareness that there was any problem with the drawing, ER-65, 76, 87, 89, there is no evidence that any disruption would occur were B.B. not punished. Becerra's punishment of B.B. cannot be sustained under *Tinker*'s substantial disruption prong. *See Karp*, 477 F.2d at 176 ("The balancing necessary to enable school officials to maintain discipline and order allows curtailment but not necessarily punishment.").

B. B.B.'s Drawing Did Not Interfere with M.C.

As fully discussed in B.B.'s Opening Brief, "[t]he precise scope of *Tinker*'s interference with the rights of others language is unclear." *See Wynar v. Douglas Cnty. Sch. Dist.*, 728 F.3d 1062, 1072 (9th Cir. 2013) (quoting *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 217 (3d Cir.

2001) (Alito, J.)). Nevertheless, speech must be more than "merely offensive to some listener" to be punishable. *Wynar*, 728 F.3d at 1072.[1]

The District is correct that this Court has not yet joined the Eighth Circuit in adopting a rule that *Tinker*'s rights-of-others prong is only implicated by tortious speech. *See 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). This Court has not opined on that aspect of *Kuhlmeier* at all. But contrary to the District's assertion, *see* Answering Br. at 12, *Harper v. Poway Unified Sch. Dist.*, did not reject the argument that *Tinker*'s rights-of-others prong only applies to tortious speech. 445 F.3d 1166, 1177-78 (9th Cir. 2006), *vacated as moot by*, 549 U.S. 1262 (2007).[2] Rather, this Court rejected the argument that the prong applies only when a student is "physically accosted." *Id.* at 1177. And as speech can

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[1] At various points, the District frames this case as being about M.C.'s "right to not be exposed to the 'adult controversy.'" *See* Answering Br. at 16. As already noted, this is an "adult controversy" that the District is responsible for introducing to the first grade class. But in any event, the District cites no authority establishing such a "right," and *Tinker*—a case upholding silent protests of American involvement in the Vietnam War—shows otherwise.

[2] While *Harper* is cited extensively in both parties' briefs due to the similarity of facts with this case, the opinion has been vacated by the Supreme Court.

be tortious, *see*, *e.g.*, *Unelko Corp. v. Rooney*, 912 F.2d 1049, 1058 (9th Cir. 1990) (claims of tortious interference with business relationships are subject to First Amendment analysis), *Kuhlmeier* is not inconsistent with *Harper*.[3]

Relying on *Harper*, the District contends that B.B. was properly punished for her innocent drawing because: (1) B.B. and M.C. did not understand the drawing, Answering Br. at 15-18; (2) school officials deserve discretion over the speech of young students, *id*. at 18-22, 28-30; (3) the drawing included "political phrases concerning an 'adult controversy,'" *id*. at 22-25; and (4) the punishment was "*de minimis*," *id*. at 25-27. None of these rationales are convincing.

1. *There is no evidence that justifies punishing B.B.*

The District argues that B.B.'s drawing is not protected by the First Amendment because "there was no contribution to the 'marketplace of

[3] The District's argument that "speech directed toward an individual" triggers *Tinker*'s rights-of-others prong after *Harper* drastically overstates the case. *See* Answering Br. at 13. *Harper* holds that individual-focused speech *may* trigger *Tinker* so long as the speech is sufficiently injurious, whereas the same speech targeted at a group will not (at least under the rights-of-others prong). *See* 445 F.3d at 1182.

ideas.'"[4] Answering Br. at 16. The District is fortunately not the arbiter of what speech merits protection. In fact, this Court and the Supreme Court have rejected the District's stingy understanding. *See*, *e.g.*, *Dex Media West, Inc. v. City of Seattle*, 696 F.3d 952, 954 (9th Cir. 2012) (yellow pages phone books "qualify for full [First Amendment] protection"); *Universal City Studios, Inc. v. Corley*, 273 F.3d 429, 446 (2d Cir. 2001) ("Even dry information, devoid of advocacy, political relevance, or artistic expression, has been accorded First Amendment protection.") (collecting cases).

Because B.B.'s speech is plainly protected, the District is required to show evidence of actual or likely interference with the rights of students. *Tinker*, 393 U.S. at 508-09, 511, 513-14. Such a showing is certainly not "problematic," *see* Answering Br. at 17; it is what the Constitution demands. *Cf. J.C. v. Beverly Hills Unified Sch. Dist.*, 711 F.Supp.2d 1094, 1117 (C.D. Cal. 2010) (evidence of substantial disruption is required; schools cannot punish students merely because another student takes offense). As discussed, even though speech must be more

[4] The District paradoxically argues the drawing was a "political message," *see* Answering Br. at 1, and that it does not contribute to the marketplace of ideas, Answering Br. at 16.

than "merely offensive," *Wynar*, 728 F.3d at 1072, the record shows that B.B.'s drawing is objectively innocent and that M.C. took no offense to it whatsoever. There was no disruption at all. And even if this Court considers only Clay's views on the controversy, there is still insufficient evidence to hold that M.C. was interfered with in a manner that justifies the school's punishment of B.B.

Clay confirmed that M.C. had no understanding of the messages on the drawing or of B.B.'s apology. ER-76, 87-89. And even though Clay testified that the "any life" message could "hurt," ER-88, she also testified that the drawing did not hurt M.C. and that she and her husband did not believe it was intended to hurt M.C.[5] ER-86-89; SER-112.

The District's feigned concern with parents having a voice is particularly rich. Becerra not only ignored M.C.'s parents' wish that B.B. not be punished, ER-88, but he also failed to tell B.B.'s parents of the harsh punishment he meted out against B.B., ER-8. In any event, that a parent may be concerned does not absolve school officials of their

[5] Even if "any life" was hurtful, there is no "generalized 'hurt feelings' defense to a[n elementary] school's violation of the First Amendment rights of its students." *Zamecnik v. Indian Prairie Sch. Dist. No. 204*, 636 F.3d 874, 877 (7th Cir. 2011).

responsibility to justify limiting speech with evidence that the speech will ""materially disrupt[] classwork or involve[] substantial disorder or invasion of the rights of others." *Tinker*, 393 U.S. at 513-14. Here, the record shows Becerra had no evidence that could plausibly satisfy that standard. ER-71-72.

2. *Deference is unwarranted here*

a. Deference to Becerra is unwarranted

While deference may be appropriate to school officials generally, it is not absolute. In *LaVine v. Blaine Sch. Dist.*, 257 F.3d 981, 988 (9th Cir. 2001), this Court recognized that "deference does not mean abdication; there are situations where school officials overstep their bounds and violate the Constitution."[6]

Cases where school officials overstepped and did not receive deference for restricting speech include *Tinker*, 393 U.S. at 507, *Karp*,

[6] The District cites pre-*Tinker Epperson v. State of Ark.*, 393 U.S. 97, 104 (1968), for the proposition that courts are not to intervene in school operations. Answering Br. at 28. But the District omits the Court's qualifier that intervention is unwarranted *unless* school conflicts "directly and sharply implicate basic constitutional values." *Id. Cf. Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988) ("judicial intervention to protect students' constitutional rights" required when school officials act beyond bounds permitted by the Court's school-speech cases).

477 F.2d at 174, and *West Virgina State Board of Education v. Barnette*, 319 U.S. 624, 640 (1943) ("We cannot, because of modest estimates of our competence in such specialties as public education, withhold the judgment that history authenticates as the function of this Court when liberty is infringed.").[7] *See also Chandler v. McMinnville Sch. Dist.*, 978 F.2d 524, 527 (9th Cir. 1992) (acknowledging general deference to schools but applying *Tinker* to reverse dismissal of students' complaint); *Pinard v. Clatskanie Sch. Dist. 6J*, 467 F.3d 755, 764, 768 (9th Cir. 2006) (citing *LaVine* and holding school district to its burden under *Tinker* to justify disciplining students for their speech). This case also squarely presents a situation where this Court must apply *Tinker* and hold the District to its evidentiary burden.

[7] Contrary to the District's assertion, Answering Br. at 28-29, the fact that *Barnette* involved a school board policy and potential expulsions or prosecutions, rather than a principal's ad hoc decision to hand out lesser punishment, does not make it inapt. Nothing in *Barnette* limits its holding to school board policies and stiff punishments to the exclusion of actions taken by other school officials and relatively milder punishments. *See* 319 U.S. at 642 ("We think the action of the local authorities in compelling the flag salute and pledge … invades the sphere of intellect and spirit which it is the purpose of the First Amendment … to reserve from *all official control*.") (emphasis added).

Further, Becerra's punishment of B.B. was inconsistent with District policies. For example, policy BP 5184(a) states that "[t]he Governing Board respects students' rights to express ideas and opinions, take stands, and support causes, whether controversial or not, through their speech, writings," etc. FER-3. The policy also states that "[s]tudents shall not be disciplined solely on the basis of constitutionally protected speech or other communication." *Id*. As the record here establishes that B.B. was punished for no reason other than the innocent drawing she gave to M.C., her punishment violated that policy. Becerra is thus due no deference.

Deference is also particularly inappropriate here given that Becerra's statements concerning the school's curriculum, B.B., her drawing, and the punishment she received, run counter to the record and facts found by the district court. In response to B.B.'s mother's inquiry after she first learned about the punishment, Becerra stated that B.B. "was not punished for her drawing nor … made to apologize for it." ER-50. Becerra further stated that "I do not teach nor have I ever taught about Black Lives Matter to anyone." ER-50. But as the district court found, Becerra informed B.B. that her drawing was "racist" and

"inappropriate," told her she could no longer draw at school, and instructed her to apologize to M.C. ER-8, 14. The record also shows that B.B. was introduced to the concept of Black Lives Matter at school. ER-95-97; ER-102-03.

In punishing B.B., Becerra also acted against the wishes of M.C.'s parents. ER-88 ("I don't want her punished. I don't want her humiliated. I don't want her … talked down to. I don't want her made fun of."). Thus, even if responding to the wishes of a student's parents immunized school officials from their constitutional obligations to all students, *see* Answering Br. at 29 ("Clay demanded Becerra take action"), Becerra went against those wishes here.

b. Sister courts would not uphold B.B.'s punishment

That the speech at issue in this case originated with a first grader does not, standing alone, warrant deference to Becerra's decision to punish B.B. Far from being "directly on point," *see* Answering Br. at 18, *Walz ex rel. Walz v. Egg Harbor Twp. Bd. of Ed.*, 342 F.3d 271, 273-74 (3d Cir. 2003), involved a child distributing overt religious messages with

gifts at school holiday parties.[8] The issue before the court was "whether an elementary school student has a First Amendment right to promote an unsolicited religious message during an organized classroom activity." *Id*. at 272. The organized activities in *Walz* (holiday parties) "were highly structured, supervised, and regulated." *Walz ex rel. Walz v. Egg Harbor Twp. Bd. of Ed.*, 187 F.Supp.2d 232, 241 (D. N.J. 2002).

Here, B.B. did not "promote" any message other than trying to include her classmate M.C., and she did not give M.C. the drawing as part of any organized activity. ER-94. Rather, the drawing was made in response to a lesson in class and given to M.C. at some later point. *Id*. This case is thus far afield from *Walz* where the student "controvert[ed] the rules of a structured classroom activity with the intention of promoting an unsolicited message." 342 F.3d at 280. Furthermore, unlike *Walz*, this case concerns the punishment imposed for innocent speech,

[8] If *Walz* is on point with this case, then it supports B.B. *See id*. at 279 ("Individual student expression that articulates a particular view but that comes in response to a class assignment or activity would appear to be protected."). If, as the District contends, B.B. articulated a political message about "Black Lives Matter" and "All Lives Matter," she only did so in response to her class being taught about those phrases. *See* ER-94-98.

not the school's attempt to prevent unwanted speech from occurring in the first instance.

The District's remaining authority fares no better. In *Walker-Serrano ex rel. Walker v. Leonard*, 325 F.3d 412, 414, 418-19 (3d Cir. 2003), the court held that a student's First Amendment rights were not violated when the school stopped her from distributing a petition (but was not punished) during quiet reading time in class and on the icy playground because it proved disruptive. *Muller by Muller v. Jefferson Lighthouse Sch.*, 98 F.3d 1530 (7th Cir 1996), was overruled by *N.J. by Jacob v. Sonnabend*, 37 F.4th 412, 425 (7th Cir. 2022). And even if it was good law, the portions cited by the District drastically reducing speech rights of young school children, 98 F.3d at 1538, were not joined by either of the other two judges on the panel, *see id.* at 1545, 1547.

To the extent that *Morgan v. Swanson*, 659 F.3d 359, 386 (5th Cir. 2011), is persuasive, it undercuts the District. The District cannot introduce "serious political" issues to young students and then punish them for responding to those issues. But that is what the District did in teaching "Black Lives Matter" to first graders at Viejo Elementary and

then punishing B.B. for innocently including "any life" in a drawing alongside the District's preferred phrase.

3. *The controversy here was the District's introduction of Black Lives Matter to first graders, and Becerra did not protect M.C.*

The District blatantly mischaracterizes B.B.'s innocent drawing. *See* Answering Br. at 22. While it is true that her drawing included a misspelled version of the "Black Lives Matter" phrase that she was taught in her first-grade class, ER-94-97, ER-102-103, no one—not even M.C.'s parents—expressed concern with the drawing including that phrase. ER-78-80. Instead, B.B.'s inclusion of "any life" was objectionable to M.C.'s parents and Becerra even though there is no evidence that B.B. or M.C. understood the phrase to carry any negative connotations. SER-80; ER-76, 79, 82. B.B.'s inclusion of "any life" was only controversial because *adults made it so*.

Regardless of whether B.B. intended "any life" to mean "All Lives Matter," there is no evidence that she meant it in any way other than an innocently literal way. ER-97-98 ("I only heard this, like, black lives matter, any life, in the book. That's when I heard it and saw it."). This is confirmed by the district court having to look beyond the record to

conclude that the phrase is "widely perceived as racially insensitive and belittling when directed at people of color." ER-14. The only support for the district court's conclusion was an out-of-the-record New York Times article regarding "All Lives Matter." *Id.* No evidence in the record supports the contention that B.B.'s inclusion of "any life" carried any political or controversial statement; rather, B.B.'s use of the phrase is properly understood as an innocent platitude shared in a gesture of friendship and empathy.

Accordingly, *Harper*, 445 F.3d at 1180, does not help the District. There, this Court noted that "derogatory messages" directed at students "can be harmful to their self-esteem and to their ability to learn." But B.B.'s drawing is nothing like the messages at issue in *Harper*, where a student intentionally wore a provocative shirt to school announcing his beliefs that homosexuality is wrong on the same day that the school's "Gay-Straight Alliance" held a "Day of Silence" to support homosexual students. *Id.* at 1171-72. B.B.'s inclusion of "any life" is in no way equivalent to the intentionally derogatory messages at issue in *Harper*.

Recognizing that punishing only B.B.'s innocent introduction of "any life," the District transitions to arguing that it punished the entirety

of the racially-focused drawing. Answering Br. at 24-25. However, the substantial record (and drawing all reasonable inferences in B.B.'s favor) shows that Becerra only objected to the "any life" portion of her drawing. ER-14. Clay specifically informed Becerra of her objections to "any life," SER-80, and testified that Becerra informed her that B.B.'s drawing "went against everything that they teach there, which is like … kindness and respect and everyone is equal," ER-82. *See also* FER-5 (referring to discussion of Becerra's opinion of the drawing found at ER-82).

Given that B.B. was taught positively about Black Lives Matter at school, the only aspect of the drawing that Becerra could have been objecting to was the "any life" phrase. The same inference can be drawn in B.B.'s favor because of the punishment meted out by the District. Stated differently, because the "Black Lives Matter" portion of B.B.'s drawing simply repeated what she was taught in school, then punishment for its inclusion in the drawing would be nonsensical. Indeed, the district court would have had no reason to look outside the record to point to any controversy linked to the "any life" phrase, ER-14, unless it was specifically at issue. All required factual inferences in B.B.'s

favor weigh toward her being punished solely for including "any life" in her drawing.

The District plays fast and loose with the record in its attempt to show that it objected to the entirety of B.B.'s drawing. This self-serving narrative is designed to avoid the obvious concerns about viewpoint discrimination, but the record is clear that the District *only* objected to "any life." While B.B. meant the phrase "with an inclusive denotation," ER-14, the District interpreted it as a "racist" "political message." ER-8; *see also generally* Answering Br. But "[t]he government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction." *Rosenberger v. Rector and Visitors of Univ. of Virginia*, 515 U.S. 819, 829 (1995). And as this Court noted in *Nurre v. Whitehead*, 580 F.3d 1087, 1095 n.6 (9th Cir. 2009), viewpoint discrimination is "impermissible no matter the forum." *See also* Brief of Parents Defending Education as Amicus Curiae Supporting Appellants at 8-12, Doc. 17.2.

Nor did Becerra's punishment of B.B. in any way "protect M.C.'s right to be secure" from political topics. Answering Br. at 24-25. First, as noted above, there is no such "right." Second, B.B.'s punishment was

imposed after her drawing had already been given to M.C. Third, it was *the District* that introduced racial political topics to its students, and it is *the District* selectively choosing which political topics to censor. Fourth, Clay testified that when M.C. asked her what the drawing meant, she told her not to worry about it, ER-76, and as a result, M.C. had no knowledge that anything in the drawing was problematic. Fifth, M.C. expressed that she did not understand why B.B. was apologizing. ER-65. The evidence is overwhelming; the District's punishment had nothing to do with protecting M.C. *Cf. Mahanoy*, 594 U.S. at 210 (Alito, J., concurring) (unlawful to punish speech rather than consider whether the speech would lead to disruption).

The District also misconstrues Becerra's punishment of B.B., as Becerra did not merely "regulate" B.B.'s speech. *See* Answering Br. at 24. He banned her from drawing, took away recess, and forced her to apologize without any explanation beyond claiming her drawing was "racist" and "inappropriate." ER-108-09; ER-8. It would be one thing had Becerra only told B.B. not to give M.C. drawings again, or to not make drawings about Black Lives Matter or "any life," but that is not what

Becerra did.[9] He punished B.B. and did so in a way that did not benefit or protect M.C. in any way whatsoever.

4. *B.B.'s punishment was sufficient to implicate the Constitution*

The District asserts that because B.B. was not suspended or expelled, her punishment "do[es] not amount to a constitutional violation." Answering Br. at 26. There is no authority for this sweeping position from any court.

The authorities relied upon by the District offer no support. *See* Answering Br. at 26-27. Just because some punishments were upheld under *Tinker,* it does not follow that those cases establish a baseline of punishment needed to invoke *Tinker*. In none of those cases was the punishment upheld *because* it was minimal; rather, it was upheld because it satisfied the well-established factors laid out in *Tinker*.

In *C.R. v. Eugene Sch. Dist. 4J*, 835 F.3d 1142, 1147, 1152-53 (9th Cir. 2016), a seventh grader's two-day suspension for sexually harassing two younger students was upheld because the *sexual harassment*

[9] To be clear, B.B. is not conceding that such discipline would necessarily be constitutional, only that it would fall on the side of "regulating" speech more than punishing it.

"interfered with the younger students' rights to be secure and let alone." *Id.* at 1153 (citing *Tinker*). In *Wynar*, 728 F.3d at 1070-72, a 90-day expulsion was upheld because the student's messages *threatening a school shooting* crossed the line under either of *Tinker*'s prongs.[10] And in *Brandt v. Bd. of Ed. of City of Chicago*, 480 F.3d 460, 465 (7th Cir. 2007), the court's discussion of the degree of punishment was made in the context of the plaintiffs' claim for damages, not in considering whether the punishment sufficed for a constitutional violation in the first instance.

The District is simply wrong that these cases establish some baseline of punishment necessary to show a *Tinker* violation. Regardless, the District's view on the severity—or lack thereof—of B.B.'s punishment, beggars belief. To first-grader B.B., being told her drawing is "racist" and "inappropriate," made to apologize without any explanation, prohibited from drawing and sharing pictures with friends, and then forced to sit on the sidelines and watch classmates enjoy recess

[10] Even while upholding the constitutionality of the expulsion, this Court expressed concerns over the harshness of the punishment in comparison to *LaVine*. *See Wynar*, 728 F.3d at 1072.

for two weeks without her is obviously severe.[11] *See* ER-66-67. And at this stage of the proceedings, all facts must be construed in the light most favorable to B.B.

II. B.B. WAS RETALIATED AGAINST

To succeed on her First Amendment retaliation claim, B.B. must show that she: (1) "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." *Ariz. Students' Ass'n v. Ariz. Bd. of Reg.*, 824 F.3d 858, 867 (9th Cir. 2016) (collecting cases). The record contains ample evidence to warrant reversal of the district court's dismissal of B.B.'s retaliation claim.

First, as discussed above and in B.B.'s Opening Brief, B.B.'s drawing was constitutionally protected. Opening Br. at 8-22. Seeking to avoid that conclusion, the District misconstrues the fact-specific analysis in *Corales v. Bennett*, 567 F.3d 554, 563 (9th Cir. 2009), and misapplies it as a categorical rule imposing an additional step in analyzing

[11] B.B.'s punishment arguably exceeds that in *C.R.*, which the District classifies as "significant." *See* Answering Br. at 26.

retaliation claims. *See* Answering Br. at 33 ("court must determine the scope of the discipline"). While the *Corales* Court found it necessary to clarify the allegedly retaliatory discipline in that case, such a step is not required in all cases with retaliation claims. 567 F.3d at 563. Regardless, the scope and degree of punishment received by B.B. in this case is not subject to reasonable dispute.

Nor does the unsurprising fact that some punishments have been upheld under *Tinker* affect whether B.B.'s speech here was constitutionally protected. *See* Answering Br. at 33. In *C.R.*, 835 F.3d at 1152-53, this Court upheld the suspension of a student for off-campus speech that *sexually harassed* other students. In so doing, the suspension was not upheld because it "was so minimal" as to "not constitute retaliation," Answering Br. at 33, but because the offending speech was punishable after applying *Tinker*'s rights-of-others prong. *C.R.*, 835 F.3d at 1152-53.

The same is true about *Wynar*. There, this Court held that the suspension and expulsion of a student for posting messages online *threatening a school shooting* were constitutional under both *Tinker* prongs. 728 F.3d at 1070-72. And although this Court upheld the

punishment, it noted concern with the degree of punishment imposed. *Id.* at 1072. The District here thus provides no support for its implied claim that punishment must be severe before plaintiffs may claim First Amendment retaliation. To the contrary, "even minor acts of retaliation can infringe on … First Amendment rights." *Coszalter v. City of Salem*, 320 F.3d 968, 975 (9th Cir. 2003).

Second, even though B.B. need not show that her speech "was actually suppressed or inhibited," *Mendocino Env't Ctr. v. Mendocino Cnty.*, 192 F.3d 1283, 1300 (9th Cir. 1999), B.B.'s speech *was chilled*. Notwithstanding that B.B. kept drawing for herself after being punished by Becerra, ER-62, she no longer gave her drawings to her classmates because of that punishment, ER-107, ER-67. It is thus reasonably likely that other first graders would similarly "refrain from protected speech" if their principal told them to. *See Ariz. Students' Ass'n*, 824 F.3d at 868-69.

Third, B.B.'s drawing was the reason for her punishment, and the District makes no effort to argue otherwise. The record shows that, because of B.B.'s drawing, Becerra directed her to apologize to M.C., ER-99-101, told her to stop drawing more pictures and giving them to her

classmates, ER-92, ER106-07, ER-66, and she was then removed from recess for two weeks, ER-105, 62. The district court erred in granting summary judgment to the District on B.B.'s First Amendment retaliation claim.

III. BECERRA DOES NOT HAVE QUALIFIED IMMUNITY

Qualified immunity does not provide an alternative basis to affirm, because punishing a student for innocent speech has long been clearly established as unlawful.[12] This case involves nothing more than the application of settled law to a slightly new factual permutation. The Ninth Circuit has repeatedly concluded that officials are not immune for their unlawful actions simply because the courts have not addressed an

[12] The District asserts that B.B. waived her right to respond on qualified immunity because B.B. did not discuss the issue in the opening brief. *See* Answering Br. at 34, 36-37. This misstates the law. The district court only addressed the first prong of qualified immunity—whether a constitutional right was violated—so B.B.'s opening brief focused on this issue. *See* Opening Br. at 4-5. The district court did not address whether the right was "clearly established," so B.B. had no obligation to refute it. *See Warmenhoven v. NetApp, Inc.*, 13 F.4th 717, 729 (9th Cir. 2021) ("Petitioner does not waive a challenge to any ground for [the district court's ruling] in its opening brief on appeal that was not relied on in the district court's order."). In any event, because the district court never analyzed this issue, if this Court reverses on the question of whether there was a constitutional right, this Court should remand to the district court to determine in the first instance whether that right was clearly established.

identical fact pattern. This Court should reject the application of qualified immunity.

To overcome qualified immunity, B.B. must show that the District (1) "violated a federal statutory or constitutional right" and (2) that 'the unlawfulness of their conduct was clearly established at the time." *Moore v. Garnand*, 83 F.4th 743, 750 (9th Cir. 2023). For all the reasons stated above, the District violated B.B.'s First Amendment rights. The only remaining question is whether the District's conduct was clearly established as unlawful.

This Court has clarified that the clearly-established inquiry "does not require a case directly on point." *Moore*, 83 F.4th at 750. Courts must define the right with "specificity," and ask whether the right, as defined, was established in this Court's law at the time of the conduct. *See Gordon v. Cnty. of Orange*, 6 F.4th 961, 969 (9th Cir. 2021). The task is to strike a balance where officials can "fairly be said to be on notice that their conduct was forbidden, but with a sufficient measure of abstraction to avoid a regime under which rights are deemed clearly established only if the precise fact pattern has already been condemned." *Id.*

Here, District officials knew or should have known their punishment of B.B. violated clearly established law. *Tinker* is explicit that students are entitled to freedom of expression. 393 U.S. at 511. *See also* FER-3. *Tinker* only permits restriction of speech when there is sufficient evidence of either substantial disruption or collision with the rights of other students to be secure and be let alone. *Id*. at 508, 514. The District could not have reasonably feared disruption from a private drawing given from one student to another, and there is no evidence M.C. was offended by the drawing.

The District makes two primary arguments for setting this case apart from *Tinker*. First, is B.B.'s age. Second, is the supposedly minor punishment inflicted on B.B. Neither argument supports a finding of qualified immunity on summary judgment.

First, B.B.'s age does not set this case outside the scope of prior case law. *Tinker* itself is not limited by age, and the Supreme Court has confirmed that elementary school students have First Amendment rights in school. *See*, *e.g.*, *Barnette*, 319 U.S. 624 (students, ages eight and eleven, could not be compelled to salute the flag and recite the pledge of allegiance every day). B.B.'s and M.C.'s ages mattered, as this Court

explained in *C.R.*, only because it could have affected whether the speech may have been disruptive or interfered with students' rights. And here, consideration of the students' ages actually made it less likely that M.C.'s rights could have been implicated, because neither she nor B.B. understood the adult controversy associated with "All Lives Matter." *See* Opening Br. at 18-19.

Second, the degree of punishment inflicted on B.B. has no bearing on the question of whether B.B. engaged in protected expression. But even if it were relevant, it simply isn't true that the punishment here amounted to "telling a first-grade student to say 'I'm sorry' and sitting out recess." Answering Br. at 37. Rather, the District labeled her drawing "racist," required an apology, prohibited B.B. from drawing and giving those drawings to her friends, and then banned her from recess for two weeks, requiring her to sit on a bench and watch her classmates play without her. Opening Br. at 3-4. These facts, which must be accepted at this stage, leave no doubt that B.B. was punished for her speech. Importantly, the punishment was also due *solely* to B.B.'s speech.

As this Court recently stated, "[b]ased on the long-established precedent of both this court and the Supreme Court, a reasonable school

administrator … would have known that [] the perceived unpopularity of a political view is not itself justification to prohibit protected expression." *See Dodge v. Evergreen Sch. Dist. #114*, 56 F.4th 767, 787 (9th Cir. 2022). This case is the same. The District here admittedly did not punish B.B. because of any fear of disruption, or because of any reaction on the part of M.C. Rather, they did so because of the administration's particular views on B.B.'s expression. This was patently unreasonable under clearly established law.

IV. POLICY CONCERNS DO NOT JUSTIFY AFFIRMANCE

Concerns about overwhelming the judiciary should a school's punishment of a student be held unconstitutional have been voiced for decades. *See Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586, 598 (1940) (concerned about the Court becoming the "school board for the country"). But in overruling *Gobitis*, the Court in *Barnette* recognized that "none who acts under color of law is beyond the reach of the Constitution." 319 U.S. at 638. In the decades since *Barnette* and *Tinker* were decided, courts have upheld the rights of students while continuing to function.

There is nothing about the unusually outrageous facts of this case that risk expanding the ability of students to challenge punishments.

While B.B. and the District disagree about the precedential effect of the lower court's decision regarding elementary school students' First Amendment rights, *compare* Opening Br. at 7, 17, *with* Answering Br. at 13-14, even the District agrees that students possess those rights, Answering Br. at 14. Obviously, then, courts will be called upon to enforce those rights in appropriate cases. And in this case at least, litigation could have been avoided entirely if Becerra had simply heeded the wishes of M.C.'s parents and common sense and complied with school district policy. *See* ER-88; FER-3.

CONCLUSION

For the reasons discussed above and in B.B.'s Opening Brief, the district court's summary judgment order and judgment should be reversed.

DATED: November 4, 2024.

Respectfully submitted,

Pacific Legal Foundation

s/ Caleb R. Trotter
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CERTIFICATE OF SERVICE

I hereby certify that on November 4, 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

CERTIFICATE OF COMPLIANCE FOR BRIEFS

9th Cir. Case Number: 24-1770

I am the attorney or self-represented party.

This brief contains 6,495 words, excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

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DATE: November 4, 2024.

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