IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE

Barton Thorne, Plaintiff, v. **Shelby County Board of Education** and **Dr. Joris M. Ray**, in his official capacity as Superintendent, Defendants.	Case No. 2:21-cv-02110-MSN-tmp PLAINTIFF'S RESPONSE TO MOTION TO DISMISS Oral Argument Requested

INTRODUCTION

Four years ago, Shelby County Schools asked Barton Thorne to take on the toughest task in the district: to turn around the biggest high school in the system, Cordova. His performance in that role led SCS to ask him to mentor other principals to share the strategies behind his success.

One of his tools for turnaround is a heavy emphasis on the basic virtues of citizenship—personal responsibility, critical thinking, and respectful dialogue—and on a personal connection between students and their principal. His weekly video messages were a valuable tool during the remote learning caused by COVID to achieve both goals: to maintain a personal presence in students' school experience and to reinforce the values that make for a strong school community.

In that vein, in the aftermath of the January 6 riots at the Capitol and the subsequent response by major social media channels, Principal Thorne took a teachable moment to talk about the importance of respectful dialogue with people we disagree with. He encouraged students to think critically, to talk to their parents about their family's values, and to treasure their right to speak their mind, but also to recognize the need to allow others to speak their minds, even when we disagree. And he situated that lesson in the context of social media, where students can relate.

For this message, which is grounded in basic American principles and Tennessee's social studies standards for high schools, he was immediately suspended, the same process the district reserves for serious allegations like sexual harassment or physical abuse of a student. District officials told the media that his statement did not reflect SCS values and that it was racially insensitive. They left him to languish for six weeks after promising a prompt investigation, in a case where no factual development was necessary, and only reinstated him with a warning letter in his file the same day he filed this lawsuit.

SCS's suspension violated his First and Fourteenth Amendment rights and his contract. The motion to dismiss should be denied.

STANDARD OF REVIEW

A plaintiff's factual allegations in the complaint are accepted as true, and the alleged facts must be sufficient "to state a claim to relief that is plausible on its face." *Matthew N. Fulton, D.D.S., P.C. v. Enclarity, Inc.*, 962 F.3d 882, 887 (6th Cir. 2020). "A plaintiff need not demonstrate a probable right to relief, but must plead facts sufficient to raise a reasonable expectation that discovery will reveal evidence of the alleged wrongdoing." *Schwamberger v. Marion Cty. Bd. of Elections*, 988 F.3d 851, 856 (6th Cir. 2021).

ARGUMENT

I. The Board and Dr. Ray are liable for their actions under Section 1983.

In order to establish a municipality's *Monell* liability under Section 1983, a plaintiff must identify "(1) the municipality's legislative enactments or official policies; (2) actions taken by officials with final decision-making authority; (3) a policy of inadequate training or supervision; or (4) a custom of tolerance or acquiescence of federal violations." *Winkler v. Madison Cty.*, 893 F.3d 877, 901 (6th Cir. 2018).

Principal Thorne has identified both of the first two elements, either of which is sufficient for liability. First, he alleges that SCS has a number of policies that are unconstitutionally vague and did not provide fair notice that were nevertheless enforced against him in violation of his constitutional rights. Am. Compl. ¶¶ 14, 27, 28, 39, 65, 68, 75-76, 80 (citing the SCS Employee Handbook, SCS Progressive Discipline Handbook, SCS standard contract for principals, and SCS Bd. of Educ. Policies 4002, 4012, 4018, and 4050). The Board directly adopts the Board of Education policies, and either itself reviewed, approved, or ratified the Employee Handbook, Progressive Discipline Handbook, and standard contract, or delegated final policy-making authority to other officials to develop, adopt, and enforce those policies.

The Board and its delegatee are responsible for their failure to adopt sufficiently specific policies that provide fair notice of professional standards, and instead grant tremendous discretion to secondary officers. Principal Thorne has alleged that it is these Board policies that deprived him of his First and Fourteenth Amendment rights to his detriment.

Second, Plaintiff has also alleged that the actions taken against him were made by final decision-making officials. "A single decision can constitute a policy, if that decision is made by an official who possesses final authority to establish municipal policy with respect to the action ordered, which means that his decisions are final and unreviewable and are not constrained by the official policies of superior officials." *Flagg v. City of Detroit*, 715 F.3d 165, 174-75 (6th Cir. 2013) (cleaned up). In Tennessee, the local board of education is the original locus of authority, but the Board has delegated a great deal of its authority to its agents, namely the Superintendent. *See Williams v. City of Franklin*, No. 3:08-cv-0164, 2009 U.S. Dist. LEXIS 33200, at *34 (M.D. Tenn. Apr. 16, 2009) ("A plaintiff can establish municipal liability by demonstrating that the final decision-maker delegated his or her final decision-making authority.").

Here, the Board has delegated final decision-making authority to the Superintendent in all the relevant policies; policies 4002 and 4012 make the Superintendent the final decision-maker on employee noncompliance, and policy 4018 only provides for an appeal to the Board in the case of dismissal, which did not happen here.[1] Similarly, the Employee Handbook and Progressive Discipline Handbook rely on the Superintendent (or his delegatee, the Office of Professional Standards) for final decision-making on all discipline short of firing or non-renewal. *See Handbook* at pg. 15-19.

Principal Thorne has alleged that the director of the SCS Office of Professional Standards, who is the senior district official responsible for disciplinary decisions, made the decision to suspend him. Am. Compl. ¶¶ 44, 45, 46, 60. The Plaintiff has also alleged that Dr. Ray as the superintendent directed or ratified the decision on his suspension; he has alleged the superintendent's office took direct control of his suspension at one point in the process. Am. Compl. ¶ 46. Discovery will reveal whether other members of the Superintendent's cabinet were personally involved in the suspension.

Other courts have rightly concluded that a superintendent is the responsible policy-maker who has been delegated authority from a school board in similar circumstances. *Dearman v. Stone Cty. Sch. Dist*., 832 F.3d 577 (5th Cir. 2016); *Lytle v. Carl*, 382 F.3d 978, 985 (9th Cir. 2004); *Harris v. Victoria Indep. Sch. Dist.*, 168 F.3d 216, 225 (5th Cir. 1999).

[1] Policy 4002, IV.D; Policy 4012, IV.A; Policy 4018, IV.D. All board policies are available online at https://go.boarddocs.com/tn/scsk12/Board.nsf/Public?open&id=policies#.

Ultimately, the Board clearly may be held liable for its decision to adopt constitutionally defective policies. And Dr. Ray may be held liable for his decisions as the final policy-maker for discipline short of firing.[2]

II. Defendants' unconstitutional acts toward Principal Thorne constitute an adverse employment action.

The Defendants argue that Principal Thorne has no case because he was put on paid leave, then ultimately allowed to return to work with only a warning letter. Mot. to Dismiss Mem. 6-7. Thus, they say, "Plaintiff does not allege that he was dismissed from his employment, suffered loss of pay or benefits, or was otherwise subject to an action by SCBE that amounts to an adverse employment action." *Id*. at 7.

This ignores numerous aspects of the case that show the multiple ways in which Defendants damaged Principal Thorne, his career, his reputation, and his family. In fact, he has alleged three separate damaging actions in his Complaint, each of which and together constitute an adverse employment action:

- A suspension and investigation that was unwarranted and dragged on without resolution or even activity until it magically concluded the day this lawsuit was filed. Am. Compl. ¶ 59.
- Public admonishment from senior district officials. Am. Compl. ¶¶ 40-41.
- A negatively worded warning letter in his personnel file. Am. Compl. ¶ 60.

First, Principal's Thorne suspension is an adverse employment action because it is similar to other cases where the district court held that long paid suspensions with questionable motives constituted adverse employment actions. *Johnson v. Potter*, No. 07-2665-STA, 2009 U.S. Dist.

[2] Dr. Ray's presence in the case is also important as the responsible officer designated to execute the requested injunctive relief regarding the removal of the letter from Principal Thorne's personnel file.

LEXIS 58569, at *10 (W.D. Tenn. July 9, 2009); *Kulick v. Ethicon Endo-Surgery, Inc.*, 803 F. Supp. 2d 781, 786 (S.D. Ohio 2011); *Ishoo v. Bd. of Regents*, No. CIV-06-0747 MV/ACT, 2007 U.S. Dist. LEXIS 106057, at *38-39 (D.N.M. Sep. 29, 2007); *Dilettoso v. Potter*, No. CV 04-0566-PHX-NVW, 2006 U.S. Dist. LEXIS 2973, at *21-22 (D. Ariz. Jan. 25, 2006). And that makes sense—not only does a long, unjustified suspension prevent an employee doing the job they enjoy, but it also becomes an insult to their personal and professional reputation and standing.

To be sure, paid administrative leave when used for purposes of a prompt investigation of an allegation is not an adverse employment action. *See Peltier v. United States*, 388 F.3d 984, 988 (6th Cir. 2004) ("[A] suspension with pay and full benefits pending a timely investigation into suspected wrongdoing is not an adverse employment action.")). But that is not what happened here. "*Peltier* is inapplicable where, as here, an employee is suspended for a purpose other than to allow his employer to conduct a timely internal investigation into his alleged wrongdoing." *Thompson v. Quorum Health Res., LLC*, 485 F. App'x 783, 792 n.2 (6th Cir. 2012).

Principal Thorne was not suspended for a timely internal investigation of his alleged wrongdoing. With the video being immediately available to the SCS via its internal website, no investigation or factual development was needed. Am. Compl. ¶¶ 13, 29. All that was necessary was to review the content and make a determination, which is doubtless why the Office of Professional Standards initially told Principal Thorne it could resolve the complaint promptly. *Id.* at ¶¶ 44-45. The only investigation that Principal Thorne knows of is a few phone calls early in the process from OPS that asked him questions. *Id*. The suspension itself was wildly disproportionate to the severity of the alleged violations, especially given the scales set forth in the Progressive Discipline Handbook. *Id.* at ¶ 28.

Additionally, the timeline of his suspension shows that it was politics, not personnel policy, that was at the heart of this "investigation." The Defendants suspended him the same day the complaint about the video was filed, even though they knew it was only a complaint about a principal's video message and had nothing to do with sexual harassment or physical abuse. *Id.* at ¶¶ 37-38. Principal Thorne saw in news reports that a board member and a senior district official (the director of equity and access) were personally involved in defending the suspension. *Id*. at ¶¶ 40-41. He was told this would be resolved quickly, but then as it dragged on he was told the Superintendent's Office had taken direct control of the matter. *Id*. at ¶¶ 44-46. Ultimately the Defendants ended his suspension the day this lawsuit was filed. *Id*. at ¶ 59. The suspension, in other words, was clearly for "a purpose other than to allow his employer to conduct a timely internal investigation." *Thompson*, 485 F. App'x at 792 n.2.

Second, Principal Thorne also suffered an adverse employment action because of public statements from senior district officials criticizing him. Am. Compl. ¶¶ 40-41. *See, e.g., Yanowitz v. L'Oreal USA, Inc*., 36 Cal. 4th 1028, 1060, 32 Cal. Rptr. 3d 436, 460, 116 P.3d 1123, 1143 (2005) (holding that "unwarranted and public criticism of a previously honored employee, an implied threat of termination, [and] contacts with subordinates that only could have the effect of undermining a manager's effectiveness . . . placed her career in jeopardy.").

Third, the reinstatement letter itself is an adverse employment action. That letter to Principal Thorne from SCS "advised [him] to be mindful of how remarks in your capacity as principal may affect school staff and students." Am. Compl. ¶ 60. The letter further "encourage[s him] to participate in professional development on methods to ensure the school environment remains optimal for student learning." *Id*. The letter is permanently placed in his personnel file. *Id*. ¶¶ 24, 60. A warning letter like this can also constitute an adverse employment action. *Wyatt v.*

City of Bos., 35 F.3d 13, 15-16 (1st Cir. 1994) ("unwarranted negative job evaluations"); *Cole-Hatchard v. Cty. of Rockland*, No. 17-CV-2573 (KMK), 2019 U.S. Dist. LEXIS 47078, at *33-34 (S.D.N.Y. Mar. 21, 2019) ("warning letter"); *Stern v. State Univ. of N.Y.*, No. 16-CV-5588, 2018 U.S. Dist. LEXIS 173054, at *16 (E.D.N.Y. Sept. 30, 2018) ("reprimands . . . with senior management copied"); *Chioke v. Dep't of Educ. of City of N.Y.*, No. 15-CV-1845, 2018 U.S. Dist. LEXIS 105842, at *13 (E.D.N.Y. June 25, 2018) ("warning" letter).

At bottom, it is impossible to say that a six-week suspension, with an allegation of racial insensitivity in the news media by SCS's director of diversity, followed by a formal admonition in his personnel file, did not "place [his] career in jeopardy" and constitute an adverse employment event. The Sixth Circuit recognizes that a "materially adverse change in employment conditions often involves a material loss of pay or benefits, but that is not always the case, and other indices that might be unique to a particular situation can constitute a materially adverse change as well." *Smith v. City of Salem*, 378 F.3d 566, 576 n.1 (6th Cir. 2004) (cleaned up). This is just such an instance.

III. The Board's policies are void as applied to him for failing to give fair notice and making unrestricted delegations of enforcement.

A statute, rule, or policy "can be impermissibly vague for either of two independent reasons. First, if it fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits. Second, if it authorizes or even encourages arbitrary and discriminatory enforcement." *Hill v. Colorado*, 530 U.S. 703, 732 (2000). Such an enactment (here, board policies) violates the due process clause of the Fourteenth Amendment when it is used to deprive someone of a liberty or property interest. *City of Chi. v. Morales*, 527 U.S. 41, 56 (1999).

The Supreme Court uses the same test to evaluate enactments that are used to punish speech under the First Amendment, except it applies a higher standard because "[t]he vagueness of such

a regulation raises special First Amendment concerns because of its obvious chilling effect on free speech." *Reno v. ACLU*, 521 U.S. 844, 871-72 (1997). When considering void-for-vagueness claims that impact speech, "a more stringent vagueness test should apply." *McGlone v. Cheek*, 534 F. App'x 293, 297 (6th Cir. 2013) (quoting *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982)). In such an instance, "the vagueness doctrine demands a greater degree of specificity than in other contexts." *Id.* (*quoting Smith v. Goguen*, 415 U.S. 566, 573 (1974)).

SCS's policies, as applied to Principal Thorne, flunk both tests for vagueness: they do not give a reasonable person fair notice that his speech would be considered misconduct, and they grant extraordinary discretion to school officials, who exercise it in an arbitrary and unfair manner. This conclusion is especially necessary given the elevated standard applied to speech-chilling policies. Because this led to an adverse employment action, these policies violate the Fourteenth Amendment's due process clause as well as the First Amendment's free speech clause.

A. SCS's policies were too vague for a person of ordinary intelligence to understand what conduct they prohibit.

The First and Fourteenth Amendments both entitle public school educators to "reasonable prior notice that the speech for which she was demoted was a ground for disciplining her." *Frison v. Franklin Cty. Bd. of Educ.*, 596 F.2d 1192, 1193-94 (4th Cir. 1979).

When a teacher was suspended after using the district's approved curriculum for human growth and sexuality, the Sixth Circuit held that the teacher's First Amendment rights had been violated because he "had followed rather than violated his superior's instructions" by using the approved materials. *Stachura v. Truszkowski*, 763 F.2d 211, 215 (6th Cir. 1985), *rev'd on other grounds*, 477 U.S. 299 (1986). The Circuit reiterated in a later case that an employee cannot be punished after "the government's express decision permitting the employee to engage in that

speech" provokes community backlash that leads to discipline. *Cockrel v. Shelby Cty. Sch. Dist*., 270 F.3d 1036, 1054-55 & n.6 (6th Cir. 2001). Similar holdings are found in decisions from the First, Second, Fourth, and Eighth Circuits.[3]

When looking at whether an educator was on prior notice, "[t]he relevant inquiry is: based on existing regulations, policies, discussions, and other forms of communication between school administration and teachers, was it reasonable for the school to expect to the teacher to know that [his] conduct was prohibited?" *Marchi v. Bd. of Coop. Educ. Servs*., 173 F.3d 469, 480 (2d Cir. 1999) (quoting *Ward v. Hickey*, 996 F.2d 448, 453 (1st Cir. 1993)). *Accord Dambrot v. Cent. Mich. Univ*., 55 F.3d 1177, 1180 (6th Cir. 1995) ("The CMU policy, as written, does not provide fair notice of what speech will violate the policy.").[4]

A reasonable person would know that it is misconduct for a teacher to make "public displays of deviate sexual behavior" or "mak[e] sexual advances toward his students." *Fowler v. Bd. of Educ. of Lincoln Cty*., 819 F.2d 655 (6th Cir. 1987) (discussing cases). A reasonable person would similarly know that it is misconduct when a teacher "dressed, undressed and caressed a

[3] *Ward v. Hickey*, 996 F.2d 448, 453 (1st Cir. 1993) ("Even if a school may prohibit a teacher's statements before she makes them, . . . it is not entitled to retaliate against speech that it never prohibited"); *Keefe v. Geanakos*, 418 F.2d 359, 362 (1st Cir. 1969); *Marchi v. Bd. of Coop. Educ. Serv*s., 173 F.3d 469, 480 (2d Cir. 1999) (adopting *Ward*); *Boring v. Buncombe Cty. Bd. of Educ*., 98 F.3d 1474, 1483 (4th Cir. 1996) ("several courts have emphasized the importance of prior notice to the teacher before her speech may subject her to discipline"), *vacated and rev'd on other grounds en banc*, 136 F.3d 364 (4th Cir. 1998); *see also Lacks v. Ferguson Reorganized Sch. Dist. R-2*, 147 F.3d 718, 723 (8th Cir. 1998); *Simard v. Bd. of Educ*., 473 F.2d 988, 994 (2d Cir. 1973); *Lindros v. Governing Bd. of Torrance Unified Sch. Dist*., 9 Cal. 3d 524, 538, 510 P.2d 361, 370 (1973).

[4] Though *Garcetti v. Ceballos*, 547 U.S. 410 (2006), was decided after these cases, *Garcetti's* holding that government employers could discipline employees for their speech on the job did not relieve the government of its responsibility to give its employees fair notice with sufficiently specific disciplinary codes. *Coker v. Whittington*, 858 F.3d 304, 306 (5th Cir. 2017). *See, e.g., Kramer v. N.Y.C. Bd. of Educ.*, 715 F. Supp. 2d 335, 356 (E.D.N.Y. 2010) (applying *Ward/Marchi* after *Garcetti*).

mannequin at his home in public view" or showed "dishonesty in dealing with payroll, federal grant funds, and applications for academic positions." *Phillips v. State Bd. of Regents of State Univ. & Cmty. Coll. Sys*., 863 S.W.2d 45, 49 (Tenn. 1993) (discussing cases).

There is no way that a person of ordinary intelligence generally, or Principal Thorne specifically, could have known, based on existing regulations, policies, discussions, and other communications from SCS, that his speech about free speech, social media, and the marketplace of ideas constituted misconduct or incompetence. Principal Thorne's message was in line with the Tennessee Social Studies Standards for high school students. Am. Compl. ¶ 30. It also aligns with many major social studies curricula about the First Amendment. *Id.* at ¶ 32. And it even aligns with many of the resources that Dr. Ray recommended for discussing the aftermath of the January 6 incident at the U.S. Capitol. *Id.* at ¶¶ 35-36.

No reasonable person of ordinary intelligence would consider that he had fair notice that district policies barring "irresponsible" or "untruthful" or "obscene, profane, or discourteous" or "harassing, discriminatory, or intimidating" or "dangerous or disruptive" behavior would apply to his speech, Am. Compl. ¶ 39 (listing terms from policies). *See Mailloux v. Kiley*, 448 F.2d 1242, 1243 (1st Cir. 1971) (broad "educator code of ethics" was "impermissibly vague. It cannot justify a post facto decision by the school authorities that the use of a particular teaching method is ground for discharge, or other serious sanction, simply because some educators disapprove of it.").

Moreover, Principal Thorne was entitled to rely on the District's decision to permit other administrators and teachers to address much more controversial topics in social studies with much more opinionated language without any official response or retaliation. *See* Am. Compl. ¶ 48-55. If SCS suddenly has a new interpretation of its policies that bars administrators and teachers from discussing timely topics in social studies with their students, it must provide them fair notice of

this shift in interpretation. *Keeffe v. Library of Cong.*, 777 F.2d 1573, 1582 (D.C. Cir. 1985). That did not happen here.

The Board failed in its fundamental duty to provide Principal Thorne with clear, understandable policies that gave him fair notice that he could be suspended, investigated, publicly admonished, and subject to a warning letter in his personnel file for teaching his students about concepts found in Tennessee social studies standards and mainstream social studies curricula.

B. The Board's policies are so vague as to permit, or even encourage, arbitrary and discriminatory application.

Laws must also "provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application." *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972); *accord City of Knoxville v. Entm't Res., LLC*, 166 S.W.3d 650, 655 (Tenn. 2005). Policies must provide "clear standards guiding the discretion of the public official vested with the authority to enforce the enactment" to prevent him from "administer[ing] the policy on the basis of impermissible factors." *United Food & Commer. Workers Union, Local 1099 v. Sw. Ohio Reg'l Transit Auth.*, 163 F.3d 341, 359 (6th Cir. 1998). Otherwise, "the danger of censorship and of abridgment of our precious First Amendment freedoms is too great where officials have unbridled discretion . . ." *Id.* (quoting *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 553 (1975)). Courts should "not presume that the public official responsible for administering a legislative policy will act in good faith and respect a speaker's First Amendment rights." *Id.* "Thus, a statute or ordinance offends the First Amendment when it grants a public official unbridled discretion such that the official's decision to limit speech is not constrained by objective criteria, but may rest on ambiguous and subjective reasons." *Id.* (cleaned up).

In *UFCW*, the Sixth Circuit found that a policy that permitted officials to define the term "controversial" without any additional guidance or standards failed the "unrestricted delegation" test. 163 F.3d at 359. Similarly, in *Dambrot* the Sixth Circuit flunked a policy that "wholly delegated to university officials" the power to determine what speech is "offensive." 55 F.3d at 1184. Here, similarly, school officials are delegated unrestricted, unreviewed power, *see infra* at 5, which they have exercised in an arbitrary, viewpoint-discriminatory manner to enforce vague policy terms. Am. Complaint ¶¶ 49-55. This unreviewable, unrestricted delegation of substantial power to define and enforce broad terms, especially enforced in a discriminatory manner, fails this second principle of the void-for-vagueness doctrine.

IV. The First Amendment protects Principal Thorne's speech.

If the Court agrees that the Plaintiff was not given fair notice by the Board's policies or that these policies granted too much enforcement discretion to the superintendent, then he has stated a claim under both the First and Fourteenth Amendments, and the first two counts of his case should move forward. In addition to the vagueness theory of the First Amendment, Principal Thorne asserts additional speech theories founded on viewpoint discrimination and academic freedom.

Garcetti v. Ceballos, 547 U.S. 410 (2006), stands for the unremarkable proposition that a government employer may tell its employees what to say on the job without violating the First Amendment. *Evans-Marshall v. Board of Education of Tipp City*, 624 F.3d 332 (6th Cir. 2010), stands for the unremarkable application of that principle to the K-12 school context: local school boards may tell teachers what to say and teach in the school; teachers have no right of academic freedom to determine the curriculum for themselves. If an employee says or a teacher teaches

something contrary to their employer's announced policies and curriculum, they can be disciplined for it.

Neither *Garcetti* nor *Evans-Marshall* preclude, or even really apply, to the situation here, where a government employer *doesn't* tell its employees what to say specifically.[5] Here the government employer sets broad goals or themes and then gives its employees discretion about what to say within those broad goals. SCS did not have to create a nonpublic forum for its employees' speech, or grant academic freedom to its educators, but it has chosen to do so anyway, and though it may choose differently in the future, it cannot throw a principal under the bus for speech given within the space it chose to create at the time he spoke.

A. SCS has discriminated against Principal Thorne based on viewpoint.

Government may create a nonpublic forum within its workplace. *See, e.g., Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 806 (1985); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983). It may specifically create fora within the workplace for its employees to speak. *See, e.g., Fairchild v. Liberty Indep. Sch. Dist.*, No. 1:06-CV-92-TH JURY, 2008 U.S. Dist. LEXIS 143125, at *50 (E.D. Tex. Feb. 11, 2008). That's what SCS has done—it has given a forum to only its employees in speak, and only on certain subject matters, namely those within its curriculum and goals. *Perry Educ. Ass'n*, 460 U.S. at 49 ("Implicit in the concept of the nonpublic forum is the right to make distinctions in access on the basis of subject matter and speaker identity."). "But the government may not go further by prohibiting specific viewpoints on

[5] If this Court finds that *Garcetti* and *Evans-Marshall* do control, Principal Thorne reserves the right to argue that (1) *Garcetti's* exception for "teaching and scholarship" applies to high school educators, *Brown v. Chi. Bd. of Educ.*, 824 F.3d 713, 716 (7th Cir. 2016) (identifying circuit split); (2) that *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988), rather than *Garcetti* should control in-class speech, *Cal. Teachers Ass'n v. Bd. of Educ.*, 271 F.3d 1141, 1149 n.6 (9th Cir. 2001) (identifying circuit split); (3) and that under *Hazelwood*, viewpoint neutrality protections apply. *Morgan v. Swanson*, 659 F.3d 359, 379 (5th Cir. 2011) (en banc) (identifying circuit split).

the topics that it allows." *Am. Freedom Def. Initiative v. Suburban Mobility Auth.*, 978 F.3d 481, 498 (6th Cir. 2020). "For decades, the Supreme Court has said that even in nonpublic forums—the forums in which the government has the most leeway to regulate speech—the government may still not engage in viewpoint discrimination." *Id.* at 501.

SCS adopted a policy (4050) that empowers principals to run their individual schools. It also takes an educational approach that gives its employees flexibility to deliver in-school messages that reflect or emphasize the employee's own preferred priorities.[6] Am. Compl. ¶ 55. This is a classic nonpublic forum: only certain people (educator-employees) are allowed to discuss certain topics (those within Tennessee high school curricular standards). While SCS may exercise a great deal of prior control over the scope and nature of the forum, and may alter or change the contours of the forum at will, it may not discriminate or retaliate based on viewpoint in the forum after the fact.

Yet that is precisely what SCS has done here. It has allowed numerous other teachers and administrators to speak about highly controversial issues from their official platforms, including saying things that are far more overtly political. Am. Comp. ¶¶ 48-56. And though the cited examples in the complaint are primarily from publicly available sources, Principal Thorne alleges that administrators and teachers also engage in speech about highly controversial topics in the school or classroom setting without reprimand or retaliation. *Id*. at ¶ 55. He must develop these facts in discovery, but if it is true that SCS has created a nonpublic forum for staff to express their personal views on issues to students, then it cannot discriminate and retaliate against him because it does not like his views. Defendants can redefine the forum to prevent his sharing those views in

[6] Discovery is necessary to develop how the district has defined this forum in its communications to its employees about the messages they can share in the school setting; at this stage, it is sufficient to allege that such a forum has been created by the district's policies and customs.

the future, or even give him a script to read in the future that is contrary to those views, but it may not punish him after the fact for expressing those views in that forum.

B. SCS entrusted Principal Thorne with academic freedom, and having done so may not discipline for his appropriate exercise of professional judgment.

A teacher has "no more free-speech right to dictate the school's curriculum than she had to obtain a platform—a teaching position—in the first instance." *Evans-Marshall v. Bd. of Educ. of the Tipp City Exempted Vill. Sch. Dist*., 624 F.3d 332, 340 (6th Cir. 2010). True enough. But here the State of Tennessee, through its statewide social studies standards, and SCS, through its curricular choices, has chosen the school's curriculum, which Principal Thorne is obligated to teach. And it has given him a measure of academic freedom about how to teach it.

Superintendent Ray's email to educators about the events of January 6, 2021, is a great example of this. Am. Comp. ¶¶ 34-36. He wrote that the events of January 6 created a "teachable moment about the importance of civility and democracy." *Id*. at ¶ 34. And he suggested a number of resources that educators could consider using in their schools based on their students' maturity, the subjects they teach, and the other lessons in their curricula. In other words, he defined the broad theme or goal and then entrusted to their discretion (their academic expertise and professional judgment) the specific materials to use from his suggestions and words to say to teach that lesson. In other words, he gave them a measure of academic freedom. And the exercise of that freedom, which he was not obligated to give (he could have told them to only use one resource, or made them play a video of him talking about January 6), is protected by the First Amendment.

The Sixth Circuit "has rejected as totally unpersuasive the argument that teachers have no First Amendment rights when teaching, or that the government can censor teacher speech without restriction." *Meriwether v. Hartop*, 992 F.3d 492, 505 (6th Cir. 2021) (quoting *Hardy v. Jefferson*

Cmty. Coll., 260 F.3d 671, 680 (6th Cir. 2001)[7]). It is no more this court's right than the *Meriwether* panel's "prerogative to cast aside our holding that 'a teacher's in-class speech deserves constitutional protection.'" *Meriwether*, 992 F.3d at 506 (quoting *Hardy*, 260 F.3d at 680).

Now, academic freedom can be abused like any other freedom. Evans-Marshall's non-tenured contract to teach was non-renewed after she was argumentative and insubordinate toward superiors and consistently picked materials that included explicit language, sexual content, and controversial themes about sexuality. *Evans-Marshall*, 624 F.3d at 535. In a similar case, a teacher abused his academic freedom when he chose curricular materials outside and contrary to the district's list. *Kirkland v. Northside Independent School Dist.*, 890 F.2d 794 (5th Cir. 1989). Similar too are teachers who insisted on producing a play or showing a movie with controversial content about sexuality without obtaining preclearance as required by a district policy on controversial materials. *Boring v. Buncombe Cty. Bd. of Educ*., 136 F.3d 364 (4th Cir. 1998) (en banc); *Bd. of Educ. v. Wilder*, 960 P.2d 695, 698 (Colo. 1998). Each of these teachers abused their academic freedom. Principal Thorne, by contrast, taught within the academic freedom granted him by the district, and thus is entitled to rely on the First Amendment for its protection.

V. SCS violated its contract with Principal Thorne.

[7] Though *Hardy* involved a community college, its holding about teachers' freedom did not limit itself to that setting—it proceeded the statement quoted by *Meriwether* with a citation to *Tinker*, a case about speech in high schools: "The Court has long recognized that educational institutions occupy a unique place in First Amendment jurisprudence. *See Tinker v. Des Moines Indep. Cmty. Sch. Dist*., 393 U.S. 503, 506, 21 L. Ed. 2d 731, 89 S. Ct. 733 (1969) (noting that 'the unmistakable holding of this Court for almost 50 years' has been that 'First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students.'"). And *Hardy* followed the statement quoted in *Meriwether* with a citation to another high-school speech case, *Minarcini v. Strongsville City Sch. Dist.*, 541 F.2d 577, 582 (6th Cir. 1976), which it described as "holding that the First Amendment's protection of academic freedom applies to teachers' in-class discussions." *Hardy v. Jefferson Cmty. Coll*., 260 F.3d 671, 680 (6th Cir. 2001).

Principal Thorne has done all that is required of him at the pleadings stage of the case. Nothing in the cases that Defendants cite require that he attach a copy of the contract to the complaint for the Defendants to have notice. *Tolliver*, the case relied on by Defendants, is actually about the need for congruity between the complaint and the motion for summary judgment. *Tolliver v. Tellico Vill. Prop. Owners Ass'n*, 579 S.W.3d 8, 26 (Tenn. Ct. App. 2019). In that case, the pleadings asserted a breach-of-contract claim, but "the only factual allegations that support such a claim are the alleged conversations between" the parties. *Id*. Only later were the articles of incorporation mentioned in the response to the motion for summary judgment, and the court found the complaint did not put the defendants on sufficient notice that the articles would be the contract at issue in the case. *Id*. This is all a far cry from Principal Thorne's case for three reasons.

First, he has alleged in his complaint that he has a contract with SCS. Am. Compl. ¶¶ 5, 14, 39, 44. He alleges that it was a standard (or adhesion) contract, *id*. ¶ ata 14, and attaches a copy of the standard copy, *id*., Ex. B, which is surely sufficient at this stage of the pleadings. *See Parker v. ABC Techs., Inc.*, No. M2020-00675-COA-R3-CV, 2021 Tenn. App. LEXIS 65, at *22 (Ct. App. Feb. 23, 2021). Though Principal Thorne did not retain a copy of this adhesion contract specific to him, his particular copy is assuredly located in the business records of the Defendants and should be easily produced in discovery.

Second, Plaintiff has identified in his complaint numerous specific provisions of the standard contract and the documents it incorporates by reference which secure his rights against unjustified discipline. Am. Compl. ¶¶ 83-90. Defendants set up a straw man that "[i]nstead of alleging violations of the contract, Plaintiff relies almost exclusively upon provisions of an 'employee handbook' that is not referenced in the alleged contract." Mot. to Dismiss Mem. 17. Yet the Employee Handbook takes up two paragraphs of the Plaintiff's breach-of-contract count,

Am. Compl. ¶¶ 89-90, after the Plaintiff has listed four relevant provisions of the standard employment contract. *Id*. at ¶¶ 83-86. And though the Employee Handbook has disclaimer language, no such disclaimer is present in the Progressive Discipline Handbook.[8] *See id*. at ¶ 88.[9]

Third, Defendants argue that Principal Thorne has failed to allege damage from the breach, again because they characterize their actions as a legitimate, justified paid administrative leave, which is simply not the case on these facts. They further state that "'emotional distress' and 'harm to reputation' are not compensable categories of damages for a breach of employment contract under Tennessee law." Mot. to Dismiss Memo. at 18-19.

Though decisions suggest this latter proposition is generally true, *Hampton v. Macon Cty. Bd. of Educ*., No. M2013-00864-COA-R3-CV, 2014 Tenn. App. LEXIS 10, at *28 (Ct. App. Jan. 10, 2014),[10] Tennessee courts have carved an exception for cases involving harm to executives' careers, even when their salary remains the same.

In *Smith*, the Court of Appeals found that an employer breached its contract by retaining an employee in the same title, with the same salary, but with drastically reduced responsibilities. *Smith v. Am. Gen. Corp.*, No. 87-79-II, 1987 Tenn. App. LEXIS 2851, at *5 (Ct. App. Aug. 5, 1987); *see also Walker v. City of Cookeville*, No. M2002-01441-COA-R3-CV, 2003 Tenn. App.

[8] A complete copy of which may be downloaded as a Word document from https://www.scsk12.org/askhr/files/2017/Labor%20Relations%20forms/SCS%20Progressive%20Discipline%20Procedures%20Guide%208-18-17.doc.

[9] Nor does this disclaimer automatically save Defendants if it was ineffective in the broader context of the employment relationship. *See, e.g., DePhillips v. Zolt Constr. Co.*, 136 Wash. 2d 26, 33-34, 959 P.2d 1104, 1109 (1998); *McDonald v. Mobil Coal Producing, Inc*., 820 P.2d 986, 990-91 (Wyo. 1991).

[10] Tennessee courts also definitively permit consequential damage for inducement to breach of contract. *Reinhart v. Knight*, No. M2004-02828-COA-R3-CV, 2005 Tenn. App. LEXIS 753, at *12-13 (Ct. App. Dec. 2, 2005) ("[O]ne who induces a breach of contract is also liable for consequential losses, and emotional distress or harm to reputation." (quoting *TSC Industries, Inc. v. Tomlin*, 743 S.W.2d 169 (Tenn. Ct. App. 1987)).

LEXIS 566, at *26 (Ct. App. Aug. 12, 2003); *Phillips v. Morrill Elec., Inc.*, C/A NO. 03A01-9901-CH-00030, 1999 Tenn. App. LEXIS 617, at *7 (Ct. App. Sep. 15, 1999). The *Smith* Court specifically held out the possibility of reputational damages if they were a foreseeable result of the breach. *Id*. at *30. This Court should permit Principal Thorne to proceed with his case to show that reputational damage was a natural, expected, foreseeable result of the breach, and therefore is compensable.

CONCLUSION

Defendants put Principal Thorne through an awful experience that severely damaged his personal and professional reputation, telling the public his comments were racially insensitive. They suspended him under the same rule permitting suspension of employees for physical or sexual abuse of a student. And they left him to languish there until the day this lawsuit was filed, and even then put a warning letter in his publicly available personnel file.

They put him through all that because he told his students to think critically, to value their right to free speech, and to listen respectfully to those they disagree with, a message that was consistent with Tennessee social studies standards and curricula used nationwide and even curricula recommended by SCS's superintendent.

He did not receive fair notice that his message would be considered a violation of any district policies. He was punished under policies that granted unrestricted, unreviewable discretion by school officials. He was suspended for teaching this message while other educators have been permitted to teach more explicitly political or controversial messages without response or retaliation. He was forced from his post for doing his job, exercising the professional judgment the district hired him to use as an educator. He didn't breach his contractual commitments in any way, but SCS did so by violating its promises to him about how and when he would be disciplined.

The motion to dismiss should be denied, and Principal Thorne should be permitted to proceed with his case to repair his reputation and vindicate his constitutional rights.

Dated: May 14, 2021

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CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing document was served upon the following:

Kenneth M. Walker
Jamie L. Morton

via the Court's ECF System, on this 14th day of May, 2021.

/s/ Cameron M. Watson
Cameron M. Watson