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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

PHILIP SHEN, et al.,
Plaintiffs,
v.
ALBANY UNIFIED SCHOOL DISTRICT,
et al.,
Defendants.

Case Nos. [3:17-cv-02478-JD](#) (lead case)
[3:17-cv-02767-JD](#)
[3:17-cv-03418-JD](#)
[3:17-cv-03657-JD](#)

RICK ROE, et al.,
Plaintiffs,
v.
ALBANY UNIFIED SCHOOL DISTRICT,
et al.,
Defendants.

**ORDER RE SUMMARY JUDGMENT
MOTIONS**

Re: Dkt. No. 43 in 3:17-cv-02478-JD

JOHN DOE,
Plaintiff,
v.
ALBANY UNIFIED SCHOOL DISTRICT,
et al.,
Defendants.

C.E.,
Plaintiff,
v.
ALBANY UNIFIED SCHOOL DISTRICT,
et al.,
Defendants.

These cases arise out of disciplinary actions taken by Albany Unified School District (“AUSD” or “the District”) in response to racist and derogatory content posted on an Instagram account by several students at Albany High School (“AHS”). A student created the account in November 2016 and gave access to a group of AHS students. In March 2017, the AHS student

1 body and school personnel discovered the account and its contents. AUSD expelled the account’s
2 creator and suspended the other students involved. AUSD also sponsored a variety of events in
3 response to the situation, including a “restorative justice” session that culminated in threats, and in
4 some cases physical assaults, against the disciplined students and their families. Plaintiffs, who
5 are the disciplined students, allege violations of free speech and due process under the federal
6 constitution and California state law, and have sued the District and its officials¹ to set aside the
7 disciplinary actions, among other relief.

8 In this order, the Court resolves the freedom of speech issues only. These questions are
9 central to plaintiffs’ lawsuits, and the parties agreed to address them early on summary judgment.
10 Dkt. No. 71.² Because the ten plaintiffs have filed several separate complaints, all of which have
11 been related but not consolidated for case management purposes, and because the parties filed
12 multiple overlapping motions and cross-motions for summary judgment, the litigation is a
13 procedural thicket. Reduced to the pertinent essentials, plaintiffs filed motions for summary
14 judgment on their First Amendment claims, and the District filed a cross-motion on the same
15 issue. *See* Dkt. No. 43 (motion for partial summary judgment); Dkt. No. 59 (District’s cross-
16 motion); Dkt. No. 72, Dkt. Nos. 40 and 42 in *Roe*, Dkt. No. 16 in *Doe*, Dkt. No. 13 in *C.E.*
17 (opposition to District’s cross-motion and additional cross-motions); Dkt. No. 55 in *Roe* (District’s
18 consolidated reply). This order applies to the First Amendment and related state law claims
19 alleged in all of the complaints by all plaintiffs.

20 **BACKGROUND**

21 For summary judgment purposes, the parties agree on the material facts. In November
22 2016, AHS student C.E. created a private Instagram account with the handle @yungcavage, and
23 invited several AHS students to follow it.³ Dkt. No. 13-1 ¶ 7 in *C.E.* Only the express invitees

24 ¹ The named defendants include AUSD as well as AHS officials, teachers, and AUSD Board of
25 Education officials. All named defendants have appeared jointly in these cases. For convenience,
26 in the rest of this order, the Court refers to AUSD as the representative defendant. The Court takes
up individual defendants’ qualified immunity arguments at the end of the order.

27 ² Unless otherwise specified, citations to the docket are to the lead case, Case No. 17-2478.

28 ³ Some of the plaintiffs of minor age requested permission to proceed pseudonymously, which the
Court granted. Dkt. No. 88.

1 were able to see or react to the posts by commenting or by liking them. By March 2017, at least
2 nine AHS students could access the @yungcavage account. Some of the approved followers were
3 C.E.'s close friends, and others were just passing acquaintances. *See, e.g.*, Dkt. No. 54-5 ¶ 2 in
4 *Roe*.

5 Between November 2016 and March 2017, @yungcavage made thirty to forty posts. Dkt.
6 No. 13-1 ¶ 7 in *C.E.* The posts in large part targeted fellow AHS students and school personnel
7 with racist and derogatory comments, often with a picture identifying the target. *See* Dkt. No. 60-
8 8 Exh. A ("Set 1"); Dkt. No. 60-9 ("Set 2"). Among other images, these posts depicted:

- 9 - A "Ku klux starter pack" featuring a noose, a burning torch, a
10 black doll, and a white hood. Set 1 at ECF p.12.
- 11 - A screenshot of an African-American student from her own
12 Instagram page, which she had captioned "i [sic] wanna go back to
13 the old way," juxtaposed with an image of a white man beating a
14 black slave hung by his hands. The image posted by
15 @yungcavage is captioned, "Do you really tho?" *Id.* at ECF p.17.
- 16 - An AHS student and the AHS basketball coach, both of whom are
17 African-American, with nooses drawn around their necks,
18 captioned, "twinning is winning." *Id.* at ECF p.22.
- 19 - A screenshot of a Snapchat conversation where a female African-
20 American AHS student asks C.E. to delete a video he posted
21 online. In that video, a male student touches her hair without her
22 permission. In the screenshotted conversation, C.E. refuses to take
23 down the video. The post is captioned: "Holy shit I'm on the edge
24 of bringing my rope to school on Monday." *Id.* at ECF p.24; *see*
25 *also* Dkt. No. 60-3 ¶ 3.
- 26 - "Things The World Wouldn't Have If Black People Didn't Exist",
27 including "United States avg. IQ: 98", a KKK hood, and men
28 dressed in orange prison garb. Set 2 at ECF p.7.
- The back of a female African-American AHS student's head,
captioned "Kamryn or amber" and "Fucking nappy ass piece of
shit." *Id.* at ECF p.9.
- Multiple comparisons of African-American women and students to
gorillas. *Id.* at ECF p.3; Set 1 at ECF p.19.
- The back of a female African-American AHS student's head
captioned "Fuck you." Set 2 at ECF p.10.

1 - Screenshot of an iPhone’s text replacement page, showing that the
2 phone auto-corrects the word “nigger” to “nibber.” Captioned:
 “Making my texts more black friendly.” *Id.* at ECF p.13.

3 In total, ten different AHS students were depicted on the account, and several photos were
4 taken on school property. Dkt. No. 55-4 at 13 in *Roe*. The parties agree that C.E., the creator of
5 the @yungcavage account, made all the original posts on the account. *See* Dkt. No. 13-1 ¶ 7 in
6 *C.E.* With one exception, the other students disciplined by the District liked or commented on the
7 posts, or took photographs that ended up on the account, but did not directly post images. *See,*
8 *e.g.,* Dkt. No. 43-1 at ECF pp.2-3, 7, 15. One student, pseudonymous plaintiff Nick Noe, had
9 access to the account but never commented on or otherwise responded to it online. Dkt. No. 40-1
10 ¶¶ 5-7 in *Roe*. C.E. states, and the District does not dispute, that he did not post any images to his
11 Instagram account during school or on school property. Dkt. No. 13-1 ¶ 7 in *C.E.* The other
12 plaintiffs similarly state that they did not access Instagram, comment on, or like any images during
13 school or on school property.

14 The pretense of keeping the @yungcavage account private evaporated on the weekend of
15 March 17, 2017, when the *Doe* plaintiff showed some of C.E.’s posts to two of the targeted AHS
16 students, both African-American. Dkt. No. 16-1 ¶ 7 in *Doe*. One of those students saw photos of
17 herself, including a photo of her and her basketball coach with nooses drawn around their necks.
18 Dkt. No. 60-12 ¶ 8. She also saw a post about auto-correcting “nigger” to “nibber,” a photo of her
19 next to a napping student (which she took as a reference to “nappy” hair), and comments made by
20 the account’s followers that denigrated the intelligence of African-Americans. *Id.*

21 News of the @yungcavage account spread to other AHS students over the weekend. *Id.* ¶
22 13 (student heard of account on Sunday). On the morning of Monday, March 20, at school, a
23 student who had heard about the account asked one of the plaintiffs if she could borrow his phone
24 to make a call. Dkt. No. 54-3 ¶ 10 in *Roe*. She took his phone to a bathroom, where she accessed
25 his Instagram application and took photos of @yungcavage posts using her own phone. *Id.* She
26 did this at the request of a friend who had heard about the account over the weekend and wanted to
27 see the posts. *Id.*

1 By lunchtime on Monday, a visibly distraught and agitated group of students -- several of
2 whom were targets of the account -- had gathered in a school hallway. Some students were in
3 tears, others were yelling. AHS Principal Anderson heard the disturbance from his office and
4 brought the students into a conference room. Dkt. No. 59-1 ¶ 2. This was AUSD's first
5 awareness of the Instagram account.

6 By afternoon, many more students had obtained copies of the @yungcavage posts. Dkt.
7 No. 60-8 ¶ 8. News about the situation spread rapidly through the school. One student, for
8 example, learned about the account on a high school club chat line that Monday morning. Dkt.
9 No. 60-5 ¶ 2. C.E. discovered that his account had become public knowledge and disabled it that
10 day. Dkt. No. 13-1 ¶ 9 in *C.E.* On the evening of the same day, he permanently deleted the
11 account.⁴ *Id.*

12 By June 2017, AUSD had suspended each of the account's followers for various periods of
13 time. *See, e.g.*, Dkt. No. 43 at 3. AUSD permanently expelled C.E from AHS. Dkt. No. 13-1 in
14 *C.E.* ¶ 14.

15 LEGAL STANDARDS

16 The parties seek summary judgment on whether AUSD's disciplinary actions violated
17 plaintiffs' free speech guarantees under the First Amendment and the California Education Code.
18 "A party may move for summary judgment, identifying each claim or defense -- or the part of each
19 claim or defense -- on which summary judgment is sought. The Court shall grant summary
20 judgment if the movant shows that there is no genuine dispute as to any material fact and the
21 movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The Court may dispose
22 of less than the entire case and even just portions of a claim or defense. *Smith v. State of*
23 *California Dep't of Highway Patrol*, 75 F. Supp. 3d 1173, 1179 (N.D. Cal. 2014).

24 Under Rule 56, a dispute is genuine "if the evidence is such that a reasonable jury could
25 return a verdict" for either party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A
26 fact is material if it could affect the outcome of the suit under the governing law. *Id.* at 248-49.

27 ⁴ The photos taken by the AHS student on the morning of March 20 are the only remaining visual
28 record of the images, comments, and likes on the @yungcavage account. Those photos do not
capture all the activity on the account.

1 To determine whether a genuine dispute as to any material fact exists, a court must view the
2 evidence in the light most favorable to the non-moving party and draw “all justifiable inferences”
3 in that party’s favor. *Id.* at 255.

4 The primary legal question presented for summary judgment is whether plaintiffs’
5 Instagram activity -- their posts, their comments, their likes, and that they followed the
6 @yungcavage account -- was protected from school discipline by the First Amendment. It is of
7 course a “bedrock principle” under the First Amendment that the government cannot prohibit or
8 penalize the expression of an idea “simply because society finds the idea itself offensive or
9 disagreeable.” *Texas v. Johnson*, 491 U.S. 397, 414 (1989). It is also beyond dispute that the First
10 Amendment protects not only literal speech but also conduct with expressive elements. Conduct
11 may be protected speech for purposes of the First Amendment if there was intent to convey a
12 particularized message, and “great” likelihood that that message would be understood by viewers.
13 *Id.* at 404.

14 The wrinkle here is that the speech and conduct involved a public high school and its
15 students. The “constitutional rights of students in public school are not automatically coextensive
16 with the rights of adults in other settings.” *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 682
17 (1986). “Schools must achieve a balance between protecting the safety and well-being of their
18 students and respecting those same students’ constitutional rights.” *C.R. v. Eugene Sch. Dist. 4J*,
19 835 F.3d 1142, 1148 (9th Cir. 2016) (internal citation omitted).

20 Consequently, “school speech” is not analyzed under the traditional First Amendment
21 framework. Rather, as our circuit has determined, a school-specific framework applies: “vulgar,
22 lewd, obscene, and plainly offensive speech” is governed by *Fraser*; “school-sponsored speech” is
23 governed by *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988); “speech promoting illegal
24 drug use” is governed by *Morse v. Frederick*, 551 U.S. 393 (2007); and speech that falls into none
25 of these categories is governed by *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503
26 (1969). *See generally Wynar v. Douglas Cty. Sch. Dist.*, 728 F.3d 1062, 1067 (9th Cir. 2013).

27 Earlier decisions addressing school speech often focused on whether the speech occurred
28 on- or off-campus. Geographic location is still a relevant factor, *Wynar*, 728 F.3d at 1068, but

1 strict tests of locality are not compatible with the online methods of communication in our digital
2 age. In response to our internet world, where today’s students are particularly comfortable
3 residents, the courts have developed updated approaches to analyzing school speech issues. Our
4 circuit has “identified two tests used . . . to determine when a school may regulate off-campus
5 speech.” *C.R.*, 835 F.3d at 1149. The first test looks for a sufficient nexus between the speech
6 and the school and was applied by the Fourth Circuit in *Kowalski v. Berkeley County Schs.*, 652
7 F.3d 565 (4th Cir. 2011). The second test asks whether it was reasonably foreseeable that the off-
8 campus speech would reach the school and was applied by the Eighth Circuit in *S.J.W. v. Lee’s*
9 *Summit R-7 Sch. Dist.*, 696 F.3d 771 (8th Cir. 2012). The Ninth Circuit has declined to choose
10 between the two approaches, noting that both tests “rely on the speech’s close connection with the
11 school to permit administrative discipline.” *C.R.*, 835 F.3d at 1151 n.4.

12 AUSD argues that plaintiffs’ activities satisfied both the nexus and reasonable
13 foreseeability approaches, and so were subject to discipline as school speech. Plaintiffs dispute
14 that mainly on the grounds that the challenged communications happened off-campus in a private
15 online forum. If the plaintiffs’ Instagram activity was indeed school speech, the parties further
16 disagree over whether it was protected under *Tinker*. *Tinker* does not protect student speech that
17 “materially disrupts classwork or involves substantial disorder or invasion of the rights of others.”
18 *Tinker*, 393 U.S. at 513. AUSD says it could discipline the plaintiffs for their speech, which both
19 substantially disrupted school and which infringed on the rights of other students. Plaintiffs argue
20 that they neither caused substantial disruption, nor interfered with the rights of others.

21 **DISCUSSION**

22 **I. The Instagram Activity Falls Under The First Amendment**

23 All of the challenged actions occurred on a social media site, and the parties dispute the
24 extent to which the First Amendment applies to all of the online conduct. Plaintiffs interacted
25 with the @yungcavage account in different ways. Plaintiff C.E. created the account and uploaded
26 the original posts. Other plaintiffs commented. Still others only liked some posts, and one
27 plaintiff had account access but did not post a comment or indicate a like.
28

1 Without question, the original posts and verbal comments are within the scope of the First
2 Amendment. This applies to C.E., Philip Shen, Nima Kormi, Michael Bales, Kevin Chen, John
3 Doe of the *Roe* action, and the *Doe* plaintiff, all of whom posted either original content or verbal
4 comments.

5 Plaintiffs Rick Roe and Paul Poe liked some of the posts without adding any text. This too
6 is expression covered by the First Amendment. On the Instagram phone application, a user can
7 like an image either by tapping a heart-shaped icon under the post or by double-tapping the image
8 itself. A notification goes out to the poster that someone has liked his or her post, and the like is
9 also visible to anyone else who can see the post. This action broadcasts the user’s expression of
10 agreement, approval, or enjoyment of the post, which is clearly speech protected by the First
11 Amendment. *See Bland v. Roberts*, 730 F.3d 368, 386 (4th Cir. 2013), as amended (Sept. 23,
12 2013) (“liking” Facebook political campaign page is substantive speech); *see also City of Ladue v.*
13 *Gilleo*, 512 U.S. 43, 55 (1994) (displaying signs is substantive speech even though it “may not
14 afford the same opportunities for conveying complex ideas as do other media”).

15 The parties’ disagreement is sharpest in the case of Nick Noe. Noe and defendants contest
16 whether he has any First Amendment claim at all from just following the @yungcavage postings.
17 Defendants say that he does not because he was, at most, a passive consumer of content and not an
18 active speaker. Noe’s own declaration goes to some length to state that he joined only at C.E.’s
19 request and that he “never accessed the account to view any of the dialogue or images that were
20 posted” and was not aware of its content until he was questioned by AUSD officials on March 21.
21 Dkt. No. 40-1 ¶¶ 5-7 in *Roe*.

22 Both sides frame their debate in terms of whether Noe was engaged in affirmative
23 expressive conduct, but the better approach is to view his activity as that of a reader. The First
24 Amendment protects readers as well as speakers. “The right of freedom of speech and press
25 includes not only the right to utter or to print, but the right to distribute, the right to receive, [and]
26 the right to read.” *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965). *See also Stanley v.*
27 *Georgia*, 394 U.S. 557, 564 (1969) (“right to receive information and ideas, regardless of their
28 social worth”). This principle has been applied specifically to students and schools. *Bd. of Educ.*,

1 *Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 867 (1982) (right to receive
2 information is “inherent corollary” of rights explicitly guaranteed by First Amendment). As a
3 follower of online content, Noe is no different for First Amendment purposes than the pre-internet
4 readers discussed in these cases. It is also worth noting that AUSD disciplined Noe for viewing
5 the @yungcavage posts, which is precisely the type of government conduct that these cases
6 condemned under the First Amendment.

7 Looking for a moment beyond the speech issues, the disciplinary action against Noe is
8 troubling in many respects. From the record before the Court, it appears that Noe did nothing
9 more than have access to the posts, and the District agrees that Noe’s conduct was “completely
10 devoid of any affirmative expressions or purpose, action, or ideology.” Dkt. No. 55-4 at 7 in *Roe*.
11 It is not clear how Noe or any student would have known that online access or viewing alone
12 could result in a suspension, and it is even less clear how a suspension for those reasons squares
13 with our traditional ideas of freedom of thought, due process, and fairness. Giving schools the
14 power to control what students are permitted to look at online is a deeply problematic proposition.
15 These aspects of Noe’s case will likely be addressed more fully in later proceedings. For now, the
16 Court finds that Noe engaged in protected First Amendment activity.

17 **II. The Instagram Activity Was School Speech**

18 The next issue is whether plaintiffs’ online conduct qualifies as school speech potentially
19 subject to greater regulation by school authorities. The answer to this question entails “a
20 circumstance-specific inquiry to determine whether a school permissibly can discipline a student
21 for off-campus speech.” *C.R.*, 835 F.3d at 1150. In making that determination, our circuit applies
22 the nexus and reasonable foreseeability tests. *Id.*

23 As the Ninth Circuit said in *Wynar*, the nexus test is exemplified by the Fourth Circuit’s
24 approach in *Kowalski*. In *Kowalski*, Musselman High student Kara Kowalski created a MySpace
25 discussion group where she and over two dozen Musselman students ridiculed a fellow student as
26 a “whore” infected with herpes. *Id.* at 567-68. Kowalski argued that she could not be disciplined
27 for speech that took place at home after school. The Fourth Circuit disagreed, finding a sufficient
28 nexus between Kowalski’s speech and the school. The court noted that the group consisted

1 predominantly of students at Musselman High, the group was named S.A.S.H. for “Students
2 Against Slut Herpes,” the dialogue foreseeably took place between Musselman students and
3 impacted the school environment, and the group thread was understood by the victim as an attack
4 “made in the school context.” *Id.* at 573.

5 The undisputed facts here amply satisfy the nexus test and its focus on “the subject and
6 addressees” of the speech at issue. *Wynar*, 728 F.3d at 1069. The followers were mainly AHS
7 students, and the posts featured ten different AHS students as well as school personnel. Some of
8 the most offensive posts -- for instance, the image of nooses drawn around the necks of an
9 African-American student and an African-American basketball coach -- depicted school activities
10 and were clearly taken on campus, even if not posted to Instagram from campus. Dkt. No. 60-14 ¶
11 3. Other posts were directly responsive to events that took place at school. For instance, one post
12 related to an argument that C.E. had with a female African-American AHS student. In February
13 2017, C.E. had recorded a video of another male AHS student touching her hair without her
14 permission. Dkt. No. 60-3 ¶ 3. C.E. then posted it on an Instagram account (not @yungcavage)
15 visible to other AHS students. The female student asked C.E. to delete the video, both in person
16 and via Snapchat. *Id.* ¶ 4. C.E. posted a screenshot of that Snapchat conversation on
17 @yungcavage and captioned it, “Holy shit I’m on the edge of bringing my rope to school on
18 Monday.” Set 1 at ECF p.24.

19 The same result is readily reached under the Eighth Circuit test, which asks whether it was
20 reasonably foreseeable that the speech or conduct would reach the school and create a risk of a
21 substantial disruption. *S.J.W. v. Lee’s Summit R-7 Sch. Dist.*, 696 F.3d 771, 777 (8th Cir. 2012).
22 In *S.J.W.*, two students created a blog with racist content as well as sexually degrading comments
23 about specifically identified female classmates. *Id.* at 773. The two students used a Dutch domain
24 site to prevent anyone from finding their blog using a Google search and told only six school
25 friends about their blog. They intended the blog to be a secret, but “whether by accident or
26 intention, word spread quickly.” *Id.* at 774. The *S.J.W.* court found that it was reasonably
27 foreseeable that the blog might reach the school because it “targeted” the school. *Id.* at 778.

28

1 Similarly, the Ninth Circuit has found that it is reasonably foreseeable for speech made by
2 students about other students to reach a school. *Wynar*, 728 F.3d at 1069.

3 The undisputed facts here also satisfy the “reasonable foreseeability” test. Like the speech
4 in *Wynar* and in *S.J.W.*, the activity was targeted to the school. Posts, comments, and likes were
5 made by students and about students, and it was precisely the targeted nature of the content on the
6 @yungcavage account that led the *Doe* plaintiff to show the account to others. Moreover,
7 plaintiffs’ activity on Instagram appear to have been related to ongoing social tensions at school,
8 which again increased the likelihood their speech would reach and disturb the campus. The
9 District has offered evidence that some of the activity on the account was co-extensive with a
10 campaign of offensive comments directed by C.E. and his school friends at a group of female
11 African-American students. For example, at the time the *Doe* plaintiff showed the posts to his two
12 friends, he explained “that his friend group thinks they are superior to her group, because her
13 group’s hair is too nappy and their skin is too dark.” Dkt. No. 60-12 ¶ 8. One student targeted by
14 the @yungcavage account reported that C.E. had previously texted her with a racial slur and then
15 blamed the text on Kevin Chen. Dkt. No. 60-12 ¶ 14. Another student targeted by the
16 @yungcavage account reported that C.E. had told her she should be lynched, and that Kevin Chen
17 and C.E. had called her and her friends “‘nigger’ using the hard ‘r’ at the end.” Dkt. No. 60-6 ¶ 7.
18 These circumstances made it reasonably foreseeable that the contents of the account would
19 eventually reach and disrupt AHS.

20 In opposition to both tests, plaintiffs say that the private and self-contained nature of the
21 Instagram account takes it out of the domain of school speech, *see, e.g.*, Dkt. No. 43 at 10, but that
22 is not at all the case. As an initial matter, none of the Fourth, Eighth, or Ninth Circuit’s decisions
23 have focused on a student’s subjective intent for speech to remain private. And the record does
24 not support a finding that maintaining privacy was an essential element of plaintiffs’ conduct.
25 Although C.E. states that he allowed access only to close friends, two of the plaintiffs have stated
26 that they did not know C.E. well. Dkt. No. 54-3 ¶ 2 in *Roe*; Dkt. No. 54-5 ¶ 2 in *Roe*. This
27 undercuts C.E.’s suggestion that the account was an intimate forum for friends with a shared
28 understanding of each other’s privacy expectations. It also does not appear that C.E. ever

1 instructed his followers to keep information about the account private, even though at least one of
2 the followers was a friend of AHS students targeted by the account. Nor does it appear that
3 anyone other than C.E. determined who was allowed to follow the account and who was not.
4 Plaintiffs who commented on and liked posts had little reason to believe their conduct would stay
5 secret when they could not control who was allowed to follow the account at all. In addition, it is
6 common knowledge that little, if anything, posted online ever stays a secret for very long, even
7 with the use of privacy protections.

8 Plaintiffs’ other efforts to avoid the school speech domain are equally unavailing. They
9 say that this treatment would make school officials “the final *de facto* judge and disciplinarian for
10 all student conduct not only inside of school but also outside the school.” Dkt. No. 43 at 9; Dkt.
11 No. 13 at 11 in *C.E.* That goes too far. The threshold question of whether speech is “school
12 speech” does not resolve the scope of protection offered by the First Amendment. Under *Tinker*,
13 school speech may be constitutionally restricted or disciplined only if it risks a substantial
14 disruption of the school environment or violates the rights of other students to be secure. *Tinker*,
15 393 U.S. at 513.

16 The *Shen* plaintiffs suggest that Ninth Circuit precedent forecloses *Tinker*’s application to
17 speech that is not either a threat of physical violence as in *LaVine v. Blaine Sch. Dist.*, 257 F.3d
18 981 (9th Cir. 2001), or *Wynar*, or sexual harassment occurring near school property or
19 immediately after school as in *C.R.* Dkt. No. 72 at 9. That also is not the case. Those may have
20 been the specific facts involved in the circuit’s opinions, but the circuit has expressly
21 contemplated that *Tinker* may apply to “websites dedicated to disparaging or bullying fellow
22 students.” *Wynar*, 728 F.3d at 1069. Here, there is no question that the speech at issue satisfies
23 threshold tests like the nexus test adopted by the Eighth Circuit or the reasonable foreseeability
24 test adopted by the Fourth. *Id.* Plaintiffs’ argument also unduly slights the fact that schools are
25 responsible for preventing not only acts of violence or assault, but also harassment and bullying.
26 *Kowalski*, 652 F.3d at 572.

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III. Most Of The Plaintiffs Were Properly Disciplined

Since plaintiffs’ speech was school speech, *Tinker* governs the review of defendants’ disciplinary measures. *Tinker* allows schools to discipline speech that “materially disrupts classwork or involves substantial disorder or invasion of the rights of others.” *Tinker*, 393 U.S. at 513. School officials do not have to wait for the disruption or invasion to take place; they may act prophylactically if it is reasonable under the circumstances. *See LaVine*, 257 F.3d at 989; *Wynar*, 728 F.3d at 1070. The reasonable foreseeability test also focuses on the risk of disruption, and does not require a disturbance to erupt before the school may act. *See, e.g., S.J.W.*, 696 F.3d at 777-78.

AUSD’s authority under *Tinker* to discipline C.E., the creator and main content supplier for the @yungcavage account, is not open to serious question. “In the school context, . . . [t]he cases do not distinguish between ‘substantial disruption’ caused by the speaker and ‘substantial disruption’ caused by the reactions of onlookers or a combination of circumstances.” *Dariano v. Morgan Hill Unified Sch. Dist.*, 767 F.3d 764, 778 (9th Cir. 2014) (as amended Sept. 17, 2014) (petition for rehearing en banc denied). That fits well here because a cascade of disruptive events immediately followed the public disclosure of C.E.’s @yungcavage account. After the disclosure, the students who first gathered in the hallway were “all too upset to go to class” and “were crying hysterically and talking loudly about the posts.” Dkt. No. 60-6 ¶ 3. One school administrator stated, “I had never seen a group of students as upset as these girls were. The intensity of the crying and the yelling was very disturbing and disruptive.” Dkt. No. 60-12 ¶ 3.

The level of disruption then rose even higher. School officials called in mental health counselors to help calm down the students. Dkt. No. 60-8 ¶ 5. After reviewing the posts and comments depicting and referencing the KKK, lynching, and nooses, District officials called the Albany police because “the posts could be construed as threats of violence.” Dkt. No. 60-12 ¶ 4. That afternoon, the police and District officials conducted interviews with targeted students and their parents. *Id.* ¶ 7. Many of the targeted students were unable to resume school in a normal way. One student missed multiple days of school and tests out of embarrassment and fear. Dkt. No. 60-5 ¶ 4. Another stated that she has had a hard time in school ever since March because she

1 feels “paranoid about classmates taking photographs of me and using them in the most offensive
2 ways.” Dkt. No. 60-3 ¶ 17.

3 While administrators dealt with targeted students and their parents on the afternoon of the
4 20th, news of the account quickly spread throughout the school at large. By March 21, faculty
5 members reported that classes were disrupted by upset students who wanted to talk about the
6 situation. Dkt. No. 59-1 ¶ 19.

7 Taken as a whole, the record firmly establishes that C.E. caused a substantial disruption at
8 AHS. That is enough under *Tinker* to support defendants’ disciplinary measures, and
9 consideration of whether C.E. also invaded the rights of others is not necessary. Plaintiffs try to
10 minimize the level of disruption by blaming the District for over-reacting, but it is clear that with
11 or without the intervention of school officials, the students learned about the @yungcavage
12 account and had very strong reactions to it while at school. That the disruption fell short of a full-
13 scale riot is also of no moment. C.E. suggests that anything less than that is not sufficient under
14 *Tinker*, Dkt. No. 13 at 18 in *C.E.*, but the Supreme Court hardly indicated that *Tinker* applies only
15 when the school is in flames or out of control. *See also Kowalski v. Berkeley County Schools*, 652
16 F.3d at 574 (school may act early to avoid continuing and more serious harm).

17 Defendants also properly disciplined plaintiffs Philip Shen, Kevin Chen, the *Doe* plaintiff,
18 Rick Roe, and Paul Poe, all of whom expressed approval of or liked posts that specifically targeted
19 students at AHS when, among other incidents:

- 20
- 21 - Philip Shen commented “yep” on C.E.’s post mocking an African-
22 American student who said that she wanted to “go back to the old
23 way.” Next to a photo of the student, C.E. had posted a picture of
24 a black slave being beaten by a white man and captioned the
25 picture, “Do you really tho?” Set 1 at ECF p.17.
 - 26 - Kevin Chen commented “Its[sic] too good” on a post comparing an
27 African-American AHS student to a gorilla. Set 2 at ECF pp.3-4.
28 On that post, Chen responded “no fuck YOU you dirty zookeeping
son of a bitch” to a commenter who wrote “Hey not funny/Fuck
you/Delete this.” Chen also provided some of the photos of AHS
students that ended up on the @yungcavage account and took at
least one of those photos in class. Dkt. No. 60-8 ¶¶ 25-26.

- 1 - The *Doe* plaintiff liked posts including a photo comparing an
2 African-American female student to a gorilla and the post
3 captioned “Holy shit I’m on the edge of bringing my rope to school
4 on Monday.” Set 2 at ECF p.3, Set 1 at ECF p.24. He commented
5 with three laughing emojis on a post that compared an AHS
6 student’s rear end to a tub of cottage cheese. Set 1 at ECF p.15.
- 7 - Rick Roe liked C.E.’s post about going “back to the old way”
8 (described above). Set 1 at ECF p.17. Roe also liked C.E.’s post
9 showing the back of an African-American female student’s head
10 and “Fucking nappy ass piece of shit,” Set 2 at ECF p.9, and a post
11 that compared a female student’s body to that of Jabba the Hutt.
12 Set 1 at ECF p.21.
- 13 - Paul Poe liked almost every post at issue in this case, including the
14 post where nooses were drawn around the necks of an African-
15 American AHS student and an African-American basketball coach,
16 and the post where C.E. said in reference to an African-American
17 AHS student, “Holy shit I’m on the edge of bringing my rope to
18 school on Monday.” Set 1 at ECF pp.22, 24.

19 There is no doubt that these plaintiffs meaningfully contributed to the disruptions at AHS
20 by embracing C.E.’s posts in this fashion. The evidence shows that AHS students were upset
21 precisely because others, namely these plaintiffs, had supported C.E.’s conduct. *See, e.g.*, Dkt.
22 No. 60-3 ¶ 15 (student “devastated” that classmates had “‘liked’ and encouraged the racists [*sic*]
23 posts”); Dkt. No. 60-4 ¶ 7 (when student saw seven likes on C.E.’s comment of “Holy shit I’m on
24 the edge of bringing my rope to school on Monday,” student felt “disgusted and scared” and
25 “threatened”); Dkt. No. 60-6 ¶ 12 (student depicted in “back to the old way” post felt “upset” and
26 “unwelcome” that other students “approved of C.E.’s comment and the picture by liking it or
27 posting ‘yep’”).

28 While that alone is again enough under *Tinker*, these plaintiffs also clearly interfered with
“the rights of other students to be secure and to be let alone.” *Tinker*, 393 U.S. at 508. As our
circuit has held, while speech that is “merely offensive to others” does not come within *Tinker*, the
precise scope of the interference language is unclear. *C.R.*, 835 F.3d at 1152 (internal quotation
omitted). Nevertheless, good guidelines exist for determining what constitutes impermissible
interference with the rights of other students. In *C.R.*, for example, our circuit held that sexually
harassing conduct toward a student violates her right to be secure because it “threaten[s] the

1 individual’s sense of physical, as well as emotional and psychological, security.” *C.R.*, 835 F.3d
2 at 1152. The same can be said for the racist and derogatory comments plaintiffs made here about
3 their peers. In both cases, the speech “positions the target as a[n] . . . object rather than a person”
4 and thereby violates the targeted student’s right to be secure. *C.R.*, 835 F.3d at 1152.

5 *Kowalski* is also instructive. In upholding discipline imposed on a student for online
6 harassment and intimidation of a peer, the court emphasized that personally derogatory speech is
7 “not the conduct and speech that our educational system is required to tolerate, as schools attempt
8 to educate students about ‘habits and manners of civility’ or the ‘fundamental values necessary to
9 the maintenance of a democratic political system.’” *Kowalski*, 652 F.3d at 573 (quoting *Fraser*,
10 478 U.S. at 681).

11 Whatever the outer boundary might be of *Tinker*’s interference inquiry, these cases
12 establish that students have the right to be free of online posts that denigrate their race, ethnicity or
13 physical appearance, or threaten violence. They have an equivalent right to enjoy an education in
14 a civil, secure, and safe school environment. *C.E.*, Philip Shen, Kevin Chen, the *Doe* plaintiff,
15 Rick Roe, and Paul Poe impermissibly interfered with those rights.

16 Some of the plaintiffs have tried to minimize their culpability by saying that their likes
17 were made casually and thoughtlessly. *See, e.g.*, Dkt. No. 54-5 in *Roe*. But a plaintiff’s subjective
18 state of mind is irrelevant. Under *Tinker*, the inquiry is whether the speech at issue interfered with
19 the rights of other students to be secure and let alone. The District has established that it did.

20 While AUSD was within its rights to discipline most of the students here, the four
21 remaining plaintiffs stand in a different position. The record does not show that plaintiffs Kormi,
22 Bales, Nick Noe, and plaintiff Doe in the *Roe* action either approved of or adopted any content
23 targeting specific individuals at AHS. For example:

- 24
- 25 - Nima Kormi commented on one post, “This account is racism
26 solely directed at black people” with an emoji of a laughing face.
27 Set 1 at ECF p.27. The post itself is a close-up of the face of a
28 white male. The comment is ambiguous and the District has not
presented any evidence as to why Kormi’s comment would have
invaded the rights of a specific student.

- 1 - Michael Bales commented, “Pls tell me who’s the owner to this
2 amazing account” on the post titled “things the world wouldn’t
3 have if black people didn’t exist.” Set 2 at ECF pp.7-8. Although
4 Bales admitted to also liking some posts, those posts are not
5 identified.
- 6 - Nick Noe followed the account but, as discussed, there is no
7 evidence that he did anything more.
- 8 - Plaintiff Doe in the *Roe* action commented “Stupid nibber” on the
9 post about auto-correcting “nigger” to “nibber.” Set 2 at ECF p.13.
10 On the post about going “back to the old way,” he commented, “I
11 hope I never end up on this account.” Set 1 at ECF p.17.

12 On this evidence, a reasonable jury could not find that Kormi, Bales, or plaintiffs Noe or
13 Doe in the *Roe* action interfered with the rights of other students. Endorsement or encouragement
14 of speech that is offensive or noxious at a general level differs from endorsement or
15 encouragement of speech that specifically targets individual students. The former is much more
16 akin to the “merely” offensive speech that is beyond the scope of *Tinker*. Although some of these
17 plaintiffs’ conduct may have been experienced as hurtful and unsettling by classmates, the Court
18 cannot say that their involvement affirmatively infringed the rights of other students to be secure
19 and to be let alone.

20 For similar reasons, these plaintiffs did not create a substantial risk of disruption from their
21 conduct. The District has not tendered any evidence showing that Kormi, Bales, or Noe or Doe of
22 the *Roe* action contributed to the disruptions at AHS, and so has failed to carry its burden on
23 summary judgment as to those four plaintiffs.

24 **IV. Doe plaintiff’s punishment for additional speech**

25 The *Doe* plaintiff initially received a two-day suspension on March 23. Dkt. No. 16 at 3 in
26 *Doe*. On March 24, the *Doe* plaintiff’s friend -- the student he showed the @yungcavage account
27 to on March 18 -- asked the *Doe* plaintiff if he had any other racist conversations to send her. The
28 *Doe* plaintiff sent her a screenshot of a group chat.

The *Doe* plaintiff was suspended for three more days for sending the screenshot, which
AUSD administrators justified because the screenshot “tossed gasoline on the fire.” Dkt. No. 16-1

1 ¶ 2 in *Doe*. In its consolidated reply, the District did not address the *Doe* plaintiff’s argument
2 about his second suspension or present any responsive evidence. Dkt. No. 55-4 in *Roe*. On that
3 basis, the District’s motion for summary judgment as to the second suspension of the *Doe* plaintiff
4 is denied.

5 **V. Plaintiffs’ “heckler’s veto” claims and *Doe* plaintiff’s 56(d) motion**

6 Some plaintiffs have raised a “heckler’s veto” claim. They argue that the District punished
7 them in part because it wanted to appease outraged Albany community members. Dkt. No. 42 at
8 7 in *Roe*; Dkt. No. 16 at 10 in *Doe*. “The term ‘heckler’s veto’ is used to describe situations in
9 which the government stifles speech because it is ‘offensive to some of [its] hearers, or simply
10 because bystanders object to peaceful and orderly demonstrations.” *Dariano*, 767 F.3d at 778 n.
11 7.

12 This is not a well-taken argument. The Ninth Circuit has definitively rejected the heckler’s
13 veto doctrine in school speech cases. “We recognize that, in certain contexts, limiting speech
14 because of reactions to the speech may give rise to concerns about a ‘heckler’s veto.’ But the
15 language of *Tinker* and the school setting guides us here. Where speech ‘for any reason . . .
16 materially disrupts classwork or involves substantial disorder or invasion of the rights of others,’
17 school officials may limit the speech.” *Id.*, 767 F.3d at 778 (citing *Tinker*, 383 U.S. at 513). If
18 that was not clear enough, Judge O’Scannlain, dissenting from a denial of a petition for rehearing
19 en banc, characterized the panel’s opinion as holding that “the heckler’s veto doctrine does not
20 apply to schools.” *Id.* at 772.

21 That disposes of plaintiffs’ heckler’s veto argument. The *Doe* plaintiff’s Rule 56(d)
22 motion, which is based on his stated need for additional discovery on the heckler’s veto issue, is
23 denied. Dkt. No. 20 in *Doe*.

24 **VI. Disciplinary records**

25 Some plaintiffs have argued that even if their suspensions were constitutional, recording
26 those suspensions in their permanent academic records is not. Dkt. No. 43 at 16; Dkt. No. 13 at 19
27 in *C.E*. They rely on *LaVine v. Blaine School Dist.*, 257 F.3d 981, 992 (9th Cir. 2001). In *LaVine*,
28 plaintiff LaVine wrote a poem where the narrator kills 28 people in a school shooting. He then

1 gave the poem to his English teacher for feedback. The school expelled LaVine on an emergency
2 basis. Later, LaVine was evaluated by a psychiatrist who recommended after three meetings that
3 LaVine be allowed to return to school. The school placed a letter in LaVine’s record explaining
4 that he had been expelled for safety reasons, but the letter did not refer to LaVine’s successful
5 psychiatric evaluations, which had “satisfied [the school] that James was not a threat to himself or
6 others.” *Id.* at 990-992. The court found that because the disciplinary record did not refer to
7 “later, ameliorating events,” the letter “went beyond the school’s legitimate documentation needs.”
8 *Id.* at 992.

9 Unlike in *LaVine*, plaintiffs have pointed to no “later, ameliorating” events that would
10 justify updating or removing their disciplinary records. There is no indication that their records of
11 suspension or expulsion are incomplete or mischaracterize the facts. The request to remove the
12 disciplinary records is denied.

13 **VII. The California Education Code Claims**

14 Some of the plaintiffs mention, in quite cursory fashion, that California Education Code
15 Sections 48950(a) and 48907(a) provide independent speech protections. Section 48950(a)
16 provides that schools may not discipline pupils “solely on the basis of conduct that is speech or
17 other communication that, when engaged in outside of the campus, is protected from
18 governmental restriction by the First Amendment to the United States Constitution or Section 2 of
19 Article I of the California Constitution.” Cal. Educ. Code § 48950(a). Section 48907(a) provides
20 in relevant part that public school students “shall have the right to exercise freedom of speech and
21 of the press.” Cal. Educ. Code § 48907(a).

22 Plaintiffs barely briefed these statutes, and the case law on the scope of protection offered
23 by Sections 48950(a) and 48907(a) is quite sparse. The Court would be well within its discretion
24 not to address this underdeveloped argument at all, but notes that both statutes seem readily
25 distinguishable from the facts of this case. Section 48950(a) mentions speech that is protected if
26 “engaged in outside of the campus,” but as previously discussed in detail, the online
27 communications in this case were closely tied to the school and its students. Plaintiffs add the
28 somewhat odd argument under Section 48950(a) that Instagram is “a full public and not a limited

1 public platform, and strict scrutiny, should nonetheless apply.” Dkt. No. 43 at 18; *see also* Dkt.
2 No. 13 at 20 in *C.E.* The forum analysis plaintiffs propose applies only to government restrictions
3 on speech on public property. *Lopez v. Tulare Joint Union High Sch. Dist.*, 34 Cal. App. 4th
4 1302, 1328 (1995) (forum analysis weighs “government’s interest in limiting the use of its
5 property to its intended purpose” against “interest of those wishing to use the property for other
6 purposes”). As plaintiffs themselves emphasize, the speech at issue here took place on a “non-
7 governmental, non-school related” platform. Dkt. No. 43 at 17.

8 Similarly, the legislative history of Section 48907(a) indicates that it is “a statutory
9 embodiment of the *Tinker* and related First Amendment cases at that time.” *Lopez*, 34 Cal. App.
10 4th at 1318. While Section 48907(a) may go beyond the Constitution and Section 48950(a) in
11 guaranteeing particular rights to students publishing in school-sponsored publications such as
12 school newspapers, those extended protections are not relevant here.

13 CONCLUSION

14 In light of the multiplicity of overlapping motions, the Court offers this substantive guide to
15 the holdings in this order:

16 Summary judgment is granted in favor of Nima Kormi, Michael Bales, Nick Noe, and John
17 Doe of the *Roe* action. Summary judgment is granted in favor of the District with respect to
18 plaintiffs C.E., Philip Shen, Kevin Chen, Rick Roe, and Paul Poe. Summary judgment is also
19 granted in favor of the District with respect to the *Doe* plaintiff except on the issue of his
20 additional suspension time, for which summary judgment is granted in his favor. All remaining
21 summary judgment motions are denied, as is the *Doe* plaintiff’s Rule 56(d) motion.

22 As a final note, the District appended to its main arguments a cursory reference to qualified
23 immunity. The reference is underdeveloped legally and factually, and the District did not
24 differentiate between the conduct of the ten different plaintiffs for immunity purposes. The Court
25 declines to take up qualified immunity on this inadequate record. The parties are directed to meet
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and confer about whether any qualified immunity issues remain after this order, and if so, to jointly propose to the Court a schedule for resolving them.

IT IS SO ORDERED.

Dated: November 29, 2017



JAMES DONATO
United States District Judge