FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RACHEL G. DAMIANO; KATIE S. 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, *Defendants-Appellees*.	No.23-35288 D.C. No. 1:21-cv-00859-CL OPINION

Appeal from the United States District Court
for the District of Oregon
Mark D. Clarke, Magistrate Judge, Presiding

Argued and Submitted June 3, 2024
Portland, Oregon

Filed June 17, 2025

Before: Johnnie B. Rawlinson, Danielle J. Forrest, and Jennifer Sung, Circuit Judges.

Opinion by Judge Sung

SUMMARY*

First Amendment/Equal Protection

The panel affirmed in part and vacated in part the district court's summary judgment in favor of Grants Pass School District and individual defendants, and remanded, in a lawsuit brought by Rachel Sager and Katie Medart alleging that defendants terminated them from their positions with the District in retaliation for their protected speech pertaining to gender identity, parental rights, and education policy, and discriminated against them on the basis of their religion and viewpoint.

The District employed Medart as a middle school science and health teacher and Sager as an assistant middle school principal. Plaintiffs created, using their own devices and on their own time, the "I Resolve" campaign, which included a website and a video, uploaded to YouTube. Sager, among other things, sent emails from her school account to District employees which provided a link to the "I Resolve" website. Following complaints by employees, students, and

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

concerned citizens, and an independent investigator's determination that plaintiffs violated District policies, the District terminated plaintiffs but subsequently reinstated them and transferred them to other positions.

The panel affirmed in part and vacated in part the district court's summary judgment for defendants on plaintiffs' claim that defendants retaliated against them for engaging in speech protected by the First Amendment. The panel determined that there were genuine disputes regarding the circumstances of plaintiffs' expressive conduct and the extent of the resulting disruption to the District's operations and educational environment. In affirming the summary judgment, the panel found that the individual District defendants were entitled to qualified immunity on the First Amendment claim for damages because the record contained undisputed facts showing that plaintiffs' expressive conduct gave rise to significant actual and predicted disruption to the District's operations and educational environment and it was not clearly established in 2021 that a school district could not terminate a teacher and assistant principal under such circumstances.

The panel vacated the grant of summary judgment to the District on the First Amendment claim for damages because at this stage, given that factual disputes are to be resolved in favor of plaintiffs, the panel could not conclude that defendants had shown that the actual or reasonably predicted disruption was so substantial that the District's interests outweighed plaintiffs' interest as a matter of law under a *Pickering* balancing test. The panel vacated the district court's summary judgment to all defendants on the First Amendment retaliation claims seeking declaratory and injunctive relief.

The panel affirmed in part and vacated in part the district court's summary judgment on plaintiffs' as-applied, content- and viewpoint-based discrimination claims, which challenged the District's original and amended speech policies on the grounds that defendants exercised unbridled discretion under the policies to discriminate against plaintiffs and punish them for their views. For the reasons explained above, the panel held that the individual defendants were entitled to qualified immunity and affirmed the district court's summary judgment as to the damages claim. The panel vacated the grant of summary judgment to the District on the as-applied, content- and viewpoint-based discrimination claim for damages, and vacated the grant of summary judgment to all defendants on the related claims for declaratory and injunctive relief.

The panel affirmed in part and vacated in part the district court's summary judgment on plaintiffs' Fourteenth Amendment Equal Protection claim, which alleged that defendants treated district employees differently based on whether they endorsed the concept of shifting gender identity. The panel assumed, without deciding, that there was a genuine factual dispute regarding whether defendants treated similarly situated employees differently based on their views on gender identity. Although there were genuine factual disputes that prevented the panel from concluding that defendants prevailed as a matter of law, the individual defendants were entitled to qualified immunity. The panel affirmed the district court's grant of summary judgment to the individual defendants on the equal protection claim for damages and vacated the grant of summary judgment to the District. The panel vacated the grant of summary judgment to all defendants on the related claims for declaratory and injunctive relief.

The panel exercised its discretion to vacate the district court's grant of summary judgment on plaintiffs' First Amendment prior restraint and compelled speech claims, which challenged the District's original and amended speech policies. The panel held that the basis for the district court's summary judgment ruling was too unclear for proper review, and plaintiffs raised their merits arguments for the first time on appeal. The panel vacated the district court's summary judgment without commenting on how the district court should proceed on remand.

The panel affirmed the district court's summary judgment on plaintiffs' state constitutional claim alleging they were disciplined for engaging in speech protected by the Oregon Constitution. Because plaintiffs failed to discuss this claim in any substantive way, the district court correctly granted summary judgment on the ground of forfeiture.

The panel vacated the district court's dismissal of plaintiffs' claims against the individual Board members in their personal capacities for terminating plaintiffs' employment, rejecting the district court's conclusion that, as a general rule, board members cannot be held personally liable for decisions made by majority vote.

The panel vacated the grant of summary judgment to the District on the claim for *Monell* liability because the district court granted summary judgment on the basis that there were no underlying constitutional violations, and the panel vacated the grant of summary judgment on the underlying First Amendment retaliation and Fourteenth Amendment equal protection claims.

Finally, the panel vacated the district court's grant of summary judgment on plaintiffs' Title VII claim, which alleged that the District terminated them for expressing their

biblically-based views on gender and sexuality. For protected class membership, plaintiffs were not required to cite Bible passages or scripture to support their religious views. The panel also agreed with plaintiffs that there was a genuine issue of material fact regarding the credibility of the District's proffered reasons for the terminations.

COUNSEL

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OPINION

SUNG, Circuit Judge:

This case arises from the terminations of Plaintiffs Rachel Sager (née Damiano) and Katie Medart from their positions with Grants Pass School District No. 7 in Oregon. Sager and Medart principally claim that the District and other individual defendants unlawfully retaliated against them for engaging in protected speech and discriminated against them on the basis of their religion and viewpoint. Defendants moved for summary judgment on all claims, which the district court granted in full. For the reasons below, we vacate in part, affirm in part, and remand for further proceedings.

I. BACKGROUND

Because this appeal arises from a grant of summary judgment, we relate the facts that are not genuinely disputed, unless otherwise stated.

A. The Parties

In 2021, when this case arose, Plaintiffs were employed by the District at North Middle School (NMS). Medart began working at NMS as a science and health teacher in 2019, and Sager joined NMS as an assistant principal in July 2020. Sager and Medart each had more than a decade of experience working in education. Plaintiffs engaged in the expressive conduct that led to their terminations because of their views on subjects such as gender identity, parental rights, and education policy, which are based on their philosophical and Christian religious beliefs, as well as their understandings of scientific evidence. Before the events at issue here, Plaintiffs generally had good relationships with students and

coworkers, and they had not been the subject of any complaints from parents or disciplinary action. Defendants are the District; District Superintendent Kirk Kolb; NMS Principal Thomas Blanchard; and three members of the District's Board of Directors, Scott Nelson, Debbie Brownell, and Brian DeLaGrange.

B. The District's Policies

Since 2004, and for most of the relevant period of this lawsuit, the District has regulated employee speech under a policy titled, "Staff Participation in Political Activities." This policy generally permits the District's employees to "exercise their right to participate fully in affairs of public interest on a local, county, state and national level on the same basis as any citizen in a comparable position in public or private employment and within the law." However, the policy prohibits "[s]uch discussion and persuasion . . . during the performance of district duties, except in open discussion during classroom lessons that center on a consideration of all candidates for a particular office or various sides of a particular political or civil issue." Additionally, the policy requires District employees to include a disclaimer when speaking on "controversial issues": "[E]mployees must designate that the viewpoints they represent on [such] issues are personal viewpoints and are not to be interpreted as the district's official viewpoint." The policy also bars employees from using District facilities, equipment, or supplies "in connection with political campaigning," or using any time "during the working day for campaign purposes."

The District's speech policy did not originally define the terms "political or civil issue" or "controversial issues." But in April 2021, shortly after Plaintiffs engaged in the

expressive conduct that led to their terminations, the District amended the speech policy to define those terms. The amended speech policy provides that a "'[p]olitical or civil issue' shall include, but not be limited to, any political or civil issue for which there is more than one reasonable interpretation or position and on which reasonable persons may disagree." A "controversial civil issue shall specifically include issues which appear likely to create controversy among students, employees or the public, or which the District determines may be disruptive to its educational mission or instruction." And "[i]n determining whether a civil issue is controversial, the district shall consider whether the speech is consistent with district policy and resolutions."

In February 2021, the District circulated an administrative memorandum on "Gender Identity, Transgender, Name, and Pronoun Guidance." The memorandum opens by explaining that it is "intended to summarize the District's interpretation" of guidance issued by the Oregon Department of Education on creating a safe and supportive school environment for transgender students. The memorandum recommends that "District employees accept a student'[s] assertion of his/her/their own gender identity." Along these lines, the memorandum provides:

> In all situations where a student approaches District employees [] to request a change in gender, pronouns or names, the District, through its counselors and/or school administrators, should work with the student and the student's parents or guardians to ensure that appropriate accommodations can be made for the student based on his or her particular situation. Absent circumstances

> that pose a risk to the safety of students, the District will not prohibit students from accessing restrooms, locker rooms or other facilities which may be separated by gender, that are associated with the student's preferred gender identity.

"When the student's parents are not aware of the student's gender identity preferences," the memorandum directs District employees to be "careful to balance the safety and concern for the well-being of the student with the District's obligations to maintain accurate educational records, which are available to parent[s]." "Even if the parents do not consent to a formal change of gender, name or pronoun," the memorandum states that "District employees should not prohibit other students or employees from using the student's preferred name or pronoun in informal or in-person or virtual classroom settings if requested by the student."

Danny Huber-Kantola, the District's human resources director, presented the memorandum to all District administrators, including then-Assistant Principal Sager. A few weeks later, Principal Blanchard informed NMS science teacher Medart that "there were new procedures related to transgender identity coming," but he did not share when these policies would be implemented. Sager and Medart separately reached out to Huber-Kantola and Blachard, respectively, to raise their individual concerns about the District's new policies. After realizing that they shared the same concerns, Sager and Medart decided to publicly campaign for alternatives to the District's guidance.

C. Plaintiffs' "I Resolve" Campaign

On March 6, 2021, Sager and Medart prepared a draft resolution and logo for their campaign, which they called the "I Resolve" movement. According to Sager, they did so on Sager's "private device and private time." Less than two weeks later, at 9:10 a.m. on a school day, Medart used her school account to forward Sager an email from another staff member with feedback on the draft resolution. According to Medart, her students could have been in her classroom when she sent the email. That same morning, Sager also used her school account to respond to Medart's email.

On March 17, Sager met with Human Resources Director Huber-Kantola and brought him copies of the draft resolution as well as proposed legislation pending before the Oregon legislature and Congress. Sager told Huber-Kantola that she and Medart "had a website," "inten[ded] to create a video," and "planned to do social media posts." According to Sager, Huber-Kantola did not indicate that "anything [she] was doing could be violating district policies," and he "suggested that [she] have a meeting with [Superintendent] Kolb to inform him of [their] plan as well." Sager complied, sharing the relevant details with Kolb two days later and explaining that she and Medart wished to "inform the public on this matter of public concern and [] lobby legislators regarding [their] proposed solution." According to Sager and Medart, Kolb said he would consider bringing the resolution to the Board to "gain their support and [] potentially implement the solution" and would also bring the resolution

to counsel to review.[1] Later that day, on March 19, the District's week-long spring break began.

While on spring break, Medart used her school email address to respond to a former colleague who sent her constructive feedback on the resolution, and to share the "I Resolve" website, www.iresolvemovement.com, with another staff member. Also during spring break, Sager and Medart filmed a video about their resolution while "away from school, as private citizens." The Edgewater Christian Fellowship helped produce the video and sent the final edited version to Sager's school account on March 25. Sager responded from her school email address: "Thank you so much for all the work you guys did. We feel very blessed to have had this opportunity. I will upload it to Youtube and embed it on the site."

The "I Resolve" video opens with Sager describing current policies and proposed legislation regarding gender identity in public schools. Sager then asks Medart how she has been impacted by the District's new guidance regarding transgender students, considering her recent return to K–12 education. In response, Medart explains that within a month of returning to K–12 teaching, she was presented with a "very foreign circumstance": Another staff member sent her an email stating that one of Medart's students was "on a journey of exploring [their] gender identity" and "made a request to identify as a male," "go by he and him," and "change [their] name." After describing this email, Medart states that she "didn't know what to do," so she went to her administration to ask questions about the guidance. Next, Sager and Medart discuss their alternative proposals

[1] Kolb disputes this account; he maintains that he did not suggest that he would be bringing the "I Resolve" resolution to the Board.

regarding students' preferred pronouns and names as well as restroom use. They conclude by urging viewers to contact their political representatives to advocate for "I Resolve" and to protest a bill pending before the Oregon legislature.

On March 25, while still on spring break, Sager and Medart uploaded this video to YouTube and linked to it on the "I Resolve" website. Sager and Medart also posted the full text of the "I Resolve" resolution and a link to "Sign the Resolution" on their website.

The day after publishing the video, Sager and Medart emailed the Edgewater Christian Fellowship from Sager's personal account and copied Medart's school account. Sager and Medart wrote that they were reaching out to "influencers in policies ([American Legislative Exchange Council (ALEC)], Prager U, Ben Shapiro) to garner their support" for the resolution, and they asked for "ideas on how [they] could continue to get the word out and increase momentum for the resolution." On the same day, Sager emailed Ben Shapiro to publicize "I Resolve," sending the email from her personal account and copying her school account. Sager and Medart also emailed ALEC to publicize the resolution; they sent the email from Sager's personal account but copied both of their school accounts, signing the email with their full names and work titles: "Rachel Damiano and Katie Medart," "Southern Oregon Assistant Principal and Southern Oregon Science Teacher."

On March 29, the first school day after spring break, Sager and Medart returned to work. At that time, there was "no incident or mention to [them] of any potential disruption caused by the I Resolve video, website, or social media." On the same day, Sager used her authority as an administrator to unblock the "I Resolve" video from the District's internet

filters. According to Sager, all new domains are blocked by default, and any District employee may fill out a form to request that an administrator unblock a domain.

On March 30, at about 1:52 pm, Medart sent an email from her school account to two other District employees' school accounts, stating, "Thank you for the time today!" and providing a link to the "I Resolve" website. Later that day, one employee responded: "I just signed it."

D. Responses to Plaintiffs' Campaign

Meanwhile, on March 30 and 31, several District teachers and staff members emailed the District to share their concerns about the "I Resolve" video. On the afternoon of March 31, Superintendent Kolb met separately with Sager and Medart to discuss these emails. Kolb told them that several District employees had emailed with concerns, including two NMS employees, three Grants Pass High School employees, and an elementary school staff member. Kolb also explained that there were no formal complaints and that, "at this time," the District was "treating [the emails] as concerns from staff members to be addressed at the lowest level possible and informally."

After these meetings, Kolb emailed Sager and Medart with several follow-up questions. In his email to Medart, he wrote:

> 1. Given the likelihood that transgender students will see the video on the [I Resolve] website, and it is possible they may respond in a similar manner as some of your colleagues in being offended, how will you continue to support your transgender students should they feel emotionally threatened?

> 2. Will you follow administrative expectations that would require us to allow a transgender student to use a restroom designated for the gender they identify with, . . . referring to students as their preferred name, and honoring confidentiality should a student not share their gender identity with their parents?
>
> 3. How will you navigate the potential challenges with colleague and peer relationships with those that are offended by your position and efforts with the [I Resolve] movement and efforts?
>
> 4. What is and has been your intent of attending North Middle School's LGBTQ+ Club?

In his email to Sager, Kolb raised the same first two questions but asked a slightly modified version of the third question and replaced the fourth:

> 3. How will you navigate the challenges with colleague, subordinate, and peer relationships with those that are offended by your position as stated with the [I Resolve] movement and efforts?
>
> 4. Given that I communicated that I do not support and will not move forward with the proposed resolution as proposed by [I Resolve], how do you intend to proceed?

In his email to Sager, Kolb also summarized the concerns expressed by other District employees by directly quoting

their emails. For example, he noted that one staff member wrote: "I'm concerned that local leadership by a person in a position of power within the district might have more sway over those not in a position of power/the employees they evaluate."

Because Kolb had raised the issue of a disclaimer statement during his meetings with them, Sager and Medart added the following disclaimer to the iresolvemovement.com website: "The views expressed on this site and any related video(s) produced by I Resolve are the expression of the individuals, as private citizens and do not necessarily represent the views or opinions of any specific education entity."

By April 3, four District employees had lodged formal complaints against Sager and Medart. One staff member asserted that Sager's statements that "she can determine when and if she chooses to use a person's preferred pronouns and preferred name" were "contradictory to District 7 policy as well as state law." This complainant questioned Sager's ability to "safely and adequately supervise a transgender staff member while protecting that person's rights." The complainant also alleged that Medart's "personal and religious beliefs got in the way of her doing her job" because Medart stated in the video that she "didn't know what to do" after receiving an email "about a transgender student, transitioning from female to male."

The other District employees who submitted formal complaints against Plaintiffs alleged, in relevant part: (1) Sager and Medart violated the District's speech policy, which prohibits employees from using District resources or working time in connection with a political campaign, by discussing and recruiting NMS staff for "I Resolve" on

school property during work hours; (2) Sager and Medart violated the District's speech policy, which imposes a disclaimer requirement, by failing to specify that "I Resolve" did not represent the official viewpoint of the District; (3) Sager and Medart violated various District policies by publicly posting the "I Resolve" video and website, including the policy barring "[s]taff actions on social media websites, public websites and blogs, while on or off duty, which disrupt the school environment" and the policy prohibiting "[b]ias incident[s]," defined as a "hostile expression of animus toward another person or group of persons, relating to the other person's or group's distinguished . . . race, color, religion, sex, gender identity, sexual orientation, disability or national origin"; and (4) Medart violated District policies prohibiting employees from "posting confidential information about students, staff or district business" by discussing one of her students in the "I Resolve" video. These employees also alleged that Plaintiffs' "I Resolve" activities disrupted the morale of the District's teachers and administrators.

On April 5, Principal Blanchard placed Sager and Medart on paid administrative leave "pending investigation into allegations of inappropriate behavior." On the same day, Superintendent Kolb emailed the Board stating that Sager and Medart had caused a "significant disturbance that is impacting the entire district" and that he was "VERY seriously dealing with this."

On April 6, Blanchard received a formal complaint from a fifth District employee, an NMS staff member. This employee questioned Medart's ability as a teacher to "support a student who was transitioning," and Sager's ability as an assistant principal to oversee "processes and school policy for all students which clearly includes the

LGBTQ population." Soon after, Kolb emailed all District staff. He stated:

> I am writing today to address reports of a "movement" circulating on social media that is in direct conflict with the values of Grants Pass School District 7.
>
> To be very clear, we do not support or endorse this message.
>
> District 7 is unequivocally committed to providing welcoming and safe learning environments for all students, including our LGBTQ students. In Grants Pass schools, we ALL belong, regardless of race, religion, gender, sex, or ability.
>
> Please contact me or our Human Resources Director, Danny Huber-Kantola, with any additional concerns or needed support.

Later that evening, one of the District's current students, a junior at Grants Pass High School, emailed a complaint directly to Medart. This student wrote that they were "deeply unsettled" by the campaign and felt "so bad for [Medart's] transgender students (or students questioning their gender identity) to have to see that their own teacher doesn't support them and openly speaks against their rights." The student urged Medart to "have compassion and take down [the] campaign." By April 8, three former students had lodged formal complaints against Sager and Medart. By April 9, a sixth District employee and at least eight concerned citizens—not claiming to be students or parents of students

in the District—had also submitted complaints.[2] Like the other coworker complaints, the sixth employee's email alleged that Plaintiffs violated several District policies.

E. The District's Initial Investigation

Also on April 6, Principal Blanchard and Human Resources Director Huber-Kantola conducted an investigatory interview of Medart, which she attended with her union representative. The administrators read excerpts from the complaints submitted against Medart and asked her questions about each allegation. For example, after reviewing the District's policy that prohibits staff actions on social media that disrupt the school environment, Blanchard asked Medart if she was "aware of any potential disruptions" that the "I Resolve" website, video, and social media pages had caused to either NMS or the District. Medart responded that there had been communication among staff (both emails

[2] The parties dispute the total number of complaints received. Superintendent Kolb testified that he received between 75 and 150 complaints, and Sherry Ely, the District's Chief Finance and Operations Manager, testified that the District's office fielded approximately 50 complaints. In the record before us, however, neither District official provided any other information about these alleged complaints. Plaintiffs assert that Bill Landis, the District's independent investigator, "only identified at most 14 complaints, and Defendants produced only 23 documents classified as complaints." Landis's reports in the record include, as exhibits, copies of twenty complaints against each Plaintiff, and each report states that these exhibits represent "only some of the complaints from citizens sent to District 7 email accounts" between April 6 and April 7, 2021. Viewing the record in the light most favorable to Plaintiffs, we find that there is no genuine dispute as to the written complaints included in the record. However, as discussed further below, *see infra* Section II.A.1.a.iii, there is a genuine, material dispute regarding whether additional complaints were lodged against Plaintiffs, and if so, the timing and nature of those complaints.

and conversations) and that she "had an interaction with a student" a few days earlier. According to Medart, this student asked to speak with her after class, showed her the "I Resolve" video, and said, "my friend wants to know if you're homophobic." Medart responded, "absolutely not," "I love all students." The student then said: "I like you are one of my favorite teachers. So I'm talking to you." Medart told the student that "I Resolve" was "about policy for students," and she asked the student to tell their friend that she "care[d] about how they feel" and "would like to talk with them if they have questions."

During the investigatory interview, Huber-Kantola also asked Medart if she used any District resources in connection with "I Resolve" or engaged in any activities related to the movement while on campus during the workday. Medart responded that she had initiated conversations with other NMS employees on school property about "policy we are hoping to have you consider" and that, on some occasions, those conversations took place during the workday.

Huber-Kantola later asked Medart if she would be able to follow the District's guidance regarding "all students belong and that sort of thing." After Medart asked Huber-Kantola to clarify the question, he described a hypothetical email from a school counselor who was working with a transgender student who wished to change their name and pronouns at school but was not yet ready to inform their parents. Huber-Kantola then asked Medart whether, in line with District guidance, she would be able to use the student's preferred name and pronouns. Medart asked Huber-Kantola to confirm that he was asking her if she would be able to "call the child with a different name and use different pronouns" without parental permission. He reiterated his

earlier response: "Yeah. That is the guidance. Knowing on the other end that they're working with . . . an administrator or a counselor and . . . they're talking to students about when it's safe or how it's safe." Medart asked for additional time to think through her answer. Huber-Kantola agreed, so Medart did not answer the question.

Blanchard then read the following excerpt from a staff member's complaint: "There is [the] separation of church and state in which a public employee cannot [encroach] their religious beliefs onto others in a [manner] that impacts their ability to do their job." Blanchard asked Medart to respond to this complaint, and Medart remarked: "I don't think that my faith interferes with my ability to do my job." Referring back to Huber-Kantola's earlier questions about Medart's ability to follow District guidance on students' preferred names and pronouns, Blanchard followed up: "[Y]ou have made a statement that faith does not affect my ability to do the job. Mr. Kantola just asked you if this was what we're supposed to do. How we're supposed to handle that situation. Is that your faith telling you that . . . You can't answer that question right now." Medart demurred: "I know." Blanchard went on: "So it gives me a little bit of concern when you say that my faith does not affect my ability to do the job. That it may."

Two days later, Blanchard and Huber-Kantola conducted a similar investigatory interview with Sager, who attended with a representative from the Association of American Educators. As with their interview of Medart, Blanchard and Huber-Kantola reviewed each alleged policy violation and asked Sager numerous questions, including whether she had used District resources to create and promote the "I Resolve" movement. Additionally, they asked Sager multiple questions about her understanding of her responsibilities as

assistant principal, such as the responsibility to ensure that teachers comply with District policies and guidance. Blanchard also asked Sager about the allegation that she was attempting to promote her religious beliefs at school. Sager denied the allegation, describing "I Resolve" as a "tolerant, respectful, kind, and loving conversation around the different opinions . . . that includes all students and staff members because they are a part of this equation as well."

F. The Independent Investigator's Findings

On April 12, the District hired Bill Landis, an independent investigator, to determine whether Sager and Medart had violated the District's policies. Landis issued two investigative reports in June 2021, one addressing Sager and the other Medart.[3] In the reports, Landis represented that he reviewed all documentation collected by the District, "including emails, potential involved policies, audio files, documents, and other associated information," examined the "I Resolve" video, website, and media reports, and conducted additional interviews of Sager and Medart. For each allegation in the formal complaints against Sager and Medart, Landis described the evidence he reviewed, attached the relevant exhibits, indicated whether he found the

[3] As explained below, *see infra* Section II.A.1.a.i, Plaintiffs contest the accuracy of Landis's findings. Because it is undisputed that Defendants received the reports before deciding to terminate Plaintiffs, we recount Landis's findings for context. In doing so, however, we make no determination as to their accuracy. Consistent with the summary judgment standard, we also do not resolve any genuine factual disputes as to the findings.

allegation was sustained, not sustained, exonerated, or unfounded, and provided reasons for that finding.[4]

Landis "sustained" four allegations against both Sager and Medart, finding that they violated the District's policies by: (1) using District resources in connection with a political campaign; (2) using time during the workday for campaign purposes; (3) failing to include a viewpoint disclaimer; and (4) using social media and public websites in a manner that disrupted the school environment. Landis did "not sustain" the allegation that either Sager or Medart violated District policy by committing a "bias incident" because he found that it was "not clear" whether "I Resolve" was a "hostile expression of animus toward those who use a different gender identity." Finally, Landis sustained against Medart, but not Sager, the allegation that she violated District policy by describing a confidential email about a student in the "I Resolve" video. Although Medart did not disclose a student name, Landis reported that other staff members were able to identify a particular student who matched Medart's description. Landis did "not sustain" this allegation against Sager because she was not employed by the District during the school year that Medart discussed in the video, and it was unclear "what [Sager] knew and when she knew it."

In his reports, Landis also indicated that four news stories had been published about "I Resolve." He described

[4] Landis explained that he "sustained" an allegation where his "investigation resulted in sufficient evidence from one or more sources to conclude the incident occurred." He did "not sustain" an allegation where he "did not have enough evidence to prove or disprove the allegation." An allegation was "exonerated" where the "activity or action did occur, but it was appropriate (per policy, or lawful, etc.) given the circumstances," and an allegation was "unfounded" where "no evidence existed to support the claim."

these articles as follows: (1) on April 7, news channel KOBI 5 published a story and depicted a statement identifying Sager as the "Assistant Principal of North Middle School"; (2) on April 8, news channel KTVL published a story identifying Sager as an assistant principal and Medart as a teacher at NMS; (3) on April 14, KOBI 5 published a story regarding an eighth-grade student at NMS who was protesting "I Resolve"; and (4) on April 15, KTVL published a story stating that NMS students had started a petition to have Sager and Medart fired.

Landis first submitted his reports to Chief Finance and Operations Manager Ely. Ely provided a summary of Landis's findings to Sager and Medart. She subsequently recommended termination of Plaintiffs' employment to Superintendent Kolb. Kolb, in turn, recommended the Board terminate Sager and Medart. On July 15, the Board held pre-termination hearings for Sager and Medart. At these hearings, Sager, speaking for herself, and Medart, represented by her teachers' union counsel, each responded to the District's allegations and fielded questions from the individual members of the Board. Sager and Medart also disputed the accuracy of Landis's reports. A few days later, the Board voted 4-3 to terminate them.

On September 17, the Board permitted Sager and Medart to appeal their terminations, and on November 9, the Board changed its position and voted 4-3 to reinstate them. Upon reinstatement, Medart was "involuntarily transferred to GPFlex—an online school, even though a science teacher position at North Middle School was still available." Sager was also reassigned to the online school, where her "interaction with students was minimal and [her] job responsibilities were highly constricted."

G. District Court Proceedings

Sager and Medart sued Defendants on June 7, 2021—while they were on paid administrative leave and before they were terminated. After the District terminated and then reinstated them, Plaintiffs filed the operative Second Amended Complaint (SAC). The SAC alleges violations of the First Amendment and the Fourteenth Amendment under 42 U.S.C. § 1983 as well as Title VII and the Oregon Constitution.

In particular, the SAC alleges that Defendants retaliated against Plaintiffs by terminating them for engaging in speech protected under the First Amendment and article I, section 8 of the Oregon Constitution. The SAC also raises a content- and viewpoint-based discrimination challenge to the District's speech policies under the First Amendment, and an equal protection claim under the Fourteenth Amendment. The SAC further asserts prior restraint and compelled speech challenges to the District's speech policies under the First Amendment. It finally alleges that, in terminating Plaintiffs, Defendants discriminated against them on the basis of their religion in violation of Title VII. Plaintiffs seek declaratory relief, injunctive relief, and damages.

Defendants moved for summary judgment on all claims. Plaintiffs opposed Defendants' motion but did not file a cross-motion for summary judgment. After a hearing, the district court granted summary judgment for all Defendants on all claims. Plaintiffs timely appealed.

II. DISCUSSION

We review de novo a district court's grant of summary judgment. *See DeFries v. Union Pac. R.R. Co.*, 104 F.4th 1091, 1104 (9th Cir. 2024). Viewing the evidence in the light

most favorable to the nonmoving party, we "determine whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law." *Id.* (citing *L.F. v. Lake Wash. Sch. Dist. #414*, 947 F.3d 621, 625 (9th Cir. 2020)). "A factual issue is genuine 'if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.'" *Ochoa v. City of Mesa*, 26 F.4th 1050, 1055 (9th Cir. 2022) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). "A material fact is one that is needed to prove (or defend against) a claim, as determined by the applicable substantive law." *Id.* at 1055–56 (quoting *Anderson*, 477 U.S. at 255).

A. First Amendment Retaliation

Plaintiffs first challenge the grant of summary judgment to Defendants on the First Amendment retaliation claims for damages and declaratory and injunctive relief. In moving for summary judgment, Defendants argued that Plaintiffs failed to establish a constitutional violation as a matter of law, and even if they did, the individual defendants were entitled to qualified immunity on the damages claim.

"To determine whether an official is entitled to qualified immunity, we ask two questions: (1) whether the official's conduct violated a constitutional right; and (2) whether that right was 'clearly established' at the time of the violation." *Hines v. Youseff*, 914 F.3d 1218, 1228 (9th Cir. 2019). We may address these questions in either order. *See Pearson v. Callahan*, 555 U.S. 223, 236 (2009). Because we also must evaluate the merits of Plaintiffs' First Amendment retaliation claim "in light of their request for [declaratory and] injunctive relief, . . . judicial efficiency counsels us to begin with the first prong of the qualified immunity

framework." *Riley's Am. Heritage Farms v. Elasser*, 32 F.4th 707, 719 n.7 (9th Cir. 2022).

1. Whether the Terminations Violated the First Amendment

The First Amendment generally prohibits the government from retaliating or discriminating against individuals for engaging in protected speech. *See Hartman v. Moore*, 547 U.S. 250, 256 (2006). "If an official takes adverse action against someone based on that forbidden motive, and 'non[]retaliatory grounds are in fact insufficient to provoke the adverse consequences,' the injured person may generally seek relief by bringing a First Amendment claim." *Nieves v. Bartlett*, 587 U.S. 391, 398 (2019) (quoting *Hartman*, 547 U.S. at 256). But in the context of public employment, the Supreme Court has long recognized that the government has "interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general." *Pickering v. Bd. of Ed. of Twp. High Sch. Dist. 205*, 391 U.S. 563, 568 (1968). Accordingly, the Court has developed a framework that requires a "fact-sensitive and deferential weighing of the government's legitimate interests" against the First Amendment rights of public employees. *Bd. of Cnty. Comm'rs v. Umbehr*, 518 U.S. 668, 677 (1996). This framework—often called the "*Pickering* balancing test"—is part of a two-step, burden-shifting approach. *Riley's*, 32 F.4th at 720–21.

"First, a plaintiff must establish a prima facie case of retaliation. This requires the plaintiff to show that '(1) it engaged in expressive conduct that addressed a matter of public concern; (2) the government officials took an adverse action against it; and (3) its expressive conduct was a

substantial or motivating factor for the adverse action.'" *Id.* at 721 (quoting *Alpha Energy Savers, Inc. v. Hansen*, 381 F.3d 917, 923 (9th Cir. 2004)). "If the plaintiff carries its burden of showing these three elements, the burden shifts to the government," which "can avoid liability in one of two ways." *Id.* "First, the government can demonstrate that its 'legitimate administrative interests in promoting efficient service-delivery and avoiding workplace disruption' outweigh the plaintiff's First Amendment interests." *Id.* (quoting *Alpha Energy Savers*, 381 F.3d at 923). Alternatively, "the government can show that it would have taken the same actions in the absence of the plaintiff's expressive conduct." *Id.* (citing *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 285 (1977)).

The district court determined that the adverse employment action was "not reasonably in dispute," and that Plaintiffs raised genuine issues of material fact as to the other elements of their prima facie case. And it assumed without deciding that Plaintiffs satisfied their burden under *Pickering*. It then concluded that Defendants met their burden at summary judgment to show that the District's legitimate administrative interests outweighed Plaintiffs' speech rights under the *Pickering* balancing test as a matter of law. The district court did not reach Defendants' alternative argument—that they adequately showed that the District would have terminated Plaintiffs absent their protected speech.

On appeal, Defendants do not challenge the district court's ruling on Plaintiffs' prima facie case, and they do not pursue their alternative argument that the District would have terminated Plaintiffs absent their protected speech. Therefore, in evaluating the first prong of the qualified immunity analysis, we assume that Plaintiffs' speech

addressed a matter of public concern, and that their speech was a motivating factor in the District's adverse decision to terminate their employment. *See Riley's*, 32 F.4th at 721. And so, the only question before us is whether Defendants have satisfied their burden to show that they should prevail under the *Pickering* balancing test as a matter of law.[5]

a. *Pickering* Balancing Test

Under the *Pickering* balancing test, the ultimate question is whether the government's legitimate administrative interests outweigh the employee's right to engage in the expressive activity at issue. *See Umbehr*, 518 U.S. at 677; *Riley's*, 32 F.4th at 726. While this "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); *accord Eng v. Cooley*, 552 F.3d 1062, 1071–72 (9th Cir. 2009) ("Although the *Pickering* balancing inquiry is ultimately a legal question . . . its resolution often entails underlying factual disputes."); *see also Riley's*, 32 F.4th at 725 n.10 (same).

"For us to find that the government's interest as an employer in a smoothly-running office outweighs an employee's first amendment right, defendants must demonstrate actual, material and substantial disruption, or reasonable predictions of disruption in the workplace."

[5] Plaintiffs argue that we should "reverse and remand with instructions to enter summary judgment in their favor" on the First Amendment retaliation claim. Because Plaintiffs never moved for summary judgment below, we reject this request and consider only whether the district court erred in granting summary judgment for Defendants. *See Kassbaum v. Steppenwolf Prods., Inc.*, 236 F.3d 487, 495 (9th Cir. 2000).

Robinson v. York, 566 F.3d 817, 824 (9th Cir. 2009) (cleaned up). "[T]he employer need not establish that the employee's conduct *actually* disrupted the workplace—reasonable predictions of disruption are sufficient." *Riley's*, 32 F.4th at 725 (quoting *Nichols v. Dancer*, 657 F.3d 929, 933 (9th Cir. 2011)). But "the government must support its claim that it reasonably predicted disruption 'by some evidence, not rank speculation or bald allegation.'" *Id.* (quoting *Nichols*, 657 F.3d at 934). We "are more likely to accept a government employer's prediction of future disruption if some disruption has already occurred." *Moser*, 984 F.3d at 909. And evidence of actual disruption "will weigh more heavily against free speech" than evidence of potential disruption. *Keyser v. Sacramento City Unified Sch. Dist.*, 265 F.3d 741, 749 n.2 (9th Cir. 2001).

The Supreme Court has recognized that employee speech may disrupt the "effective functioning" of the workplace in a variety of ways—it may "impair[] discipline by superiors or harmony among co-workers, ha[ve] a detrimental impact on close working relationships for which personal loyalty and confidence are necessary, or impede[] the performance of the speaker's duties or interfere[] with the regular operation of the enterprise." *Rankin v. McPherson*, 483 U.S. 378, 388 (1987) (citing *Pickering*, 391 U.S. at 570–73). In the context of K–12 education, employee speech may also disrupt the "school's operations or curricular design" by "erod[ing] the public trust between the school and members of its community." *Riley's*, 32 F.4th at 725.

Various factual circumstances can affect how much disruption the government must show to prevail under *Pickering*. For one, courts have "applied a sliding scale in which the '[government]'s burden in justifying a particular

discharge or adverse employment action varies depending upon the nature of the employee's expression.'"[6] *Moser*, 984 F.3d at 906 (quoting *Connick v. Myers*, 461 U.S. 138, 150 (1983) (alteration omitted)). Because "[s]peech about matters of public concern 'occupies the highest rung of the hierarchy of First Amendment values,'" *Dodge v. Evergreen Sch. Dist. #114*, 56 F.4th 767, 782 (9th Cir. 2022) (quoting *Allen v. Scribner*, 812 F.2d 426, 430 (9th Cir. 1987) (alterations omitted)), an employer must make "an even stronger showing of disruption" when the speech at issue deals "directly with issues of public concern." *Robinson*, 566 F.3d at 826 (quoting *McKinley v. City of Eloy*, 705 F.2d 1110, 1114 (9th Cir. 1983)). "The more tightly the First Amendment embraces the speech the more vigorous a showing of disruption must be made." *Hyland v. Wonder*, 972 F.2d 1129, 1139 (9th Cir. 1992).

We also must consider "'the manner, time, and place in which' the employee's speech took place." *Clairmont v. Sound Mental Health*, 632 F.3d 1091, 1107 (9th Cir. 2011) (quoting *Connick*, 461 U.S. at 152); *see also Rankin*, 483 U.S. at 388 ("In performing the balancing, the [employee's] statement will not be considered in a vacuum; the manner, time, and place of the employee's expression are relevant, as is the context in which the dispute arose."). "The government is more likely to meet its burden when an employee's disruptive conduct takes place in the workplace, compared to when the same conduct occurs 'during the

[6] "Even though the government generally cannot consider the content of the speech under the First Amendment, courts have carved a narrow exception for speech by government employees." *Moser*, 984 F.3d at 906.

employee's free time away from the office.'" *Riley's*, 32 F.4th at 725 (quoting *Clairmont*, 632 F.3d at 1107).

The government's interest in "avoiding disruption is magnified when the employee asserting the right serves in a 'confidential, policymaking, or public contact role.'" *Moran v. State of Washington*, 147 F.3d 839, 846 (9th Cir. 1998) (quoting *Rankin*, 483 U.S. at 390–91). "[T]he expressive activities of a highly placed supervisory, confidential, policymaking, or advisory employee will be more disruptive to the operation of the workplace than similar activity by a low level employee." *Faghri v. Univ. of Conn.*, 621 F.3d 92, 98 (2d Cir. 2010) (internal quotation marks and citation omitted). Additionally, the relationship between teacher and principal is "precisely the type of employment relationship with respect to which the Supreme Court has concluded that 'a wide degree of deference to the employer's judgment is appropriate.'" *Brewster v. Bd. of Educ. of Lynwood Unified Sch. Dist.*, 149 F.3d 971, 981 (9th Cir. 1998) (quoting *Connick*, 461 U.S. at 152).

For example, when a high school journalism teacher failed to comply with his principal's directives, including by encouraging students to publish "controversial articles" without first submitting the articles "on sensitive topics to school officials," we held that the teacher's conduct "involve[d] questions of supervisorial discipline, loyalty and harmony among coworkers." *Nicholson v. Bd. of Educ. Torrance Unified Sch. Dist.*, 682 F.2d 858, 864–65 (9th Cir. 1982); *cf. Jensen v. Brown*, 131 F.4th 677, 692 (9th Cir. 2025) ("But the state's interest in punishing a disobedient employee for speaking in violation of their supervisor's orders cannot automatically trump the employee's interest in speaking."). In *Pickering*, however, the Supreme Court concluded that a teacher could not be dismissed for

publishing a letter that criticized how his school board handled a proposed school bond and subsequently allocated funds between educational and athletic programs. *See* 391 U.S. at 565–67. In so holding, the Court relied at least partly on the fact that the teacher's "employment relationships with the [school board] and, to a somewhat lesser extent, with the superintendent are not the kind of close working relationships for which it can persuasively be claimed that personal loyalty and confidence are necessary to their proper functioning." *Id.* at 570.

Applying these principles here, and viewing the evidence in the light most favorable to Plaintiffs, we conclude there are genuine factual disputes material to the *Pickering* analysis.

i. Content, Form, and Context

We begin by considering the "content, form, and context" of Plaintiffs' expressive conduct. *Connick*, 461 U.S. at 147. While we assume that Plaintiffs' speech addressed a matter of public concern, "that does not end our inquiry into the content of [their] speech." *Moser*, 984 F.3d at 906. Most of Plaintiffs' expression concerned District policy and proposed legislation. Such political expression is afforded the "broadest protection." *Dodge*, 56 F.4th at 782 (internal quotation marks and citation omitted). Moreover, "[w]e have long recognized 'the importance of allowing teachers to speak out on school matters,' . . . because '[t]eachers are, as a class, the members of a community most likely to have informed and definite opinions' on such matters." *Settlegoode v. Portland Pub. Schs.*, 371 F.3d 503, 514 (9th Cir. 2004) (first quoting *Connick*, 461 U.S. at 162 (Brennan, J., dissenting); then quoting *Pickering*, 391 U.S. at 572); *see also Moser*, 984 F.3d at 906 ("At the apex of the

First Amendment rests speech addressing problems at the government agency where the employee works."). Although Plaintiffs expressed their disagreement with the District's guidance regarding transgender students, Defendants do not contend that either Sager or Medart held a position for which agreement with District policy is a job requirement. *See Pickering*, 391 U.S. at 571–73; *cf. Weisbuch v. County of Los Angeles*, 119 F.3d 778, 783–84 (9th Cir. 1997) ("In a high level supervisory position, or a confidential advisory position, the requirement of agreement with a supervisor's policy views may be entirely appropriate.").[7]

Yet Plaintiffs engaged in at least some expressive activity that is not entitled to the same protection.[8] Most notably, in the "I Resolve" video, Medart appears to share personal, sensitive information about a real middle school student. In this discussion, Sager asks Medart to explain how she has been affected by the District's guidance regarding transgender students. Medart responds:

> [W]ithin a month of teaching, I was presented with a very foreign circumstance to me. I had a female student. She then was on a journey of exploring what is her gender identity. She had made a request to identify as a male.

[7] The *Pickering* analysis arguably should be individualized in this case because Plaintiffs are not identically situated. For one, Sager was an assistant principal, while Medart was a teacher. Because the parties do not make individualized arguments, however, we consider both Plaintiffs together.

[8] When an employee makes various statements that warrant different levels of First Amendment protection, we assess them independently. *See, e.g.*, *Pool v. VanRheen*, 297 F.3d 899, 906–07 (9th Cir. 2002); *Demers v. Austin*, 746 F.3d 402, 413–14, 416 (9th Cir. 2014).

> Then the request came for [the student] to go by he and him and to change the name.

Defendants' briefing assumes that Medart intentionally described an actual student in the "I Resolve" video. But Plaintiffs contend that Medart was merely describing a "hypothetical illustrative scenario" rather than a real student. Medart's subjective intent is a genuinely disputed fact that turns in part on her credibility.[9] And, because we are considering Defendants' motion for summary judgment, *see Anderson*, 477 U.S. at 255, we must assume that Medart, as she attests, intended to describe only a hypothetical student.

Even so, Plaintiffs' wording choices plainly created the appearance that Medart was discussing an actual student. Based on the information that Plaintiffs provided about themselves and the student in the "I Resolve" video, multiple District employees were able to identify a real student who matched Medart's description. Landis, the District's independent investigator, determined that an actual NMS student could have identified themself as the subject of Medart's comments in the "I Resolve" video. On this basis,

[9] According to the transcript of the investigatory interview conducted by District officials, Human Resources Director Huber-Kantola asked Medart whether her statement was "based on a real scenario from . . . [her] first fall of teaching," and Medart responded, "Yes. And I know that student and I know a scenario and that the student has moved last year." But during this same interview, Medart also stated: "It was multiple scenarios not just one in particular." Additionally, Medart attests in her declaration that she was merely describing a "hypothetical illustrative scenario."

Landis found that Medart had described a real student, in violation of the District's confidentiality policy.[10]

It is self-evident that discussing a student's sensitive, personal situation in a video aimed at the general public and distributed widely on social media would erode the trust needed for effective teacher-student relationships. *See, e.g.*, *Munroe v. Cent. Bucks Sch. Dist.*, 805 F.3d 454, 476–77 (3d Cir. 2015) (teacher's blog posts about unnamed students who could identify themselves based on her descriptions "disrupt[ed] her duties as a high school teacher"). Because Plaintiffs at least created the appearance that they were publicly discussing sensitive information about a real student, the District "reasonably predicted" that Plaintiffs' video would erode that trust, regardless of Medart's subjective intent. *Riley's*, 32 F.4th at 725; *see Lytle v. Wondrash*, 182 F.3d 1083, 1088 (9th Cir. 1999) (recognizing public employer's "need to maintain an efficient and cohesive school environment conducive to learning"). And, as discussed below, *see infra* Section II.A.1.a.iii, Defendants also show that Plaintiffs' apparent breach of a real student's

[10] Although Plaintiffs dispute Landis's findings, the undisputed fact that Landis "sustained" the allegation that Medart violated District policy by posting confidential information about a student online supports Defendants' assertion of disruption. *See Robinson*, 566 F.3d at 824 (holding that an employer may rely on "reasonable predictions of disruption"). Landis provided detailed explanations of his findings and included supporting evidence. He also deemed several allegations against Plaintiffs "not sustained" or "unfounded." Plaintiffs do not contend that they were denied due process during Landis's investigation or the Board's termination proceedings. These facts do not render Landis's findings conclusive, but they do indicate that it was reasonable for the District to rely on his findings in considering disruption.

trust disrupted "supervisorial discipline" and "harmony among coworkers." *Nicholson*, 682 F.2d at 865.

ii. Manner, Time, and Place

We must also consider the "manner, time, and place" of Plaintiffs' expression. *Connick*, 461 U.S. at 152. These factors point in both directions. It is undisputed that Plaintiffs directed the "I Resolve" campaign to the public at large. But it is also undisputed that Plaintiffs directed some speech to their coworkers. For example, the record shows that Plaintiffs shared the "I Resolve" website with a District staff member and asked if he would be willing to submit a video. Medart also spoke with at least three coworkers about "I Resolve" on campus.

Some of Plaintiffs' "I Resolve" activities took place while Plaintiffs were not at school, during their personal time. But others took place on campus during the workday. Plaintiffs do not dispute that they worked on "I Resolve" during working time. However, Plaintiffs contend that they generally limited their "I Resolve" activities to periods when, under District policy, they were permitted to engage in personal activities at work. Considering the present record, we hold that there are genuine factual disputes about the extent to which Plaintiffs engaged in "I Resolve" activities on campus during the workday, and the extent to which Plaintiffs did so in a manner prohibited by District policy.

iii. Actual or Reasonably Predicted Disruption

We next turn to the evidence cited by Defendants to support their assertion that the District experienced actual or reasonably predicted disruption because of Plaintiffs' expressive conduct. *See Riley's*, 32 F.4th at 725. Defendants

contend that, soon after Plaintiffs posted and publicized their video "with social media and outreach to local and national media," the District "received complaints from [P]laintiffs' coworkers, parents, current and former students and members of the community." Plaintiffs dispute the number and nature of these complaints, as well as the legal relevance of complaints from coworkers and members of the community who are neither District students nor parents. Plaintiffs also take issue with Defendants' reliance on the media attention received by "I Resolve." We address each type of evidence in turn.

Complaints from Students and Parents.

"The position of public school teacher requires a degree of public trust not found in many other positions of public employment." *Munroe*, 805 F.3d at 475 (internal quotation marks and citation omitted). We have explained that courts may reasonably consider whether "students and parents have expressed concern that the plaintiff's conduct has disrupted the school's normal operations, or has eroded the public trust between the school and members of its community." *Riley's*, 32 F.4th at 725. The disruption resulting from such expressions of concern, in turn, "can be fairly characterized as internal disruption to the operation of the school, a factor . . . which may outweigh a public employee's rights." *Id.* (quoting *Melzer v. Bd. of Educ. of City Sch. Dist.*, 336 F.3d 185, 199 (2d Cir. 2003)). And "[b]ecause schools act *in loco parentis* for students . . . school officials can reasonably predict that parents and students will fear the influence of controversial conduct on the learning environment." *Id.* (citations omitted).

Here, there is no genuine dispute that one of Medart's students showed her the "I Resolve" video and said, "my

friend wants to know if you're homophobic." During Medart's investigatory interview, she cited this conversation as an example of "possible disruption" caused by Plaintiffs' "I Resolve" campaign activities. Additionally, at least one current District student, a junior at Grants Pass High School, complained about Plaintiffs' speech before they were terminated. Plaintiffs argue that this complaint is not legally significant because it was made by a high school student rather than a student at Plaintiffs' middle school. We disagree. The high school student was a member of the educational community served by the District. Accepting Plaintiffs' argument would make it more difficult for a school district to show disruption in elementary and middle schools, because younger students are less likely to complain to administrators in any fashion, much less in writing.

It is also undisputed that at least some NMS students protested in response to Plaintiffs' campaign. But Plaintiffs dispute the timing and nature of such protests. Superintendent Kolb testified at his deposition that there were student demonstrations arising from the "I Resolve" video or Plaintiffs' employment status. However, he provided almost no detail about these demonstrations, such as how many occurred, when they occurred, how many students participated, or what kinds of statements the students made. *Cf. Melzer*, 336 F.3d at 191 (record showed "[t]he students themselves held a 300–400 person assembly . . . , where a majority of the 30–40 students who spoke opposed plaintiff's continued employment"). The independent investigator's report states there was an April 14, 2021, news story about a "North Middle School 8th grade student who is protesting the conduct of [Plaintiffs] related to the 'I Resolve' campaign," and an April 15, 2021, news story reporting that "students at North Middle School

have started a petition to have [Plaintiffs] fired." But the underlying news articles are not in the record before us, and Defendants do not identify any other evidence of these protests.

Plaintiffs also concede that on November 16, 2021, NMS students walked out in protest of the Board's decision to reinstate Plaintiffs. But they argue that, because the students were protesting Plaintiffs' reinstatement rather than their original publication of "I Resolve" and the District's initial decision to terminate Plaintiffs' employment could not be based on a protest that had not yet occurred, the district court erred in considering this protest in the *Pickering* analysis. We disagree. To establish "material and substantial disruption," Defendants may rely on actual or reasonably predicted disruption. *Riley's*, 32 F.4th at 725 (quoting *Robinson*, 566 F.3d at 824). Reasonable predictions of disruption, however, must be supported by "some evidence," not mere speculation. *Id.* (quoting *Nichols*, 657 F.3d at 934). Because evidence that students protested Plaintiffs' reinstatement is relevant to showing the District reasonably predicted that terminating Plaintiffs was necessary to avoid such disruption, the district court did not err in considering it. Nonetheless, because the record evidence of student protests is limited and lacks specificity, we agree with Plaintiffs that material facts related to the magnitude of actual and predicted disruption—including the total number of protests and level of student participation—are genuinely disputed.

In addition to the student protests, Defendants assert in their brief that the District received complaints from parents, but they do not identify any specific evidence of such complaints. Defendants note that, at his deposition, "Superintendent Kolb estimated that he received between 75

and 150 complaints." And they underscore that Ely, the District's Chief Finance and Operations Manager, stated that the District fielded approximately 50 phone calls about "I Resolve." But neither District official specified whether these complaints came from students, parents, District employees, or others. Nor is there any other information about the nature of these complaints. *Cf. Melzer*, 336 F.3d at 191 (record showed "[m]any of the 50 or 60 parents in attendance" at parents' association meeting "threatened to remove their children" from the school if plaintiff teacher were allowed to return). And, as Plaintiffs underscore, the record includes at most 23 documents that may be characterized as formal, written complaints.

We agree with Plaintiffs that factual details, such as the number of complaints and size of protests, are material to the *Pickering* analysis. *See Riley's*, 32 F.4th at 725–26. But we caution that no minimum number determines whether disruption is substantial or material. We must consider any evidence of disruption in context. *See Connick*, 461 U.S. at 147, 153. Therefore, we cannot rule out the possibility that just one serious complaint could constitute actual, material, and substantial disruption, or support a reasonable prediction of such disruption.

Complaints by Coworkers.

The Supreme Court has made clear that "[i]nterference with work, personnel relationships, or the speaker's job performance can detract from the public employer's function," and "avoiding such interference can be a strong state interest." *Rankin*, 483 U.S. at 388. Consequently, "courts have found it significant when employee expression disrupts harmony among co-workers." *Brewster*, 149 F.3d at 980; *see also id.* at 980–81 ("[T]he existence of a

'personality conflict[]' between school employees is a relevant consideration." (quoting *Nicholson*, 682 F.2d at 865–66)). However, when considering the reactions of coworkers to employee speech, we must consider whether the disruption exceeds that which "necessarily accompanies controversial speech." *Dodge*, 56 F.4th at 782 (cleaned up).

While evidence of "intra-school disharmony" among coworkers is relevant, an individual coworker's "hurt feelings cannot be determinative of the balance." *Brewster*, 149 F.3d at 980 (internal quotation marks omitted). *Compare Pool*, 297 F.3d at 909 (defendants met their burden in part through evidence that "[n]umerous Sheriff's Office employees complained to [defendant sheriff] about [plaintiff's] article and . . . statements"); *and Nicholson*, 682 F.2d at 865–66 (defendants met their burden in part through evidence that plaintiff's "coworkers became angry and dissatisfied" with him, such that "the potential for further personality conflicts within the faculty was sure to have a detrimental effect on intra-school harmony"); *with Dodge*, 56 F.4th at 782 (defendant did not meet her burden through evidence that some coworkers felt "intimidated, shocked, upset, angry, scared, frustrated, and didn't feel safe after learning about" plaintiff's expression (cleaned up)); *and Settlegoode*, 371 F.3d at 514–16 (defendants did not meet their burden where coworkers testified that they were "furious, outraged, and upset" by plaintiff's speech (cleaned up)).

Citing *Dodge*, 56 F.4th at 782, Plaintiffs argue that we should not give any weight to the coworker complaints in the record because they show only the disruption that necessarily accompanies controversial speech. But here, unlike in *Dodge*, the coworker complaints do not merely express personal disagreement and frustration with

Plaintiffs' viewpoint. Plaintiffs' coworkers filed formal, written complaints alleging that Plaintiffs violated various District policies, including by using District resources for political campaigning, failing to include required disclaimers while identifying themselves as an assistant principal and teacher with a middle school in the District's region of the state, and breaching student confidentiality. These coworker complaints cited the District's policies and included specific factual allegations. And they were, on their face, substantial enough to cause the District to initiate a formal investigation.

Plaintiffs' coworkers also raised concerns about the disruptive effects of Plaintiffs' expression on supervisory discipline and the student-teacher relationship. For example, some coworkers questioned the ability of Sager, as assistant principal, to ensure compliance with the District's guidance regarding transgender students or the District policies that she allegedly violated. Other District employees raised concerns about the impact of Plaintiffs' statements about an apparent student in the "I Resolve" video and the "damage that has been done to our students' trust." Because the coworker complaints included specific and nonfrivolous allegations that Plaintiffs' conduct violated District policy and disrupted school operations, we agree with Defendants that these complaints present evidence of disruption beyond that which necessarily accompanies controversial speech.[11]

[11] As noted above, *see supra* Section II.A.1.a.i, Plaintiffs maintain that they did not violate any policies as alleged by their coworkers. Although Defendants underscore that Landis, the District's independent investigator, "determined that [P]laintiffs violated multiple District policies," Defendants do not argue that any reasonable factfinder,

Complaints from Broader Community.

The record also includes complaints from individuals outside of the District's school community, none of whom claim to be current District students, parents, or employees. Some of these complaints were submitted by former students, while others were submitted by individuals who reside in the region served by the District. Still other complaints were submitted by individuals unaffiliated with the District altogether.

Plaintiffs contest the legal relevance of these complaints. They argue that, by relying on such complaints, the District "allow[ed] hecklers to drown out speech they don't like." We agree with Plaintiffs that "[t]he First Amendment generally does not permit the so-called 'heckler's veto,' i.e., 'allowing the public, with the government's help, to shout down unpopular ideas that stir anger.'" *Munroe*, 805 F.3d at 475 (quoting *Melzer*, 336 F.3d at 199); *see also Rosenbaum v. City & County of San Francisco*, 484 F.3d 1142, 1158 (9th Cir. 2007) ("A 'heckler's veto' is an impermissible content-based speech restriction where the speaker is silenced due to an anticipated disorderly or violent reaction of the audience.").

But "[w]orries about a heckler's veto . . . do not directly relate to the wholly separate area of employee activities that affect the public's view of a government agency in a negative fashion, and, thereby, affect the agency's mission." *Dible v. City of Chandler*, 515 F.3d 918, 928–29 (9th Cir. 2008). Accordingly, we "have accepted a government

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viewing the record in the light most favorable to Plaintiffs, would make the same findings as Landis. Consequently, we agree with Plaintiffs that whether they violated any District policy presents a genuine factual dispute.

employer's predictions of disruption when it provided evidence that the community *it serves* discovered the speech or would inevitably discover it." *Moser*, 984 F.3d at 909 (emphasis added). For example, in light of the "unique and sensitive position of a police department and its necessary and constant interactions with the public," we have afforded considerable weight to evidence that several members of the public complained about a police officer who "was not interested in conveying any message whatsoever and was engaged in [sexually explicit] indecent public activity solely for profit." *Dible*, 515 F.3d at 928–29; *cf. Moser*, 984 F.3d at 910 (concluding there was no disruption to police department where there was "no evidence that anyone other than the anonymous tipster even saw [plaintiff officer's] Facebook comment," plaintiff's "Facebook profile [did not] confirm[] his employment," and plaintiff "deleted [the challenged] December 2015 comment by February 2016").

In the K–12 context, we have held that complaints from a school district's current students and parents are legally relevant under *Pickering* and may even cause "internal disruption to the operation of the school" that "outweigh[s] a public employee's rights." *Riley's*, 32 F.4th at 725 (quoting *Melzer*, 336 F.3d at 199); *accord Munroe*, 805 F.3d at 475–78 (complaints from hundreds of parents about a teacher's blog amounted to substantial disruption); *Craig v. Rich Twp. High Sch. Dist. 227*, 736 F.3d 1110, 1119–20 (7th Cir. 2013) (school district had legitimate interest in preventing disruption arising from parent complaints about guidance counselor). Considering these cases and Plaintiffs' legitimate concerns about a heckler's veto, we question whether complaints from individuals who have no connection to the District and live outside its service area should be given much, if any, weight in the *Pickering*

analysis. We also question how much weight to afford to complaints from former students and individuals who have no connection to the school but reside within the District's service area, although such evidence presents a closer question under the reasoning of *Dible*.

Still, we need not resolve these issues now, because the evidence of these complaints, even if legally relevant, is too general to be afforded any weight. Only some written complaints are in the record, and, as noted above, Superintendent Kolb only estimated the total number of complaints received without providing any other information.

Media Attention.

Finally, "evidence that the media or broader community has taken an interest in the plaintiff's conduct may also weigh in favor of the government's assertion of disruption." *Riley's*, 32 F.4th at 727; *see Gilbrook v. City of Westminster*, 177 F.3d 839, 868 (9th Cir. 1999) (considering "whether the speaker directed the statement to the public or the media, as opposed to a governmental colleague"). The amount and nature of any media attention affects how much weight we give this factor. *Compare Munroe*, 805 F.3d at 462–63 (finding substantial disruption where teacher "appeared on ABC, CBS, NBC, CNN, Fox News, and other television stations," and "gave interviews to several print news sources, including the Associated Press, Reuters, *Time Magazine*, and the *Philadelphia Inquirer*"); *with Riley's*, 32 F.4th at 727 (finding little disruption where only one local news outlet reported on the incident).

Defendants contend that Plaintiffs "courted media attention" and their speech "generated significant media attention." Plaintiffs do not dispute that they tried to

publicize "I Resolve" to garner public support. Nor do Plaintiffs dispute that at least four news stories about "I Resolve" were published a couple weeks after Plaintiffs first posted their video on YouTube. However, the only record evidence of these news stories are the brief descriptions provided by Landis, the District's independent investigator, in his reports. Without more specific and complete information about these stories, we cannot properly determine how disruptive the media attention was to the District's operations or school environment.

* * *

Considering the evidence above, we now determine whether, on this record, Defendants have satisfied their burden to show they are entitled to summary judgment under *Pickering*. There is no genuine dispute that Plaintiffs' speech activities caused some actual and reasonably predicted disruption to the District's operations and educational services. But a showing of *some* disruption is not necessarily enough. *See Riley's*, 32 F.4th at 726–27.

"[T]he balancing test articulated in *Pickering* is truly a balancing test, with office disruption or breached confidences being only weights on the scales." *Porter v. Califano*, 592 F.2d 770, 774 (5th Cir. 1979). When determining whether the government's interests in avoiding disruption outweigh an employee's First Amendment interests, "[v]igilance 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*, 483 U.S. at 384. Here, because Defendants moved for summary judgment, their burden is especially high—they must show that Plaintiffs' expressive

conduct caused actual or reasonably predicted disruption "so substantial" that the District's interests outweigh Plaintiffs' free speech interests as a matter of law. *Riley's*, 32 F.4th at 726.

As detailed above, there are numerous genuine factual disputes regarding the circumstances of Plaintiffs' expressive conduct and the extent of the resulting disruption to the District's operations and educational environment. At this stage, we must assume those factual disputes will be resolved in favor of Plaintiffs. *See Moser*, 984 F.3d at 905 (citing *Eng*, 552 F.3d at 1071–72). Doing so, we cannot conclude that Defendants have shown actual or reasonably predicted disruption so substantial that they prevail under *Pickering* as a matter of law.

2. Whether the Right was Clearly Established

Because there are genuine disputes of material fact that prevent us from concluding that Defendants did not violate Plaintiffs' First Amendment rights under *Pickering* (the first prong of the qualified immunity analysis), we turn to the second prong of the qualified immunity analysis—whether the individual Defendants violated a constitutional right that was clearly established at the time of the alleged violation. *See Riley's*, 32 F.4th at 729.

"[F]or a right to be clearly established, existing precedent must have placed the statutory or constitutional question beyond debate." *Kisela v. Hughes*, 584 U.S. 100, 104 (2018) (quoting *White v. Pauly*, 580 U.S. 73, 79 (2017)). A government employer "violates clearly established law when, at the time of the challenged conduct, the contours of a right are sufficiently clear that every reasonable official would have understood that what he is doing violates that right." *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011)

(cleaned up); *see also Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) (same). Because *Pickering* "requires a fact-sensitive, context-specific balancing of competing interests, the law regarding public-employee free speech claims will 'rarely, if ever, be sufficiently "clearly established" to preclude qualified immunity under *Harlow* and its progeny.'" *Brewster*, 149 F.3d at 979–80 (quoting *Moran*, 147 F.3d at 847).

The legal right at issue is not "the general right to be free from retaliation for one's speech." *Reichle v. Howards*, 566 U.S. 658, 665 (2012). Rather, it "must be defined at a more specific level tied to the factual and legal context of a given case." *Riley's*, 32 F.4th at 729 (citing *Reichle*, 566 U.S. at 665). Here, viewing the record in the light most favorable to Plaintiffs, there is no genuine dispute that Plaintiffs' "I Resolve" campaign activities led to formal and informal complaints from other District employees, at least some student protests, media attention, and findings by an independent investigator that Plaintiffs violated multiple District policies. Thus, we ask whether it was clearly established in 2021, when these events occurred, that a school district could not terminate a teacher and assistant principal under such circumstances. *See Riley's*, 32 F.4th at 729 & n.12 (discussing level of specificity required to determine whether constitutional right was clearly established in a *Pickering* case). We conclude that no case placed the constitutional inquiry here beyond debate.

Plaintiffs rely on three cases, *Pickering*, *Tinker*, and *Settlegoode*, but each involved substantially different

circumstances.[12] In *Pickering*, a public-school teacher submitted a letter to the editor criticizing his school district's budgetary allocations, and there was no evidence that his public statements "impeded the teacher's proper performance of his daily duties in the classroom or . . . interfered with the regular operation of the schools generally." 391 U.S. at 569–73. In *Tinker*, students (not a teacher and assistant principal) wore arm bands protesting the Vietnam war, and the students' silent expression was "unaccompanied by any disorder or disturbance." *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 504, 508 (1969). In *Settlegoode*, a teacher expressed her dissatisfaction only in "internal letters" and discussions with supervisors; she "made no public statements." 371 F.3d at 514.

By contrast, the record here contains undisputed facts showing that Plaintiffs' expressive conduct gave rise to significant actual and predicted disruption to the District's operations and educational environment. Consequently, the individual "defendants had a heightened interest, and thus more leeway, in taking action in response to [Plaintiffs'] speech to prevent interruption to the school's operations," and "the right at issue was not clearly established." *Riley's*, 32 F.4th at 730; *see also id.* (affirming grant of qualified immunity to individual school defendants based on undisputed evidence that plaintiff's tweets gave rise to "actual parent and community complaints and media attention").

[12] Plaintiffs cannot rely on *Dodge* at step two of the qualified immunity analysis because that case was decided *after* they were terminated. *See Kisela*, 584 U.S. at 107 (courts may not deny qualified immunity based on cases post-dating incident).

* * *

In sum, the individual defendants are entitled to qualified immunity, and we affirm the grant of summary judgment on the First Amendment retaliation claim for damages against the individual defendants on that ground. However, the District is not entitled to qualified immunity, and Plaintiffs also bring claims for declaratory and injunctive relief. Because genuine disputes of material fact prevent us from concluding that Defendants prevail under *Pickering* as a matter of law, we vacate the grant of summary judgment on the First Amendment retaliation claim for damages against the District and the claims for declaratory and injunctive relief against all Defendants.

B. First Amendment Content and Viewpoint Discrimination

We next review the grant of summary judgment on Plaintiffs' as-applied, content- and viewpoint-based discrimination challenge to the District's original and amended speech policies.[13] The SAC alleges, in relevant part: "Defendants exercised the unbridled discretion conferred upon them by the Speech Policies to discriminate against Plaintiffs based on both content and viewpoint to punish Plaintiffs for expressing their views regarding gender-identity education policy." In moving for summary judgment, Defendants argued that this claim was subject to

[13] Although the SAC states that Plaintiffs challenge the amended speech policy "both facially and as applied to Plaintiffs," Plaintiffs only cursorily addressed a facial claim below, and they did so without sufficient analysis or supporting case law. Additionally, Plaintiffs do not raise a facial claim on appeal. Consequently, any facial challenge is forfeited. *See Blumenkron v. Multnomah County*, 91 F.4th 1303, 1317–18 (9th Cir. 2024).

the same *Pickering* analysis as the retaliation claim. In their opposition brief, Plaintiffs stated they "d[id] not disagree entirely" with that argument, and they did not offer a different analysis. Consistent with the parties' arguments, the district court held that Defendants were entitled to summary judgment on the First Amendment retaliation and content- and viewpoint-based discrimination claims for the same reasons.

We agree with Defendants that both the First Amendment retaliation and the as-applied, content- and viewpoint-based discrimination claims are subject to the *Pickering* analysis. *See Berry v. Dep't of Soc. Servs.*, 447 F.3d 642, 650–51 (9th Cir. 2006) (concluding that "the *Pickering* balancing approach applies regardless of the reason an employee believes his or her speech is constitutionally protected" and applying *Pickering* to public employee's viewpoint discrimination claim); *see also Dariano v. Morgan Hill Unified Sch. Dist.*, 767 F.3d 764, 776–80 (9th Cir. 2014) (applying *Tinker*'s analogous substantial-disruption framework to public school students' viewpoint discrimination claim).

For the reasons explained above, genuine disputes of material fact prevent us from concluding that Defendants prevail under *Pickering* as a matter of law, but the individual defendants are entitled to qualified immunity. *See supra* Section II.A. Therefore, we affirm the district court's grant of summary judgment to the individual defendants on the as-applied, content- and viewpoint-based discrimination claim for damages. But we vacate the grant of summary judgment to the District on the as-applied, content- and viewpoint-based discrimination claim for damages, and we vacate the grant of summary judgment to all Defendants on the related claims for declaratory and injunctive relief.

C. Fourteenth Amendment Equal Protection

"The Equal Protection Clause directs that all persons similarly circumstanced shall be treated alike." *Am. Soc'y of Journalists & Authors, Inc. v. Bonta*, 15 F.4th 954, 964 (9th Cir. 2021) (quoting *Plyler v. Doe*, 457 U.S. 202, 216 (1982)). It further requires that all government rules "affecting First Amendment interests be narrowly tailored to their legitimate objectives." *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 101 (1972). Government conduct may give rise to an equal protection claim if it targets a suspect class, burdens a fundamental right, or treats one individual differently from others similarly situated without any rational basis for the difference.[14] *See Plyler*, 457 U.S. at 216–17; *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000).

With respect to the equal protection claim, the SAC alleges that Defendants have "taken no disciplinary action against employees who . . . endorse[] . . . the concept of shifting gender identity," but "have taken disciplinary action against Plaintiffs, who dared openly present dissenting views on those concepts." The SAC also alleges that these disfavored individuals hold opposing viewpoints for "religious," "scientific," or "medical" reasons.

[14] The Supreme Court has clarified that the third type of equal protection claim—the "class-of-one theory"—"has no application in the public employment context." *Engquist v. Or. Dep't of Agric.*, 553 U.S. 591, 607 (2008); *see Jensen*, 131 F.4th at 701 ("[U]nlike in the legislative and regulatory context where the class-of-one theory of equal protection has traditionally been applied, the state's role as an employer often 'involve[s] discretionary decisionmaking based on a vast array of subjective, individualized assessments.'" (quoting *Engquist*, 553 U.S. at 603)).

The district court granted summary judgment to Defendants on the equal protection claim for two reasons. First, the district court concluded that the SAC did not allege that Plaintiffs were discriminated against based on their "membership in a protected class," but instead alleged only that Plaintiffs were discriminated against based "on the viewpoints they expressed." Second, the district court concluded that, because the Fourteenth Amendment claim is "factually based on retaliation for [] Plaintiffs' speech," it is "not cognizable under the Equal Protection [C]lause." We agree with the first conclusion but not the second.[15]

Because the SAC alleges that Defendants discriminated against individuals who oppose the "concept of shifting gender identity,"—whether they do so for "religious," "scientific," or "medical" reasons—the district court correctly concluded that the SAC does not allege discrimination on the basis of Plaintiffs' religion (or their membership in any other suspect class). However, the district court erred in concluding that Plaintiffs' equal protection claim is identical to their First Amendment retaliation claim. Although the difference is subtle, it is

[15] Defendants correctly point out that, in opposing summary judgment, Plaintiffs argued that the discriminatory action was "enact[ing] the Amended Speech Policy in response to Plaintiffs' speech." On appeal, Plaintiffs abandon this policy-based theory and instead assert that Defendants discriminated against them by terminating them. Plaintiffs' failure to pursue the latter theory below would ordinarily amount to forfeiture. *See Yamada v. Nobel Biocare Holding AG*, 825 F.3d 536, 543 (9th Cir. 2016). However, the district court's analysis of the equal protection claim addressed the SAC's allegations of discriminatory termination, not the policy-based theory argued in Plaintiffs' opposition to summary judgment. As a result, we exercise our discretion to overlook the forfeiture and review the claim anyway. *See In re Mercury Interactive Corp. Sec. Litig.*, 618 F.3d 988, 992 (9th Cir. 2010).

significant. Plaintiffs' First Amendment retaliation claim alleges that Defendants took an adverse action against them in response to their protected speech. By contrast, Plaintiffs' equal protection claim alleges that Defendants treated District employees who oppose the "concept of shifting gender identity" differently from employees who support that concept. We have held that allegations of disparate treatment based on viewpoint give rise to a cognizable equal protection claim.[16] *See, e.g.*, *Dariano*, 767 F.3d at 779–80; *OSU Student All. v. Ray*, 699 F.3d 1053, 1067–68 (9th Cir. 2012). Therefore, the district court erred in granting summary judgment to Defendants on the ground that Plaintiffs' equal protection claim is not cognizable.

Defendants alternatively argue that we should affirm the district court's grant of summary judgment to the individual defendants on the ground that they are entitled to qualified immunity. As explained above, *see supra* Section II.A, for the first step of the qualified immunity analysis, we consider whether there was a constitutional violation. *See Hines*, 914 F.3d at 1228. "Where plaintiffs allege violations of the Equal Protection Clause relating to expressive conduct, we employ 'essentially the same' analysis as we would in a case alleging only content or viewpoint discrimination under the First Amendment." *Dariano*, 767 F.3d at 780 (quoting *Barr v.*

[16] Our sister circuits have split on whether a "pure" or "generic" retaliation claim—that is, a claim premised solely on a public employee's allegations that "she suffered adverse consequences" for exercising her First Amendment rights—is cognizable under the Equal Protection Clause. *Wilcox v. Lyons*, 970 F.3d 452, 461–62 (4th Cir. 2020) (collecting cases), *cert. denied*, 141 S. Ct. 2754 (2021); *see also Gilbrook*, 177 F.3d at 870 & n.16 (same). To our knowledge, our court has not addressed that issue, but we do not need to in this case because Plaintiffs allege disparate treatment based on viewpoint.

Lafon, 538 F.3d 554, 575 (6th Cir. 2008)). Thus, if a public employee brings an equal protection claim premised on viewpoint discrimination, the government may defend against the claim by showing that its legitimate interests outweigh the public employee's speech rights under *Pickering*. *See id.* (applying *Tinker* to public school students' equal protection claim based on viewpoint discrimination); *cf. Berry*, 447 F.3d at 650–51 (applying *Pickering* to public employee's viewpoint discrimination claim).

Defendants do not argue that Plaintiffs failed to proffer enough evidence to create a genuine dispute of material fact about any element of their equal protection claim. Consequently, we assume without deciding that there is a genuine factual dispute regarding whether Defendants treated similarly situated employees differently based on their views on gender identity. *Cf. Dariano*, 767 F.3d at 780.

In arguing that this court should affirm the district court's grant of summary judgment on this claim, Defendants rely only on the *Pickering* defense. For the same reasons discussed above, although there are genuine factual disputes that prevent us from concluding that Defendants prevail under *Pickering* as a matter of law, the individual defendants are entitled to qualified immunity. *See supra* Section II.A. Accordingly, we affirm the district court's grant of summary judgment to the individual defendants on the equal protection claim for damages. We vacate the grant of summary judgment to the District on the equal protection claim for damages, and we also vacate the grant of summary judgment to all Defendants on the related claims for declaratory and injunctive relief.

D. First Amendment Prior Restraint and Compelled Speech

We next consider the grant of summary judgment on Plaintiffs' prior restraint and compelled speech challenges to the District's original and amended speech policies. In their brief opposing summary judgment, Plaintiffs failed to mention prior restraint or compelled speech. Because Plaintiffs "did not respond" to Defendants' motion for summary judgment on these claims, the district court "consider[ed] [them] conceded." On appeal, Plaintiffs challenge this ruling on two grounds.

First, Plaintiffs assert that they addressed the prior restraint and compelled speech claims in their briefing below and at the district court's summary judgment hearing. In the briefing Plaintiffs cite, however, they only summarily stated that they were challenging "the constitutionality—both facially and as applied" of the District's speech policies under the Oregon Constitution. Plaintiffs did not mention the federal Constitution, much less meaningfully argue that the District's policies imposed a prior restraint or compelled speech in violation of the First Amendment. And at the summary judgment hearing, in response to Defendants' assertion that Plaintiffs forfeited both claims, Plaintiffs argued that they impliedly addressed the prior restraint claim in the First Amendment retaliation section of their opposition to summary judgment. That argument lacks merit because First Amendment retaliation and prior restraint are distinct claims that require different analyses. *Compare Barone v. City of Springfield*, 902 F.3d 1091, 1098 (9th Cir. 2018) (First Amendment retaliation turns on whether "the relevant speech was a substantial or motivating factor in the adverse employment action."); *with Moonin v. Tice*, 868 F.3d 853, 861 (9th Cir. 2017) (Prior restraint focuses on "the

text of the policy to determine the extent to which it implicates public employees' speech as citizens speaking on matters of public concern." (emphasis added)).

Second, Plaintiffs contend that even if they "waived" their prior restraint and compelled speech claims,[17] we should reach the merits of those claims. In support of this assertion, Plaintiffs cite *Petersen v. Boeing Co.*, 715 F.3d 276 (9th Cir. 2013), where we explained that "[o]ur waiver rules do not apply where . . . 'the district court nevertheless addressed the merits of the issue not explicitly raised by the party.'" *Id.* at 282 n.5 (quoting *Ahanchian v. Xenon Pictures, Inc.*, 624 F.3d 1253, 1260 n.8 (9th Cir. 2010)). We agree that *Petersen* would apply if the district court reached the merits of these claims despite Plaintiffs' forfeiture. The problem here is that we cannot tell whether the district court reached the merits of these claims or relied on forfeiture.

On the one hand, the district court arguably deemed the prior restraint and compelled speech claims "conceded." And a district court may rely on forfeiture in granting summary judgment. *See Est. of Shapiro v. United States*, 634 F.3d 1055, 1060 (9th Cir. 2011). On the other hand, the district court arguably addressed the merits of these claims in a footnote that briefly discusses the case law and implies that the District's actions were justified. And a district court has discretion to reach forfeited issues. *Cf. Petersen*, 715

[17] Plaintiffs use the term "waiver" in describing the basis for the district court's ruling, but a party's failure to address a claim or issue in briefing is best described as a "forfeiture." *See, e.g.*, *Lui v. DeJoy*, 129 F.4th 770, 780 (9th Cir. 2025). A finding of waiver requires evidence that a party intentionally relinquished or abandoned a known right. *See Hamer v. Neighborhood Hous. Servs. of Chi.*, 583 U.S. 17, 20 n.1 (2017). But the "failure to raise an argument in a timely fashion is a forfeiture not a waiver." *Hebrard v. Nofziger*, 90 F.4th 1000, 1006 (9th Cir. 2024).

F.3d at 282 n.5. Because the basis for the district court's summary judgment ruling is too unclear for proper review, and because Plaintiffs raise their merits arguments for the first time on appeal, we exercise our discretion to vacate the grant of summary judgment on these claims without commenting on how the district court should proceed on remand.

E. Oregon Constitution

We affirm the district court's grant of summary judgment to Defendants on Plaintiffs' state constitutional claim. The SAC alleges that Defendants were placed on administrative leave and ultimately discharged for engaging in speech protected by article I, section 8 of the Oregon Constitution. In moving for summary judgment, Defendants argued that the Oregon Constitution provides no private right of action for damages, and Plaintiffs were terminated because of their violations of District policy, not the content of their speech.

In their opposition to summary judgment, Plaintiffs abandoned their claim for damages under state law. Plaintiffs only obliquely asserted that they were challenging the constitutionality of the District's speech policies and seeking injunctive relief under the Oregon Constitution. As the district court noted, Plaintiffs failed to discuss the claim "in any substantive way." Therefore, the district court correctly granted summary judgment on the ground of forfeiture.[18] To the extent that Plaintiffs raise new arguments in support of their state constitutional claim for the first time

[18] Unlike the prior restraint and compelled speech challenges, the district court did not even hint at the merits of the state constitutional claim.

on appeal, we decline to consider them. *See Yamada*, 825 F.3d at 543.

F. Personal Liability of Individual Board Members

Plaintiffs also appeal the district court's dismissal of the § 1983 claims brought against the individual Board members in their personal capacities for terminating Plaintiffs' employment.[19] The district court concluded that the individual Board members could not be liable in their personal capacities for Plaintiffs' terminations because any Board decision requires a majority vote. On appeal, Plaintiffs argue that this was legal error because "both the Supreme Court and this Court have recognized that board members are responsible for their own conduct even when they act by way of majority vote." Defendants offer no response to this argument.

We agree with Plaintiffs that the individual members may be personally liable even though the Board makes decisions only by majority vote. In at least some cases, we have permitted personal capacity claims to proceed against individual members of a municipal board. *See, e.g.*, *Navarro v. Block*, 250 F.3d 729, 734 (9th Cir. 2001) (allowing plaintiff to sue members of board of supervisors in their personal capacities and holding that members did not have

[19] The SAC alleges both official and personal capacity § 1983 claims against the individual members of the Board for (1) enacting and amending the District's speech policies and (2) terminating Plaintiffs' employment. The district court dismissed the official capacity claims against the individual Board members because Plaintiffs bring these same claims against the District. The district court also concluded that the individual members were entitled to legislative immunity for enacting and amending the District's speech policies in their personal capacity. Plaintiffs do not appeal either ruling.

qualified immunity for bad-faith decisions to indemnify officers); *Trevino v. Gates*, 23 F.3d 1480, 1482–83 (9th Cir. 1994) (permitting individual liability against members of Los Angeles City Council who voted to pay punitive damages award); *see also Wood v. Strickland*, 420 U.S. 308, 319–20 (1975) (holding that individual school board members who voted to expel student were not absolutely immune from claim that expulsion decision violated student's due process rights), *abrogated on other grounds by Harlow*, 457 U.S. at 818.

We recognize that none of these cases expressly address whether an individual member may be held personally liable when the board acts by majority vote. Nonetheless, the district court's conclusion—that individual board members cannot, as a general rule, be personally liable for decisions made by majority vote—would be in tension with these cases.[20] Further, neither the district court nor Defendants offer any reasons why we should adopt such a rule now. Therefore, we decline to do so in this case, and we vacate the

[20] The district court relied solely on an out-of-circuit case, *Doe v. Clairborne County*, 103 F.3d 495 (6th Cir. 1996). There, the Sixth Circuit considered whether individual members of a school board could be personally liable under 42 U.S.C. § 1983 for deliberate indifference to a teacher's sexual abuse of a student. *See id.* at 512–13. The court concluded that the individual members were not personally liable because they had no supervisory responsibility over the teacher. *See id.* Although that lack of responsibility stemmed in part from the fact that the individual members could only "act, in a legal sense, [] as constituent members of a board majority," *id.*, the Sixth Circuit did not hold that individual board members are categorically immune from individual liability when they act by majority vote.

district court's dismissal of the personal capacity claims against the individual Board members on that ground.[21]

G. *Monell* Liability

Municipalities and other local governing bodies such as school districts may be held liable under § 1983 where a plaintiff shows that "execution of a government's policy or custom . . . inflict[ed] the injury." *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 691, 694 (1978). "A school district's liability under *Monell* may be premised on any of three theories: (1) that a district employee was acting pursuant to an expressly adopted official policy; (2) that a district employee was acting pursuant to a longstanding practice or custom; or (3) that a district employee was acting as a final policymaker." *Lytle v. Carl*, 382 F.3d 978, 982 (9th Cir. 2004) (internal quotation marks and citation omitted).

The district court held that the District could be liable under *Monell* for terminating Plaintiffs because "the decision to terminate Plaintiffs' employment was made according to District policies." The District does not dispute that conclusion on appeal. The district court granted summary judgment to the District only because, in its view, there were no underlying constitutional violations as a matter of law. Because we vacate the grant of summary judgment on the underlying First Amendment retaliation and Fourteenth Amendment equal protection claims, *see supra*

[21] Although we vacate the district court's dismissal of the § 1983 claims brought against the individual Board members in their personal capacities, we affirm the grant of summary judgment to the individual Board members on the damages claims because they are entitled to qualified immunity.

Sections II.A, C, we also vacate the grant of summary judgment on *Monell* liability.

H. Title VII Claim

Finally, we review the district court's grant of summary judgment on Plaintiffs' claim that Defendants violated Title VII by terminating them "for expressing their biblically-based views on gender and sexuality."[22] "[W]hen responding to a summary judgment motion," a Title VII plaintiff "is presented with a choice regarding how to establish his or her case." *McGinest v. GTE Serv. Corp.*, 360 F.3d 1103, 1122 (9th Cir. 2004). The plaintiff may "produce direct or circumstantial evidence demonstrating that a discriminatory reason more likely than not motivated" the employer. *Id.* Or the plaintiff may rely on the burden-shifting framework of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). *See McGinest*, 360 F.3d at 1122. Under *McDonnell Douglas*, "once a plaintiff establishes a prima facie case of [] discrimination through indirect proof, the defendant bears the burden of producing a [] neutral explanation for its action, after which the plaintiff may challenge that explanation as pretextual." *Comcast Corp. v. Nat'l Ass'n of Afr. Am.-Owned Media*, 589 U.S. 327, 340 (2020).

A plaintiff alleging disparate treatment makes out a prima facie case under *McDonnell Douglas* by showing: (1) she is a member of a protected class; (2) she was qualified for her position; (3) she experienced an adverse employment action; and (4) similarly situated individuals outside her protected class were treated more favorably *or* other circumstances surrounding the adverse employment

[22] Plaintiffs do not allege that Defendants denied them a religious accommodation in violation of Title VII.

action give rise to an inference of discrimination. *See Hittle v. City of Stockton*, 101 F.4th 1000, 1011–12 (9th Cir. 2024); *see also Lui*, 129 F.4th at 778 (clarifying that "the fourth element of the *McDonnell-Douglas* prima facie test . . . requir[es] only that the adverse action occurred under circumstances giving rise to an inference of discrimination" (cleaned up)). "The *prima facie* case method established in *McDonnell Douglas* was never intended to be rigid, mechanized, or ritualistic." *U.S. Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 715 (1983) (internal quotation marks and citation omitted). Rather, it "operates as a flexible evidentiary standard." *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 512 (2002); *see also McDonnell Douglas*, 411 U.S. at 802 n.13 (same).

At summary judgment, the degree of proof necessary to establish a prima facie case is "minimal and does not even need to rise to the level of a preponderance of the evidence." *Lyons v. England*, 307 F.3d 1092, 1112 (9th Cir. 2002) (internal quotation marks and citation omitted). In fact, "very little[] evidence is necessary to raise a genuine issue of fact regarding an employer's motive." *Opara v. Yellen*, 57 F.4th 709, 723–24 (9th Cir. 2023) (quoting *McGinest*, 360 F.3d at 1124).

The district court granted summary judgment to Defendants on the Title VII claim because it concluded that Plaintiffs failed to raise triable issues regarding the first and fourth elements of their prima facie case.[23]

[23] The second and third elements are not at issue because Defendants concede that Plaintiffs were qualified for their positions and suffered an adverse employment action.

On the first element, the district court held that Plaintiffs are not members of a protected class because even "[a]ssuming that being a Christian is a protected class, Plaintiffs do not cite to any Bible passage or scripture to support the views expressed in their 'I Resolve' video." This was legal error. Discrimination on the basis of religious beliefs is discrimination on the basis of religion for purposes of Title VII. *See Groff v. DeJoy*, 600 U.S. 447, 458 (2023) ("Congress provided that 'the term "religion" includes all aspects of religious observance and practice, as well as belief.'" (quoting 42 U.S.C. § 2000e(j))).

Further, in the context of Free Exercise claims, it is well-established that an individual may sincerely hold a religious belief that is not reflected in a biblical passage or scripture. *See Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136, 144 n.9 (1987) ("So long as one's faith is religiously based at the time it is asserted, it should not matter, for constitutional purposes, whether that faith derived from revelation, study, up-bringing, gradual evolution, or some source that appears entirely incomprehensible." (quoting *Callahan v. Woods*, 658 F.2d 679, 687 (9th Cir. 1981))); *accord Callahan*, 658 F.2d at 687 ("Nor can the courts easily distinguish between beliefs springing from religious and secular origin."). We see no basis for adopting a different rule in the Title VII context. *See Philbrook v. Ansonia Bd. of Educ.*, 757 F.2d 476, 481–82 (2d Cir. 1985), *aff'd and remanded*, 479 U.S. 60 (1986).

Turning to the fourth element, the district court concluded Plaintiffs failed to introduce sufficient evidence showing that the District "treated [them] differently than other teachers" who "caused the level of disturbance that was caused by the 'I Resolve' video and [] Plaintiffs' conduct in promoting that video at school." The district court

erred by considering only whether Plaintiffs showed that they were treated differently from other teachers who caused the same level of disturbance. As noted above, Plaintiffs do not have to identify comparators; they can also make out a prima facie case by showing that other circumstances surrounding their terminations give rise to an inference of discrimination. *See Hittle*, 101 F.4th at 1012.[24]

Additionally, where, as here, the employer argues that it terminated the plaintiff for legitimate, non-discriminatory reasons, the plaintiff may "survive summary judgment without producing any evidence of discrimination beyond that constituting his prima facie case, if that evidence raises a genuine issue of material fact regarding the truth of the employer's proffered reasons." *Chuang v. Univ. of Cal. Davis*, 225 F.3d 1115, 1127 (9th Cir. 2000). Defendants contend that the District terminated Plaintiffs because they violated multiple District policies. Yet Defendants do not actually argue that, viewing the record in the light most favorable to Plaintiffs, any reasonable factfinder would find that they violated those policies. Rather, Defendants state only that "[t]he District held an honest belief that plaintiffs violated multiple policies." Consequently, we agree with Plaintiffs that there is a genuine issue of material fact regarding the credibility of the District's proffered reasons for terminating them. For all these reasons, we vacate the

[24] In moving for summary judgment, Defendants did not address—and the district court did not consider—whether, viewing the record in light most favorable to Plaintiffs, there is sufficient evidence of circumstances that give rise to an inference of discrimination. We decline to consider this question in the first instance.

district court's grant of summary judgment on the Title VII claim.[25]

[25] We reject Plaintiffs' alternative argument that there is enough direct evidence of Defendants' discriminatory animus to preclude summary judgment on their Title VII claim. Plaintiffs quote partial statements made by Principal Blanchard and Superintendent Kolb out of context, but we must consider these allegedly discriminatory statements as a whole and in context. *See Hittle*, 101 F.4th at 1013–16 (concluding various statements did not provide direct evidence of discriminatory animus). Plaintiffs first point to a statement made by Principal Blanchard during his investigatory interview of Medart. After Medart declined to answer whether she would be able to follow District guidance on students' preferred names and pronouns, Blanchard said: "So it gives me a little bit of concern when you say that my faith does not affect my ability to do the job. That it may." Read in context, we conclude that Blanchard's response reflects legitimate operational concerns, not religious animus. *See id.* at 1013–14. Plaintiffs also point to Superintendent Kolb's April 6, 2021 email, where he stated:

> I am writing today to address reports of a 'movement' circulating on social media that is in direct conflict with the values of Grants Pass School District 7.
>
> To be very clear, we do not support or endorse this message.
>
> District 7 is unequivocally committed to providing welcoming and safe learning environments for all students, including our LGBTQ students. In Grants Pass schools, we ALL belong, regardless of race, religion, gender, sex, or ability.

To the extent Kolb was referencing the views of others stated in "reports" to him, Kolb's email does not provide direct evidence of his own animus. *See id.* at 1013. But even assuming Kolb was expressing only his own views, the above email does not provide direct evidence of religious animus or discrimination. *See id.* at 1012–16 (same).

III. CONCLUSION

For the foregoing reasons, we affirm on qualified immunity grounds the grant of summary judgment to the individual defendants on Plaintiffs' damages claims for First Amendment retaliation; as-applied, content- and viewpoint-based discrimination under the First Amendment; and viewpoint discrimination under the Equal Protection Clause. However, for those damages claims, we vacate the grant of summary judgment to the District; for the related claims for declaratory and injunctive relief, we vacate the grant of summary judgment to all Defendants. We affirm the grant of summary judgment to all Defendants on the facial content- and viewpoint-based discrimination claim and the Oregon Constitution claim. Finally, we vacate the grant of summary judgment on the First Amendment prior restraint and compelled speech claims as well as the Title VII claim.

VACATED IN PART, AFFIRMED IN PART, AND REMANDED.

Defendants shall pay costs on appeal.