Jon Greenbaum (Cal. Bar No. 166733)
Petition for Bar Membership pending
Becky Monroe (Cal. Bar No. 224409)
Petition for Bar Membership pending
Arusha Gordon (Cal. Bar No. 298301)
Petition for Bar Membership pending
LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW
1401 New York Avenue, N.W., Suite 400
Washington, D.C. 20005
Telephone: (202) 662-8600

David Kiernan (Cal. Bar No. 215335)
JONES DAY
555 California Street
26th Floor
San Francisco, CA 94104
Telephone: (415) 626-3939
Facsimile: (415) 875-5700

Attorneys for the Lawyers' Committee for Civil Rights Under Law and the National Women's Law Center

Barbara Harding
Filed pro hac vice application pending
JONES DAY
51 Louisiana Avenue, N.W.
Washington, D.C. 20001
Telephone: (202) 879-3939
Facsimile: (202) 626-1700

Peter Canfield
Pro hac vice application forthcoming
JONES DAY
1420 Peachtree St., N.E., Ste. 800
Atlanta, Georgia 30309
Telephone: (404) 521-3939
Facsimile: (404) 581-8330

Joseph H. Walsh
Pro hac vice application forthcoming
JONES DAY
901 Lakeside Avenue
Cleveland, OH 44114
Telephone: (216) 586-3939
Facsimile: (216) 579-0212

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

PHILIP SHEN, through his Guardian John Shen; NIMA KORMI, through his Guardian Ellie Kormi; MICHAEL BALES, through his Guardian Patricia Mingucci; and KEVIN CHEN, through his Guardian Kai Dong Chen,

Plaintiffs,

v.

ALBANY UNIFIED SCHOOL DISTRICT; ALBANY HIGH SCHOOL; VALERIE WILLIAMS, in her personal and official capacities as Superintendent of the Albany Unified School District; JEFF ANDERSON, in his personal and official capacities as Principal of Albany High School; MELISA PFOHL, in her personal and official capacities as Assistant Principal at Albany High School; SUZANNE YOUNG, in her personal and official capacities as Instructor at Albany High School; and DOES 1-50,

Defendants.

Case No. 3:17-cv-02478-JD

NOTICE OF MOTION AND MOTION FOR LEAVE TO FILE *AMICI CURIAE* BRIEF OF THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW AND THE NATIONAL WOMEN'S LAW CENTER IN SUPPORT OF NEITHER PARTY

Hearing Date:	July 13, 2017
Time:	10:00 a.m.
Dept.:	Courtroom 11, 19th Floor
Judge:	Hon. James Donato

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NOTICE OF MOTION FOR LEAVE TO FILE *AMICI CURIAE* BRIEF

PLEASE TAKE NOTICE that the Lawyers' Committee for Civil Rights Under Law ("Lawyers' Committee") and the National Women's Law Center ("NWLC") respectfully move this Court for leave to file the attached brief as *amici curiae* in support of neither party.

MOTION FOR LEAVE TO FILE *AMICI CURIAE* BRIEF

The Lawyers' Committee for Civil Rights Under Law ("Lawyers' Committee") and the National Women's Law Center ("NWLC") hereby request permission to file the attached *amici curiae* brief addressing the pernicious impact of hate speech on students and school communities.

The Lawyers' Committee is a nonprofit organization formed in 1963 at the request of President John F. Kennedy to enlist the private bar's leadership and resources in combating racial discrimination and the resulting inequality of opportunity. The Lawyers' Committee's principal mission is to secure equal justice for all through the rule of law, targeting in particular the inequities confronting African Americans and other racial and ethnic minorities.

The NWLC is a nonprofit legal organization that is dedicated to the advancement and protection of women's legal rights and the expansion of women's opportunities. Since 1972, the NWLC has worked to secure equal opportunity in education for girls and women through full enforcement of the Constitution and laws prohibiting discrimination.

The attached *amici curiae* brief reviews case law and academic research discussing the disruptive impact of hate speech on communities and individuals, particularly in the school setting. This brief addresses how hate speech—such as that at issue here—can affect its targets and other students of color. Specifically, it discusses the impact hate speech can have on the mental health, physical well-being, and social engagement of its targets, particularly children.

Accordingly, the Lawyers' Committee and the NWLC request leave to file the attached *amici curiae* brief. The Lawyers' Committee and the NWLC do not take a position regarding the ultimate decisions this Court must make regarding the claims stated in the Complaint, but rather provide background to help inform that decision. After consultations with counsel for plaintiffs and defendants, neither party consented to the filing of this brief.

1 DATED: June 9, 2017

2 Respectfully Submitted,

3

4 /s/ David Kiernan
David Kiernan (Cal. Bar No. 215335)
5 JONES DAY
555 California Street, 26th Floor
6 San Francisco, CA 94104
Telephone: (415) 626-3939
7 Facsimile: (415) 875-5700

8 Barbara Harding
Filed pro hac vice application pending
9 JONES DAY
51 Louisiana Avenue, N.W.
10 Washington, D.C. 20001
Telephone: (202) 879-3939
11 Facsimile: (202) 626-1700

12 Peter Canfield
Pro hac vice application forthcoming
13 JONES DAY
1420 Peachtree Street, N.E.
14 Suite 800
Atlanta, Georgia 30309
15 Telephone: (404) 521-3939
Facsimile: (404) 581-8330

16 Joseph H. Walsh
17 *Pro hac vice application forthcoming*
JONES DAY
18 901 Lakeside Avenue
Cleveland, OH 44114
19 Telephone: (216) 586-3939
Facsimile: (216) 579-0212

20 *Attorneys for the Lawyers' Committee for*
21 *Civil Rights Under Law and the National*
Women's Law Center

Jon Greenbaum (Cal. Bar No. 166733)
Petition for Bar Membership pending
Becky Monroe (Cal. Bar No. 224409)
Petition for Bar Membership pending
Arusha Gordon (Cal. Bar No. 298301)
Petition for Bar Membership pending
LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW
1401 New York Avenue, N.W.
Suite 400
Washington, D.C. 20005
Telephone: (202) 662-8600

NATIONAL WOMEN'S LAW CENTER
11 Dupont Circle, N.W., #800
Washington, D.C. 20036
Telephone: (202) 588-5180

22

23

24

25

26

27

28

Jon Greenbaum (Cal. Bar No. 166733)
Petition for Bar Membership pending
Becky Monroe (Cal. Bar No. 224409)
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Petition for Bar Membership pending
LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW
1401 New York Avenue, N.W., Suite 400
Washington, D.C. 20005
Telephone: (202) 662-8600

David Kiernan (Cal. Bar No. 215335)
JONES DAY
555 California Street, 26th Floor
San Francisco, CA 94104
Telephone: (415) 626-3939
Facsimile: (415) 875-5700

Attorneys for the Lawyers' Committee for Civil Rights Under Law and the National Women's Law Center

Barbara Harding
Filed pro hac vice application pending
JONES DAY
51 Louisiana Avenue, N.W.
Washington, D.C. 20001
Telephone: (202) 879-3939
Facsimile: (202) 626-1700

Peter Canfield
Pro hac vice application forthcoming
JONES DAY
1420 Peachtree St., N.E., Ste. 800
Atlanta, Georgia 30309
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Facsimile: (404) 581-8330

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901 Lakeside Avenue
Cleveland, OH 44114
Telephone: (216) 586-3939
Facsimile: (216) 579-0212

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Case No. 3:17-cv-02478-JD

***AMICI CURIAE* BRIEF OF THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW AND THE NATIONAL WOMEN'S LAW CENTER IN SUPPORT OF NEITHER PARTY**

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AMICI CURIAE BRIEF OF THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW AND THE NATIONAL WOMEN'S LAW CENTER IN SUPPORT OF NEITHER PARTY

The Lawyers' Committee for Civil Rights Under Law ("Lawyers' Committee") and the National Women's Law Center ("NWLC") submit this *amici curiae* brief to provide timely argument about the applicability of case law and academic research concerning the disruptive impact of hate speech targeting students and staff of color at a school. The Lawyers' Committee and the NWLC do not take a position regarding whether the specific actions taken by the school in this case were appropriate or inappropriate.

INTEREST OF THE *AMICI CURIAE*

The Lawyers' Committee is a nonprofit organization formed at the request of President Kennedy to enlist the private bar's resources in combating racial discrimination and inequality of opportunity. For over fifty years, the Lawyers' Committee's mission has been to secure equal justice for all, targeting in particular the inequities confronting racial and ethnic minorities. The Instagram activity in this case is but another example of the racism that the Lawyers' Committee has combated for decades. Images of klansmen, lynchings, and nooses—like those "liked" and commented on here—are dehumanizing and threatening. These images have been, and continue to be, used to justify violence against racial and ethnic minorities. Recently, the Lawyers' Committee launched the Stop Hate Project, which aims to combat hate and bias-motivated crimes and incidents. The Stop Hate Project manages a resource helpline where hate incidents can be reported. The Lawyers' Committee first learned about the Instagram activity at issue in this case when a local community member contacted the helpline.

The NWLC is a nonprofit legal organization that is dedicated to the advancement and protection of women's legal rights and the expansion of women's opportunities. Since 1972, the NWLC has worked to secure equal opportunity in education for girls and women through full enforcement of the Constitution and laws prohibiting discrimination. The NWLC has participated in numerous cases involving discrimination in education before the Supreme Court and the courts of appeals. The NWLC advocates for the end of overly punitive disciplinary practices in schools, particularly those that affect black girls.

ARGUMENT

This brief addresses the harm that is caused to students and their school communities by the circulation of racist images. No matter whether the Instagram activity here qualifies as "vulgar, lewd, obscene, and plainly offensive speech" subject to restriction by school authorities under *Bethel School District No. 403 v. Fraser*, 478 U.S. 675, 687 (1986),[1] or even, as constitutionally unprotected "true threats"[2]—issues beyond the scope of this brief—the harm is real and, under *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969), an official response is not only permissible but warranted.

I. CIRCULATION OF RACIST IMAGES OF THE SORT AND IN THE MANNER THAT REPORTEDLY OCCURRED HERE INFLICTS SUBSTANTIAL HARM ON STUDENTS AND THEIR SCHOOL COMMUNITIES.

As discussed below, empirical research demonstrates that cyberbullying and online hate speech inflicts substantial harm on students and their school communities. First, cyberbullying—bullying that takes place using electronic technology[3]—severely impacts targeted students' mental and physical well-being. Second, racially charged cyberbullying and online hate speech, when viewed in a historical or social context, is particularly damaging to students and can result

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[1] "The Supreme Court has outlined four types of student speech that schools may restrict, each governed by its own lead case." *C.R. v. Eugene Sch. Dist. 4J*, 835 F.3d 1142, 1148–49 (9th Cir. 2016), *cert. denied,* No. 16-940, 2017 WL 388107 (U.S. May 15, 2017). The first—vulgar, lewd, obscene, and plainly offensive speech—is governed by *Bethel School District No. 403 v. Fraser*, 478 U.S. 675 (1986); the second—school-sponsored speech—is governed by *Hazelwood*; the third—speech promoting illegal drug use—is governed by *Morse v. Frederick*, 551 U.S. 393 (2007); and the fourth—speech that falls into none of these categories—is governed by *Tinker*. *Id.* (citing *Wynar v. Douglas Cty. Sch. Dist.*, 728 F.3d 1062, 1067 (9th Cir. 2013)).

[2] The Supreme Court has held that "[t]rue threats" are not protected by the First Amendment. *See R.A.V. v. City of St. Paul*, 505 U.S. 377, 388 (1992) (citing *Watts v. United States*, 394 U.S. 705, 707 (1969)). In *Virginia v. Black*, 538 U.S. 343, 359 (2003), the Supreme Court identified "true threats" as "those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." Cal. Penal Code. § 11411(a) makes it a crime to "hang[] a noose, knowing it to be a symbol representing a threat to life, on the property of a . . . high school . . . for the purpose of terrorizing any person who attends or works at the school."

[3] U.S. Dept. of Health & Human Services, What is Cyberbullying, https://www.stopbullying.gov/cyberbullying/what-is-it/ (last visited June 8, 2017) ("Cyberbullying is bullying that takes place using electronic technology . . . Examples of cyberbullying include mean text messages or emails, rumors sent by email or posted on social networking sites, and embarrassing pictures, videos, websites, or fake profiles.").

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in an inability to engage with society. Third, the use of social media platforms further increases the harm done to students by cyberbullying and online hate speech.

A. Cyberbullying impacts students' mental and physical well-being.

Numerous studies have confirmed that cyberbullying can severely harm young individuals' mental health.[4] For instance, cyberbullying has been linked with increased rates of depression[5] and researchers have found that cyberbullying targets are more likely to "lose trust in others, experience increased social anxiety, and decreased levels of self-esteem."[6] This impact on mental health manifests in other ways as well, such as fewer friendships and lower school attainment.[7] Targets of cyberbullying may also be more likely to use alcohol and drugs and are up to eight times more likely to carry a weapon to school than their peers.[8] Most disturbingly, targets of cyberbullying are almost twice as likely to have attempted suicide as their peers.[9]

In addition to impacting mental health, studies have shown that cyberbullying can have physiological effects including problems sleeping, headaches, poor appetite, skin problems, and stomachaches.[10] These physical problems can in turn lead to missed school or poor concentration.

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[4] *See e.g.,* Brendesha M. Tynes, et al., *Online Racial Discrimination and Psychological Adjustment Among Adolescents*, 43 J. of Adolescent Health 565-69 (2008); Katerina O. Sinclair, *Cyber and Bias-based Harassment: Associations With Academic, Substance Use, and Mental Health Problems,* 50 J. of Adolescent Health 521-23 (2012); Danielle Keats Citron and Helen Norton, *Intermediaries and Hate Speech: Fostering Digital Citizenship for Our Information Age*, 91 Boston U. Law Rev. 1435, 50-51 (2011).

[5] Charisse L Nixon, *Current perspectives: the impact of cyberbullying on adolescent health*, Adolescent Health, Medicine and Therapeutics, 145, *available at* http://pubmedcentralcanada.ca/pmcc/articles/PMC4126576/pdf/ahmt-5-143.pdf) (summarizing studies finding a link between cyberbullying and depression); Victims of Hate Speech, Child Trends DataBank (Nov. 2015), *available at* https://www.childtrends.org/wp-content/uploads/2015/11/94_Victims_of_Hate_Speech.pdf) (citing Graham, S. and Juvonen, J. Self-blame and peer victimization in middle school: An attributional analysis. *Developmental Psychology, 34*, 587-599 (1998).

[6] *See* Nixon, *supra* note 5.

[7] *See* Nixon, *supra* note 5.

[8] *See* Nixon, *supra* note 5.

[9] *See* Nixon, *supra* note 5.

[10] *See* Nixon, *supra* note 5.

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B. Racially charged cyberbullying and online hate speech, when placed in historical and social context, are particularly damaging to students as they impact students' ability to engage at school.

The harmful impact of online postings—such as those reported here—is magnified by the inclusion of dehumanizing and threatening images evoking historically racist stereotypes and symbols. *See Monteiro v. Tempe Union High Sch. Dist.*, 158 F.3d 1022, 1034 (9th Cir. 1998) ("It does not take an educational psychologist to conclude that being referred to by one's peers [as a nigger] . . . the most noxious racial epithet in the contemporary American lexicon, being shamed and humiliated on the basis of one's race, and having the school authorities ignore or reject one's complaints would adversely affect a Black child's ability to obtain the same benefit from schooling as her white counterparts."). Images of klansmen, lynchings, and nooses are particularly threatening when considered within historical context: at least 4,700 people were lynched in the late 18th and early 19th centuries by mobs eager to maintain a system of white supremacy.[11] Three quarters of these lynching victims were black.[12] And, while "[m]ob lynchings dissipated after the 1930s," the noose remained and became "a stand-in for vigilantism, for murder by community, an unveiled threat and a symbol to brandish to keep blacks, especially, 'in their place.'"[13] The loaded symbolism of the noose and similar symbols and language has been recognized by multiple courts. *See e.g., Washington v. Recology San Francisco*, No. C 14-05083 WHA, 2015 WL 9300413, at *4 (N.D. Cal. Dec. 22, 2015) ("[T]he noose is one of the most vile symbols in American history . . . [t]he severity of the hostility inherent in a display of a noose cannot be overstated."); *United States v. Baca*, 610 F. Supp. 2d 1203, 1212-1213 (E.D. Cal. 2009) ("A hangman's noose is a symbol of extrajudicial murder and racial hatred . . . a universally recognized symbol of racial intolerance"); *Bryant v. Independent School Dist. No. I-38 of Garvin County, OK*, 334 F.3d 928, 931 (10th Cir. 2003) (stating that the presence of offensive racial slurs and images inscribed in school furniture and on notes comprised discriminatory harassment under

[11] Jack Shuler, *The Ominous Symbolism of the Noose*, LA Times (Oct. 27, 2014), http://www.latimes.com/opinion/op-ed/la-oe-shuler-noose-hate-crimes-20141028-story.html.
[12] *See* Shuler, *supra* note 11.
[13] *See* Shuler, *supra* note 11.

Title VI). Even images which might at first seem less harmful—*i.e.*, the image comparing one of the girls to a gorilla—are more damaging when placed in this country's history of dehumanizing blacks by comparing them to animals.[14] Such dehumanization has been used to justify—and facilitate—violence against blacks for centuries.[15]

Researchers have found that individuals who have been targeted with racially charged images and words may become so fearful that they lose their ability to attend school, work, or otherwise engage with society.[16] For instance, as a result of being targeted by a white supremacist website, which had images similar to those reportedly posted on the Instagram account here, a woman and her daughter withdrew from public life and no longer have "driver's licenses, voter registration cards or bank accounts for fear of creating a public record of their whereabouts."[17] Specific to the school context, researchers have found that those targeted because of their race are more likely to "express fear of violence traveling to and from school and at school, which can lead to avoidance of school, classes and extracurricular activities."[18] Also, unsurprisingly, students who experience racial discrimination tend to earn lower grades.[19]

It should be noted that black girls subjected to offensive posting are particularly vulnerable as they exist at the intersection of two marginalized social identity groups that confront discrimination in the form of sexism and racism: they are female and they are black. Researchers have noted that women at this intersection of social identities must confront "racist

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[14] As one scholar noted, "the portrayal of African peoples as apelike became an iconographic representation rivaling even minstrelsy for popularity in visual culture during the 19th and early 20th centuries." Philip Atiba Goff et al., *Not Yet Human: Implicit Knowledge, Historical Dehumanization, and Contemporary Consequences*, 94 J. of Personality and Soc. Psychol. 292, 293 (2008).

[15] *See* Citron and Norton, *supra* note 4; Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 Mich. L. Rev. 2320, 2352, n. 166 (1989) (describing history of escalating racist violence that accompanies racist speech).

[16] *See* Citron and Norton, *supra* note 4, at 1450-51.

[17] *See* Citron and Norton, *supra* note 4, at 1450.

[18] *See* Victims of Hate Speech, Child Trends DataBank, *supra* note 5.

[19] Enrique W. Neblett Jr. et al., *African American Adolescents' Discrimination Experiences and Academic Achievement: Racial Socialization as a Cultural Compensatory and Protective Factor*, 32 J. of Black Psychology, 199, 212 (2006).

and sexist societal norms" on a daily basis[20]—therefore, by drawing on stereotypes pertaining to these two identities, such postings reinforce a societal message that black girls must already struggle with, namely, that they are not fully human or respected.

C. <u>Social media platforms further increase the harm done to students by cyberbullying and online hate speech.</u>

Circulation of racist images—what Plaintiffs dismiss as simple "passive" association with the Instagram page"[21]—further increases the harmful effects. Instagram is widely used among young people[22] and interaction with the service—particularly by "liking" or commenting on a post, serves to amplify the post's harm and increase its disruptive effect.[23] Studies show adolescents are "more likely to like photos depicted with many 'likes' than photos with few likes."[24] In addition, Instagram has a feature that displays the "likes" and comments made by accounts followed by a user, thus by commenting or liking posts, Plaintiffs increased the account's visibility to their followers, which included other Albany[25] students.[26] As the Fourth Circuit found in a case concerning Facebook, clicking "like," "literally causes to be published the statement that the User 'likes' something, which is itself a substantive statement. That a user may

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[20] Tiffany A. Eggleston and Antoinette Halsell Miranda, *Black Girls' Voices: Exploring Their Lived Experiences in a Predominately White High School,* 2 Indiana University Press 259, 281 (2009).

[21] Pls.' Mot. Summ. J. 8, ECF No. 43.

[22] *See* Shannon Greenwood, Andrew Perrin, Maeve Duggan, *Social Media Update 2016*, Pew Research Center, (Nov. 11, 2016), http://www.pewinternet.org/2016/11/11/social-media-update-2016/ ("Roughly six-in-ten online adults ages 18-29 (59%) use Instagram."); Farhad Manjoo, *See Why Instagram Is Becoming Facebook's Next Facebook*, N.Y. Times (Apr. 26, 2017), https://www.nytimes.com/2017/04/26/technology/why-instagram-is-becoming-facebooks-next-facebook.html?_r=0 ("About 700 million people now use Instagram every month, with about 400 million of them checking in daily."); Andrew Perrin, *Social Media Usage: 2005-2015*, Pew Research Center, (Oct. 8, 2015), http://www.pewinternet.org/2015/10/08/social-networking-usage-2005-2015/ ("Today, 90% of young adults use social media.").

[23] Instagram, Instagram Help Center – Privacy and Safety Center, Controlling Your Visibility, https://help.instagram.com/116024195217477/ (last visited June 8, 2017) ("When you like a photo, it's visible to anyone who can see the post . . . If your account is set to private . . . approved followers can see your posts, including any likes and comments.").

[24] Lauren E. Sherman et al., *The Power of the Like in Adolescence: Effects of Peer Influence on Neural and Behavioral Responses to Social Media*, 27 Psychol. Sci., 1027 (2016).

[25] Hereinafter, "Albany" refers to Albany High School.

[26] *See* Instagram, *supra* note 23.

use a single mouse click to produce that message that he likes the page instead of typing the same message with several individual key strokes is of no constitutional significance." *Bland v. Roberts*, 730 F.3d 368, 386 (4th Cir. 2013), *as amended* (Sept. 23 2013). The students who "liked" or commented on the Instagram postings therefore increased the chance that additional students would like the postings, they would gain popularity, and would be relayed back to the targets.

II. UNDER THIS CIRCUIT'S RECENT INTERPRETATION OF *TINKER*, ALBANY MAY TAKE ACTION TO ADDRESS HARMFUL AND DISRUPTIVE ACTIVITY.

Plaintiffs contend that their speech occurred outside the scope of any "school property or school activity," and is therefore free from regulation.[27] In *C.R. v. Eugene Sch. Dist. 4J* , the Ninth Circuit recently addressed the inquiry a court must undertake to evaluate the constitutionality of a school's regulation of student speech where that speech may have occurred off campus. 835 F.3d 1142, 1148 (9th Cir. 2016), *cert. denied*, No. 16-940, 2017 WL 388107 (U.S. May 15, 2017). First, the court must determine if a student's off-campus speech was "tied closely enough to the school to permit its regulation" or whether it was "reasonably foreseeable" that the off-campus speech would reach the school. *Id.* at 1149. If the speech meets either of those tests, then the court must evaluate the speech under *Tinker*, which holds that schools may prohibit speech that (1) "might reasonably lead school authorities to forecast substantial disruption of or material interference with school activities" or (2) threatens "the rights of other students to be secure and to be let alone." *Id.* at 1152 (quoting *Tinker,* 393 U.S. at 514).

A. Albany had authority to regulate activity associated with the Instagram account because it had a nexus to the school, it was reasonably foreseeable that the Instagram activity would reach the school, and because the school had a duty to remedy a hostile environment.

In *C.R. v. 4J*, the Ninth Circuit specifically declined to adopt a test that courts should apply to determine whether a school has authority to regulate off-campus student speech.[28] Rather,

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[27] Pls.' Mot. Summ. J. 2, ECF No. 43. While the facts remain to be established as to where the speech occurred, the Lawyers' Committee has been informed by parents, and has seen itself, that at least some images from the account appear to have been taken on school grounds.

[28] The Supreme Court has yet to address a school's ability to regulate off-campus student speech; however, in recent years, the Ninth Circuit has addressed this issue and has held that schools may regulate off-campus student speech. *See C.R. v. Eugene Sch. Dist. 4J*, 835 F.3d 1142, 1148 (9th Cir. 2016), *cert. denied*, No. 16-940, 2017 WL 388107 (U.S. May 15, 2017) (holding

the court utilized and approved of at least two tests: (1) a "nexus" test that asks "whether a student's off-campus speech was tied closely enough to the school to permit its regulation" and (2) a "reasonably foreseeable" test that asks "whether it was 'reasonably foreseeable' that off-campus speech would reach the school." 835 F.3d at 1149 (citing *Kowalski v. Berkeley County Schools*, 652 F.3d 565 (4th Cir. 2011) and *S.J.W. ex rel. Wilson v. Lee's Summit R–7 School District*, 696 F.3d 771, 777 (8th Cir. 2012)). Under either test, and under Title VI and Title IX, Albany had the authority to regulate the Instagram activity.

1. Plaintiffs' Instagram activity had a sufficient nexus to Albany.

First, Plaintiffs' Instagram "likes" and comments had a sufficient nexus to Albany because they were "closely tied" to Albany. *See C.R. v. 4J*, 835 F.3d at 1150-51 (holding that speech, which occurred in a public park, had a sufficient nexus to the school because it was "closely tied to the school" due to the fact that all individuals involved were students); *Wynar v. Douglas Cty. Sch. Dist.*, 728 F.3d 1062, 1069 (9th Cir. 2013) (holding that student's instant messages, which threatened classmates, had a "direct" nexus to the school); *Kowalski*, 652 F.3d at 576–77 (holding that a MySpace page, created by a high school senior at home in which she harassed another student, had a "sufficient nexus" to the school because the page was "designed [for] students . . . sent [to] students . . . joined [by] students . . . [and] the object of the attack" was a student). Here, like in *C.R. v 4J*, Plaintiffs and the creators of the content of the Instagram page were all students at Albany. Moreover, just as in *Kowalski*, the Instagram page was "designed for students," "sent to students," "joined by students," and "attacked" other students and staff at Albany.

2. It was reasonably foreseeable that Plaintiffs' Instagram activity would reach Albany.

Albany also had the authority to regulate the Instagram activity under the second test—the reasonably foreseeable test—because it was reasonably foreseeable that the account and Plaintiffs'

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that school could discipline students for teasing and sexually harassing other students in a public park); *Wynar v. Douglas Cty. Sch. Dist.*, 728 F.3d 1062, 1068 (9th Cir. 2013) (holding that school could discipline student for sending threatening instant messages from home); *LaVine v. Blaine Sch. Dist.*, 257 F.3d 981, 983 (9th Cir. 2001) (holding that school could discipline a student for a poem he wrote at home describing a school shooting).

"likes" and comments would "spill over" into Albany. *See C.R. v. 4J*, 835 F.3d at 1151 (holding that it was reasonably foreseeable that harassment in a public park would "spill over into the school environment" and students would "discuss [it] in school"); *Wynar*, 728 F.3d at 1069 (holding that it was reasonably foreseeable that student's threatening instant messages directed at specific classmates would reach the school); *S.J.W.*, 696 F.3d at 773, 778 (holding it was reasonably foreseeable that a website created by two students would reach the school because the website and its numerous "offensive, racist, and sexually explicit" posts were "directed at" the school); *J.C. ex rel. R.C. v. Beverly Hills Unified Sch. Dist.*, 711 F. Supp. 2d 1094, 1108 (C.D. Cal. 2010) (holding it was reasonably foreseeable that a YouTube video created by students would reach their school because it involved a classmate and because the student who posted it "contacted five to ten students" about it). Notably, in *J.C. v. Beverly Hills,* the court stated that because the video was posted on the Internet it was made "readily accessible" to other students," therefore making it even more foreseeable that it would reach the school. *Id.*

Here, because the Instagram activity was directed at specific Albany classmates and a coach, and was shared with others at Albany, it was reasonably foreseeable that the activity "would spill over" into Albany. It is, in fact, hard to imagine that students at Albany were not already discussing the Instagram activity while at school, especially since a female student knew enough about it to "commandeer" another student's phone and take screen shots of the account.[29]

3. <u>Schools have a legal obligation to respond to certain off-campus student activity under Title VI and Title IX.</u>

Additionally, although not yet addressed by the Ninth Circuit, courts have held that schools may consider off-campus conduct when evaluating whether a race- and/or sex-based hostile environment exists under Title VI and Title IX claims.[30] These courts have held, similar to the Ninth Circuit in *C.R. v. 4J*, that schools may address harassment that occurred outside of school grounds or activities if there is a "nexus" between the misconduct and the educational

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[29] Pls.' Mot. Summ. J. 1, ECF No. 43.

[30] 42 U.S.C. § 2000d et seq.; 20 U.S.C. §§ 1681 et seq. Under Title VI of the 1965 Civil Rights Act and Title IX of the 1972 Education Amendments, schools that receive federal funding must take prompt and equitable action to remedy a sex- and/or race-based hostile environment of which it has actual knowledge in order to ensure all students' equal access to education.

1 setting, such that the off-campus events create a hostile environment on school premises.[31]

2 Furthermore, the U.S. Department of Education ("DOE") and the U.S. Department of
3 Justice ("DOJ") have stated that schools may respond to off-campus student harassment. The
4 DOE has advised that "[b]ecause students often experience the continuing effects of off-campus
5 sexual harassment in the educational setting, schools should consider the effects of the off-
6 campus conduct when evaluating whether there is a hostile environment on campus."[32] The DOE
7 has applied a similar standard to claims under Title VI.[33] The DOJ recently endorsed the DOE's
8 opinion in a Statement of Interest in *Weckhorst v. Kansas State University*,[34] where it reiterated
9 that schools must address students' reports of hostile environments that derive originally from
10 events that occurred off school premises.[35] Earlier this year, the District Court adopted the DOJ's
11 view in denying Kansas State University's motion to dismiss.[36]

12 Plaintiffs' contention that Instagram activity is free from regulation is wrong. Schools may
13 respond to such activity when a sufficient nexus exists between the activity and the school, or
14 when it is reasonably foreseeable that the activity would reach the school. This conclusion is
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[31] E.g., *Rost ex rel. K.C. v. Steamboat Springs RE-2 Sch. Dist.*, 511 F.3d 1114, 1121 n.1 (10th Cir. 2008); *Weckhorst v. Kansas State Univ*, No. 16-CV-2255-JAR-GEB, 2017 WL 980456, at *16 (D. Kan. Mar. 14, 2017); *Doe ex rel. Doe v. Coventry Bd. of Educ.*, 630 F. Supp. 2d 226, 233-34 (D. Conn. 2009); *Doe ex rel. Doe v. Derby Bd. of Educ.*, 451 F. Supp. 2d 438, 445 (D. Conn. 2006). *Crandell v. N.Y. Coll. Osteopathic Med.*, 87 F. Supp.2d 304, 315-16 (S.D.N.Y. 2000).

[32] U.S. Dept. of Educ., Office for Civil Rights, 2011 Dear Colleague Letter on Sexual Violence, (April 4, 2011), *available at* https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf. *See also* U.S. Dept. of Educ., Office for Civil Rights, 2014 Questions and Answer on Title IX and Sexual Violence (April 29, 2014), available at https://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf.

[33] *E.g.,* Compliance Review, University of California San Diego, OCR Docket #09-11-6901, available at http://www2.ed.gov/about/offices/list/ocr/docs/investigations/09116901-a.html (evaluating the university's response to an off-campus party that promoted "exaggerated African American stereotypes"). *See also Cannon v. University of Chicago*, 441 U.S. 677, 694-98 (1979) (noting Congress intended that Title IX and Title VI be interpreted and applied in the same way).

[34] U.S. Dept. of Justice, Statement of Interest of the United States, *Weckhorst v. Kansas State Univ*, No. 16-CV-2255-JAR-GEB (October 27, 2016), *available at* https://www.justice.gov/crt/case-document/sw-v-kansas-state-university-statement-interest (hereinafter "DOJ Statement of Interest").

[35] *See* DOJ Statement of Interest, *supra* note 34, at 12 ("[H]ostile effects of [harassment] can permeate the academic environment and deprive the student of educational benefits.").

[36] *Weckhorst v. Kansas State Univ*, No. 16-CV-2255-JAR-GEB, 2017 WL 980456, at *16 (D. Kan. Mar. 14, 2017).

supported by the fact that schools have a legal obligation to respond to certain off-campus student activity under Title VI and Title IX.

B. Albany has the authority to institute disciplinary measures to address the type of Instagram activity here because it had the potential to disrupt or materially interfere with school activities or with the rights of students to be secure and to be let alone.

Having established that the Instagram activity had a sufficient nexus to or was reasonably foreseeable to reach the school, the Court must next decide whether that activity might reasonably lead school authorities to forecast "substantial disruption of or material interference with school activities" or "with the rights of other students to be secure and to be let alone." *C.R. v. 4J*, 835 F.3d at 1149 (citing *Tinker*, 393 U.S. at 514). If school authorities forecast such a "disruption" or "material interference," then student speech may be restricted. *Id.* Here, Plaintiffs' Instagram activity did both—it raised the possibility of a major disruption and interference of school activities and with the targeted students' rights to be secure and to be let alone.

1. The Instagram activity reasonably led school officials to forecast a substantial disruption or material interference with school activities.

To determine whether the Instagram postings and comments could have substantially disrupted activities at a school, this Court looks to "all of the circumstances confronting the school officials that might reasonably portend disruption." *Wynar*, 728 F.3d at 1070 (citing *LaVine v. Blaine Sch. Dist.*, 257 F.3d 981, 989 (9th Cir. 2001)). *Tinker's* "substantial disruption" rule "does not require school officials to wait until disruption actually occurs before they may act." *Id*. In fact, school officials "have a duty to prevent the occurrence of disturbances." *Id.*

Looking at "all the circumstances" surrounding the terrible and fear-inducing nature of the speech at issue here—including pictures of lynchings and a noose drawn around the neck of a student and staff member—it is evident that the speech falls squarely in line with speech that the Ninth Circuit and other courts have found to be of a substantially disruptive nature. *See Wynar* 728 F.3d at 1070 (holding that threatening MySpace page posed a "challenge to the safety of its students" and was therefore substantially disruptive); *S.J.W.*, 696 F.3d at 778 (holding that website with posts that contained a variety of offensive and racist comments was substantially disruptive); *Kowalski*, 652 F.3d at 574 (holding that the targeted bullying and harassment of

another student via a MySpace page was substantially disruptive). Additionally, although the facts are not yet established and Plaintiffs' Declarations do not fully describe what kind of comments were made, interaction with Instagram—by "liking" or affirmatively commenting on a post, for example—can amplify speech and make it even more disruptive.[37]

Moreover, as in *Wynar*, where the court noted that "the school district officials reasonably could have predicted that they would have to spend 'considerable time dealing with [parents' and students'] concerns and ensuring that appropriate safety measures were in place,'" Albany school officials could have reasonably predicted that they would have to spend considerable time dealing with parents' and students' concerns. 728 F.3d at 1071 (citing *D.J.M. v. Hannibal Pub. Sch. Dist. No. 60,* 647 F.3d 754, 766 (8th Cir.2011)). Indeed, the Instagram activity has consumed large amounts of the Albany community's time and energy: "the board, the district, students of Albany High School and their parents have been consumed for weeks by the controversy . . . It's the kind of thing that can ooze into the community."[38] Albany had a duty to try to prevent such a disruption.

2. The Instagram activity threatened other students' rights to be secure and to be let alone.

"[T]he precise scope of *Tinker's* interference with the rights of others [to be secure and to be let alone] is unclear," but, the Ninth Circuit has held that "the threat of a school shooting" interferes with a student's right to be secure. *Wynar*, 728 F.3d at 1072 (quoting *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 217 (3rd Cir. 2001)). It has also held that "[s]exually harassing speech on MySpace interferes with a student's right to be secure because it threatens "the individual's sense of physical, as well as emotional and psychological security." *C.R. v. 4J*, 835 F.3d at 1152. And, at least one court has held that online bullying interferes with a student's right to be secure because it "can cause victims to become depressed and anxious, to be afraid to go to school, and to have thoughts of suicide." *Kowalski*, 652 F.3d at 572.

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[37] *See generally*, supra Section I(C). *See also* Instagram, *supra* note 23.

[38] Gary Peterson, *Instagram furor takes on a new tone in Albany school board meeting*, East Bay Times (May 10, 2017), http://www.eastbaytimes.com/2017/05/10/peterson-instagram-furor-takes-a-new-tone-in-albany-school-board-meeting/.

As established above, research shows that hateful online speech like Plaintiffs' Instagram activity can result in numerous "physical, emotional, and psychological problems," including: headaches, depression, social anxiety, lower school attainment, and thoughts of suicide.[39] These are the exact problems that the Ninth Circuit expressed concerns about in prior cases.

Additionally, courts have already recognized that this type of harm—"physical, emotional and psychological problems" due to racial discrimination—interferes with students' education. Under Title VI and Title IX, schools that receive federal funding must take prompt and equitable action to remedy a sex- and/or race-based hostile environment of which it has actual knowledge in order to ensure all students' equal access to education.[40] Harassment that has been found to trigger a schools' responsibility to remedy a hostile environment includes: "use of the reviled epithet [nigger],"[41] "repeated[] use [of] offensive and derogatory epithets,"[42] "racial graffiti" and a "hit list" against African American students,[43] and "the presence of offensive racial slurs, epithets, swastikas, and the letters 'KKK' inscribed in school furniture and in notes placed in African American students' lockers and notebooks."[44] If harassment using these words and images is sufficient to create a hostile environment, then use of similar words and images on a social media platform certainly interferes with students' rights to be secure and to be let alone.

CONCLUSION

Hateful social media activity, like the Instagram "likes" and comments reportedly at issue here, inflicts serious harm on students and school communities. Confronted by such activity, school officials are entitled to act.

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[39] *See* Nixon, *supra* note 5.
[40] *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 633 (1999).
[41] *DiStiso v. Cook*, 691 F.3d 226, 242–43 (2d. Cir. 2012).
[42] *Fennell v. Marion Indep. Sch. Dist.*, 963 F. Supp. 2d 623, 646 (W.D. Tex. 2013).
[43] *Cleveland v. Blount County Sch. Dist.*, No. 3:05-cv-380, 2008 WL 250403, at *10–11 (E.D. Tenn. Jan 28, 2008).
[44] *Bryant v. Independent Sch. Dist. No. I-38 of Garvin County, OK*, 334 F.3d 928, 931 (10th Cir. 2003).

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Respectfully Submitted,

/s/ David Kiernan
David Kiernan (Cal. Bar No. 215335)
JONES DAY
555 California Street, 26th Floor
San Francisco, CA 94104
Telephone: (415) 626-3939
Facsimile: (415) 875-5700

Barbara Harding
Filed pro hac vice application pending
JONES DAY
51 Louisiana Avenue, N.W.
Washington, D.C. 20001
Telephone: (202) 879-3939
Facsimile: (202) 626-1700

Peter Canfield
Pro hac vice application forthcoming
JONES DAY
1420 Peachtree Street, N.E.
Suite 800
Atlanta, Georgia 30309
Telephone: (404) 521-3939
Facsimile: (404) 581-8330

Joseph H. Walsh
Pro hac vice application forthcoming
JONES DAY
901 Lakeside Avenue
Cleveland, OH 44114
Telephone: (216) 586-3939
Facsimile: (216) 579-0212

Attorneys for the Lawyers' Committee for Civil Rights Under Law and the National Women's Law Center

Jon Greenbaum (Cal. Bar No. 166733)
Petition for Bar Membership pending
Becky Monroe (Cal. Bar No. 224409)
Petition for Bar Membership pending
Arusha Gordon (Cal. Bar No. 298301)
Petition for Bar Membership pending
LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW
1401 New York Avenue, N.W.
Suite 400
Washington, D.C. 20005
Telephone: (202) 662-8600

NATIONAL WOMEN'S LAW CENTER
11 Dupont Circle, N.W., #800
Washington, D.C. 20036
Telephone: (202) 588-5180