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

Barton Thorne,

Plaintiff,

Case No. 2:21-cv-02110-MSN-tmp

v.

Shelby County Board of Education and
Dr. Roderick Richmond, in his official capacity
as Interim Superintendent,

Defendants.

DEFENDANTS' MOTION TO REVISE INTERLOCUTORY ORDER

Pursuant to Rule 54(b), *Federal Rules of Civil Procedure*, and Local Rule 7.3, Shelby County Board of Education (the "School District") hereby moves this Court for an Order revising its oral ruling denying the School District's Motion to Dismiss Plaintiff Barton Thorne's ("Principal Thorne") Amended Complaint [ECF No. 15] as stated in open court on Friday, April 11, 2025. [ECF No. 64] Respectfully, the School District states that, in summarily denying the School District's Motion to Dismiss without explanation or analysis, the court failed to consider dispositive legal arguments that were presented to the court before such interlocutory order. For the reasons stated herein, the Court should enter an Order granting the School District's Motion to Dismiss and dismissing Principal Thorne's Amended Complaint in its entirety. Alternatively, the School District respectfully moves the Court to enter an Order analyzing the substantive legal issues and addressing the merits of each of Plaintiff's claims individually. In support of its Motion, the School District states as follows:

PROCEDURAL BACKGROUND

The School District moved to dismiss Plaintiff's original complaint on March 18, 2021 [ECF No. 8]. Plaintiff then filed an Amended Complaint [ECF No. 10], and the School District filed a Motion to Dismiss the Amended Complaint on April 16, 2021 [ECF No. 15]. The parties submitted their Joint 26(f) Report, and a Scheduling Order was entered [ECF No. 18 & 22]. Trial was set for August 29, 2022. [ECF No. 21]. The parties exchanged written discovery, and the School District took depositions of the Plaintiff and Plaintiff's proposed expert witness [ECF No. 29, 30, 32].[1] The parties attempted mediation, but the matter could not be settled [ECF No. 26].

On February 17, 2022, the Court held a hearing on the School District's Motion to Dismiss, where counsel for both parties delivered oral argument [ECF No. 34]. At that hearing, the Court raised the issue of standing, and both parties filed supplemental briefs on that issue. [ECF No. 35, 37]. Pursuant to the agreed Scheduling Order, discovery closed on February 18, 2022 [ECF No. 18 & 22].[2] The Court held a status conference on March 11, 2022, where it ordered that the deadlines for dispositive and pretrial motions would be stayed pending its ruling on the School District's Motion to Dismiss. [ECF No. 38]. Another status conference took place on August 19,

[1] Contrary to Plaintiff's counsel's representation to the court on April 11, 2025 [ECF No. 64, PageID 320], discovery is not stayed or limited due to a pending motion to dismiss. In fact, courts in the Sixth Circuit have expressly found that a pending Fed. R. Civ. P. 12(b)(6) motion to dismiss is "usually deemed insufficient to support a stay of discovery." *Williams v. New Day Farms*, No. 2010 WL 3522397, No. 2:10-cv-0394, 2010 WL 3522397 (S.D. Ohio Sept. 7, 2010) (internal citations omitted); *see also SNMP Research, Inc*., No. 3:20-cv-451-CEA-DCP, 2021 WL 2636011 (E.D. Tenn. June 25, 2021) ("Generally, however, the mere filing of a dispositive motion, such as a motion for judgment on the pleadings or motion to dismiss, is insufficient to support a stay of discovery." (quoting *Baker v. Swift Pork Co*., No. 3:15-CV-663-JHM, 2015 WL 6964702, at *1 (W.D. Ky. Nov. 10, 2015))). In any event, Principal Thorne never sought a stay of discovery.

[2] At the February 11, 2022 hearing, the Court specifically raised the upcoming expiration of the discovery deadline, and Principal Thorne's counsel did not move for an extension or stay. In fact, Mr. Suhr expressed no concern whatsoever with the imminent closure of discovery. [ECF No. 62, PageID 280-282].

2022, where the court removed the August 29, 2022 trial date from its calendar and stayed trial in this matter pending the Court's ruling on the School District's Motion to Dismiss [ECF No. 44].

On April 11, 2025,[3] almost four years after the Motion to Dismiss was filed and more than three years after the case was originally scheduled to be tried, the Court orally denied the School District's Motion to Dismiss, finding that "the amended complaint's factual allegations are sufficient to state facially plausible claims for violation of Plaintiff's due process and First Amendment rights." [ECF No. 60, 64]. The Court also ordered the parties to confer as to which magistrate judge they would like to preside over a settlement conference [ECF No. 60, 64]. The parties have selected Judge Charmaine Claxton. [ECF No. 65].

ARGUMENT AND AUTHORITY

I. STANDARD UNDER FED. R. CIV. P. 54(B)

"District courts have authority both under common law and Rule 54(b) to reconsider interlocutory orders and to reopen any part of a case before entry of final judgment." *Rodriquez v. Tennessee Laborers Health and Welfare Fund*, 89 Fed. Appx. 949 (6th Cir. 2004) (citing *Mallory*

[3] At the status conference on April 11, 2025, Principal Thorne was represented by Dean McGee and Bridget Conlan (by phone), both Liberty Justice Center attorneys out of Texas. Though Mr. McGee and Ms. Conlan filed Notices of Appearance, they have not moved for pro hac vice admission. On the record, Mr. McGee stated: "I believe I had worked that out with my office, and I believe that motion is filed." [ECF No. 64, PageID 307]. Ms. Conlan said: "We are -- so we do not need a pro hac admission because we're just fully admitted." [*Id*.] She continued: "So this district court actually allows admissions for attorneys from other states." [*Id*.] Either Ms. Conlan misunderstands the rules governing attorney admission to the Western District of Tennessee under Local Rule 83, or she has already completed the steps required for admission. As a Pacer search of Western District of Tennessee records does not return any prior cases on which Mr. McGee or Ms. Conlan have been counsel of record, the latter seems unlikely. While attorneys from other states are certainly *eligible* for admission under Local Rule 83(b), such attorneys are not automatically admitted. Rather, attorneys seeking admission to the Western District of Tennessee must file a written petition or motion with the court and await court approval of such petition or motion. Local Rules 83(c) & 83(d). It does not appear that either Mr. McGee or Ms. Conlan have filed such a petition or motion or otherwise completed the steps required for attorney admission in this Court.

v. Eyrich, 922 F.2d 1273, 1282 (6th Cir.1991)). "This authority allows district courts 'to afford such relief from interlocutory orders as justice requires.'" *Id*. (citing *Citibank N.A. v. Fed. Deposit Ins. Corp.*, 857 F. Supp. 976, 981 (D.D.C.1994); *Melancon v. Texaco, Inc*., 659 F.2d 551, 553 (5th Cir. 1981)). "Traditionally, courts will find justification for reconsidering interlocutory orders when there is (1) an intervening change of controlling law; (2) new evidence available; or (3) a need to correct a clear error or prevent manifest injustice." *Id*. (citing *Reich v. Hall Holding Co*., 990 F. Supp. 955, 965 (N.D. Ohio 1998)).

Similarly, Local Rule 7.2(b) provides:

> (b) Form and Content of Motion to Revise. A motion for revision must specifically show: (1) a material difference in fact or law from that which was presented to the Court before entry of the interlocutory order for which revision is sought, and that in the exercise of reasonable diligence the party applying for revision did not know such fact or law at the time of the interlocutory order; or (2) the occurrence of new material facts or a change of law occurring after the time of such order; or (3) a manifest failure by the Court to consider material facts or dispositive legal arguments that were presented to the Court before such interlocutory order.

Local Rule 7.2(b).

II. THE COURT COMMITTED CLEAR ERROR BY FAILING TO CONSIDER MATERIAL FACTS AND DISPOSITIVE LEGAL ARGUMENTS.

A. Principal Thorne Does Not State a Viable Claim for Violation of the First Amendment.

1. Principal Thorne's Speech Was Not Protected by the First Amendment.

In denying the School District's motion to dismiss Principal Thorne's First Amendment claims, the Court ignored the Supreme Court's unequivocal declaration that First Amendment protections do not extend to statements made by a public employee while performing his official duties. *See Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006). Principal Thorne admits on the face of his Amended Complaint that his statements were made pursuant to his official duties as a

principal and employee of the School District. Specifically, Plaintiff states: "In his role as principal, he delivers a 'principal's message' to his students as part of the weekly announcements' videos." [Am. Compl., ¶ 1.] Thus, regardless of whether Principal Thorne suffered an adverse employment action, he has no claim for violation of the First Amendment because the First Amendment did not apply to his "principal's message."

At the first hearing on the School District's Motion, the Court acknowledged that Principal Thorne's First Amendment claims were governed by dispositive Sixth Circuit caselaw. The Court said that "the defendants in this case have set forth the authorities that are pretty straightforward in terms of what the District Court's analysis should follow." It acknowledged that "the law is the law, and *Evans-Marshall* looms large here." [ECF No. 62, PageID 273]. Indeed, *Evans-Marshall* clearly establishes the law of the Sixth Circuit: *Garcetti* applies to teachers' speech made pursuant to their official duties in the k-12 school environment, and any exception for "academic freedom" is limited to the college/university setting.[4] At the motion hearing, the Court specifically asked Principal Thorne's counsel about his reservation of the right to argue that the "academic freedom" exception applies to this case. [*Id.*]. The Court signaled its appreciation for the controlling caselaw, telling Principal Thorne's counsel that "it's not easy to see under the circumstances you might create to get around *Evans-Marshall* here." [*Id.*]. Counsel conceded that "*Garcetti* stands for the very reasonable and correct proposition that the government may direct the speech of its employees" and that "*Evans-Marshall* stands for the proposition that k-12 teachers do not have

[4] Footnote 5 to Plaintiff's Response [Doc. 16] reveals Principal Thorne's likely motive in bringing a First Amendment claim clearly unsupported by Sixth Circuit precedent. Plaintiff's reservation of "the right to argue" that the Sixth Circuit Court of Appeals misinterpreted *Garcetti* does not save his Amended Complaint from dismissal based on binding precedent in this Circuit.

academic freedom." [*Id.* at PageID 276]. He acknowledged that, while there may be a circuit split on that issue, it is a question for "a future day." [*Id*.].

Notwithstanding his counsel's acknowledgment that the School District had a right to control Principal Thorne's speech as an employee and that Principal Thorne does not have a right to academic freedom as a k-12 educator, Principal Thorne relies on the Sixth Circuit's decision in *Dambrot v. Central Michigan University*, 55 F.3d 1177 (6th Cir. 1995) and *Meriwether v. Hartop*, 992 F.3d 492 (6th Cir. 2021). Both *Dambrot* and *Meriwether* are university cases – not k-12 cases. In *Dambrot*, a basketball coach was dismissed under the university's discriminatory harassment policy after he used a racial epithet in the locker room. While the Court found that the university's policy was unconstitutionally void on its face, it also found that the termination of the coach's employment was proper. The court stated:

> **Dambrot can only demonstrate harm resulted from the application of the invalid policy if his speech was in fact protected**. Without a finding that Dambrot's speech is protected under the First Amendment, the application of the policy does not injure Dambrot. Without the demonstration of some harm, Dambrot cannot recover.

Dambrot, 55 F.3d at 1185 (emphasis added). As *Dambrot* was decided pre-*Garcetti*, it applied the *Connick* analysis, finding that the First Amendment did not protect Mr. Dambrot's speech because he did not speak on a matter of public concern. Therefore, Mr. Dambrot could not recover on a claim for violation of the First Amendment.[5]

Post-*Garcetti* cases make clear that a government employee's speech made pursuant to his official duties is not protected under the First Amendment, even if such speech relates to a matter

[5] As explained in Section II(a)(2), *infra*, Principal Thorne also cannot establish that any School District policy governing employee speech is "unconstitutional on its face on overbreadth grounds." *See Dambrot*, 55 F.3d at 1182 (citing *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 801, (1984)).

of public concern. *See Savage v. Gee*, 665 F.3d 732, 738 (6th Cir. 2012). Like Principal Thorne, Mr. Savage made statements in his capacity as a government employee that resulted in complaints against him. Specifically, at least two professors filed a sexual harassment complaint against Mr. Savage because he had suggested assigning to all incoming freshman a book containing "a chapter describing homosexuality as aberrant human behavior." *Id*. at 735. The university investigated and determined that there was no basis for those complaints. Mr. Savage took a leave of absence from his job and ultimately filed suit because "the [u]niversity had not 'taken any meaningful action to vindicate' him." *Id*. at 736. Mr. Savage argued that he was constructively discharged in retaliation for engaging in protected speech and that the university's discrimination and harassment policy was "unconstitutionally vague and overbroad, both facially and as applied." *Id*. Though his speech addressed a matter of public concern, the Sixth Circuit found that "Savage's speech was not protected by the First Amendment because the speech was made pursuant to his duties as Head of Reference and Library Instruction." *Savage*, 665 F. at 739 (citing *Evans–Marshall v. Bd. of Educ*., 624 F.3d 332, 339–40 (6th Cir. 2010). Therefore, the court affirmed the dismissal of Mr. Savage's First Amendment Retaliation Claim. *Id*.

At the most recent hearing on April 11, 2025, the Court observed that "the law has continued to be refined and clarified on certain issues by – even by the United States Supreme Court, where presumptions that parties may have presumed to apply years ago no longer do so in the same – in the same way." [ECF No. 64, PageID 314-315]. The Court did not explain what legal issues had been refined and clarified by the Supreme Court or what presumptions no longer apply in the same way. While First Amendment jurisprudence has certainly advanced during the four years the School District's Motion to Dismiss has been pending, *Garcetti's* holding remains unchanged – a government employee does not have First Amendment protections for speech made

pursuant to his official duties. For example, the Supreme Court decided *Kennedy v. Bremerton School District* on June 27, 2022. 597 U.S. 507 (2022). Applying *Garcetti*, the *Kennedy* Court determined that, when Mr. Kennedy silently prayed on the fifty-yard yard line after a football game, "he was not engaged in speech 'ordinarily within the scope' of his duties as a coach." *Kennedy*, 597 U.S. at 529. "He was not instructing players, discussing strategy, encouraging better on-field performance, or engaged in any other speech the District paid him to produce as a coach." *Id.* "Simply put, Mr. Kennedy's prayers did not 'owe their existence' to Mr. Kennedy's responsibilities as a public employee." *Id*. at 530 (quoting *Garcetti*, 547 U.S. at 421). Because Mr. Kennedy's speech was private speech that was not attributable to his government employer, his suspension violated the First Amendment.

Garcetti and *Evans-Marshall* are dispositive of Principal Thorne's First Amendment claims, and neither *Kennedy* nor any other case changes that result. In the years since the School District filed its Motion to Dismiss, the Sixth Circuit has issued several opinions that compel dismissal of Principal Thorne's First Amendment Claims. In *Anderson v. City of Jellico, Tennessee*, the Sixth Circuit affirmed the dismissal of a First Amendment complaint filed by the chief and assistant chief of the Jellico Police Department. *Anderson v. City of Jellico, Tennessee*, No. 21-5704, 2022 WL 1307403 (6th Cir. May 2, 2022). The senior officers were fired as a result of comments they made during a city counsel meeting. *Id*. at *2. Applying *Garcetti*, the court observed:

> "The critical question under *Garcetti* is whether the speech at issue is itself ordinarily within the scope of an employee's duties, not whether it merely concerns those duties." *Lane v. Franks*, 573 U.S. 228, 240 (2014)). Several sharpening questions aid the inquiry: What was the "impetus" of the speech? How did it relate to "the employee's job duties"? What was the "setting" of the speech? Who was the "audience"? *DeCrane v. Eckart*, 12 F.4th 586, 596 (6th Cir. 2021).

Id. The court easily found that officers' speech was not protected because it fell squarely within their job duties.

To the extent that *Anderson v. City of Jellico* refined or clarified *Garcetti*, it does not change the result here. Again, Principal Thorne admits his "principal's message" was delivered "[i]n his role as principal." [Am. Compl. ECF No. 10, PageID 48]. Moreover, the "sharpening questions" applied by the *Anderson* Court confirm that Principal Thorne spoke pursuant to his official duties. The impetus for Principal Thorne's speech was to "inspire, educate, inform, and challenge his high school students" as part of the school's weekly announcements' videos. [*Id.*] Obviously, delivering weekly announcements is within the scope of the school principal's duties. The setting of the speech was the classroom, specifically, students' homeroom class during the school day, and the "audience" was a captive group of high school students who are compelled by law to attend school. *See* Tenn. Code Ann. § 49-6-3001. Under well-settled law, Principal Thorne's "principal's message" is not protected by the First Amendment.

It is easy to see why *Garcetti* and *Evans-Marshall* are the law. It is critical that the government retain legal authority to control the in-class speech of public school educators. Indeed, the Tennessee General Assembly has taken a great interest in regulating the speech of public school teachers. Tennessee law prohibits instruction on several subjects, including Common Core curriculum,[6] sexual orientation or gender identity curriculum without parent consent[7] and certain family life curriculum.[8] In 2021, the General Assembly passed a statute listing fourteen (14) different "prohibited concepts" that school districts must ensure are not discussed or promoted with students. *See* Tenn. Code Ann. § 49-6-1019 ("Prohibited Concepts Law"). The statute

[6] Tenn. Code Ann. § 49-6-2206
[7] Tenn. Code Ann. § 49-6-1308
[8] Tenn. Code Ann. § 49-6-1304

permits the withholding of state public school funding if a school district permits a teacher to discuss or promote any of the prohibited concepts. *Id*. **If, as Principal Thorne contends, k-12 educators have a right to free expression in the classroom, the Prohibited Concepts Law would be unconstitutional on its face.** If the School District was not within its rights to place Principal Thorne on paid investigative leave or suspension to investigate complaints made about his in-class speech, it certainly could not dismiss or otherwise discipline a teacher for expressing beliefs about critical race theory or any other topic that could violate the Prohibited Concepts Law. That Principal Thorne's speech was not illegal under state law is entirely irrelevant. The General Assembly's regulation of public employee speech is limited by the First Amendment to the United States Constitution, just as the School District's is. Either the government can restrict educator speech in the classroom or it cannot; that the Tennessee General Assembly finds certain subject matters inappropriate does not somehow make an unconstitutional restriction constitutional. Children six and older are legally required to attend school in Tennessee. TCA § 49-6-3001. To facilitate a strong educational environment for students, the government must be able to regulate what is taught and what is said to public school students. The preservation of that authority is exactly what the rules set out in *Garcetti* and *Evans-Marshall* stand for.

2. Principal Thorne Lacks Standing to Challenge the Constitutionality of School District Policies.

In an effort to escape dismissal under *Garcetti* and *Evans-Marshall*, Principal Thorne claims that "SCS's policies concerning irresponsible, untruthful, obscene, profane, discourteous, harassing, discriminatory, intimidating, dangerous, disruptive, incompetent, or improper speech or conduct" are unconstitutionally vague. [Am. Compl., ECF No. 140, ¶ 65]. Mr. Savage attempted the same strategy in *Savage v. Gee*, arguing that the university's sexual harassment policy was unconstitutionally vague and overly broad. But the court found that Mr. Savage lacked standing

to challenge the constitutionality of the university's discrimination and harassment policy either facially or as applied. "To have standing to raise a First Amendment claim, a plaintiff must (1) satisfy the case-and-controversy requirement, and (2) demonstrate that he is a proper party." *Savage,* 665 F.3d at 740 (citing *Sec'y of State of Md. v. Joseph H. Munson, Co.*, 467 U.S. 947, 955–57 (1984)). "Standing requires plaintiffs to demonstrate 'actual present harm or a significant possibility of future harm.'" *Id*. (quoting *Nat'l Rifle Ass'n of Am. V. Magaw*, 132 F.3d 272, 279 (6th Cir. 1997)). "There are two potential theories of injury—'actual' present injury and 'imminent' future injury." *Savage,* 665 F.3d at 740 (quoting *Thomas More Law Cntr. v. Obama*, 651 F.3d 529, 535 (6th Cir. 2011) (citation omitted)).

"**While the doctrines of overbreadth and vagueness provide an exception to the traditional rules of standing and allow parties not yet affected by a statute to bring actions under the First Amendment based on a belief that a policy is so broad or unclear that it will have a chilling effect, '[a]llegations of a subjective 'chill' are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm**.'" *Savage,* 665 F.3d at 740 (*quoting Laird v. Tatum*, 408 U.S. 1, 13–14 (1972) (internal citations omitted) (emphasis added)). "In order to have standing ... a litigant alleging chill must still establish that a concrete harm—*i.e*., enforcement of a challenged statute—occurred or is imminent." *Savage,* 665 F.3d at 740 (quoting *Morrison v. Bd. Of Educ. of Boyd Cnty*., 521 F.3d 602, 610 (6th Cir. 2008); *Prime Media, Inc. v. City of Brentwood*, 485 F.3d 343, 350 (6th Cir. 2007)).[9] "[F]or purposes of standing, subjective chill requires some specific action on the part of the defendant in order for the litigant to demonstrate an injury-in-fact." *Morrison*, 521 F.3d at 610. The court found that "the

[9] Significantly, *Savage* and the two other Sixth Circuit cases the *Savage* Court relied upon in finding that a "litigant alleging chill must still establish that a concrete harm—i.e., enforcement of a challenged statute—occurred or is imminent[,]" were decided more than a decade after *Dambrot*.

University's investigation of Savage does not rise to the level of 'concrete harms' [the Sixth Circuit] ha[s] previously identified as injuries sufficient to confer standing." *Savage*, 665 F.3d at 741.

Mr. Savage and Principal Thorne's claims are easily distinguished from *Dambrot* because Mr. Dambrot had been disciplined and ultimately dismissed under the policy he claimed was vague or overly broad. *Dambrot*, 55 F.3d at 1181. Mr. Dambrot's discipline and dismissal were proper because his speech was not on a matter of public concern and therefore was not protected by the First Amendment. *Id*. at 1185. However, because he had been disciplined and dismissed pursuant to the identified policy, he was able to establish that "a concrete harm—i.e., enforcement of a challenged statute—occurred or is imminent." *See Savage*, 665 F.3d at 740 (quoting *Morrison v. Bd. Of Educ. of Boyd Cnty*., 521 F.3d 602, 610 (6th Cir. 2008); *Prime Media, Inc. v. City of Brentwood*, 485 F.3d 343, 350 (6th Cir. 2007)); *see also Dambrot*, 55 3d at 1182 ("A statute is unconstitutional on its face on overbreadth grounds if there is "a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the court...") (citing *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 801 (1984)). Moreover, unlike Mr. Dambrot, Principal Thorne did not allege that he had has been harmed because any of the District's policies "is so broad as to 'chill' the exercise of free speech and expression." *See Dambrot*, 55 3d at 1182.

Like Mr. Savage, Principal Thorne lacks standing to challenge the constitutionality of any District policy because he cannot demonstrate that he suffered an injury-in-fact. Principal Thorne does not allege that he was disciplined or dismissed. He also does not allege any facts that could suggest that enforcement of an allegedly vague or overbroad District policy has occurred or is imminent. In fact, Principal Thorne does not even identify any particular policy he claims is vague

or overly broad. Like Mr. Savage, Principal Thorne did not plead facts sufficient to establish standing or to state a claim for violation of the First Amendment. Indeed, the School District's investigation of complaints against Principal Thorne "do not rise to the level of 'concrete harms' [the Sixth Circuit] ha[s] previously identified as injuries sufficient to confer standing." *See Savage*, 665 F.3d at 741.

Principal Thorne has never alleged that he lost wages due to being placed on administrative leave. Indeed, it is undisputed that Principal Thorne was paid during that time. However, the Court has expressed its concerns about whether Principal Thorne's administrative leave constitutes a "suspension" under state law [ECF No. 64, PageID 317-318] and whether or not the law required the School District to report the allegations against Principal Thorne to the state [ECF No. 62, PageID 274]. However, those questions have no bearing on whether Principal Thorne's Amended Complaint states a viable claim for violation of the First Amendment. First, the Court need not reach the question of whether Principal Thorne experienced an adverse employment action because, as explained above, Sixth Circuit caselaw establishes that Principal Thorne's "principal's message" was not protected by the First Amendment because his remarks were made pursuant to his official duties as a government employee. For purposes of his First Amendment claims, it does not matter whether Principal Thorne suffered an adverse employment action or not because his remarks were not protected speech.

Second, Tennessee law expressly provides that an educator can be suspended for up to ninety (90) days pending investigation of a complaint. Tenn. Code Ann. § 49-5-511(b)(3). "If vindicated or reinstated, the teacher shall be paid the full salary for the period during which the

teacher was suspended." *Id.* Thus, whether called "administrative leave" or a "suspension,"[10] Tennessee law expressly permitted the School District to temporarily relieve Principal Thorne of his duties as a principal for a period of less than ninety (90) days while it investigated a complaint against him. Tenn. Code Ann. § 49-5-511(b)(3). That is exactly what happened here, and the School District's compliance with state law did not constitute an adverse employment action.

Third, Tennessee law did not require that the School District report Principal Thorne's suspension to the state, and Principal Thorne did not plead that such a report was made. Indeed, the Tennessee State Board of Education Rules require a superintendent to "report to the State Board licensed educators who have been suspended or dismissed, or who have resigned, following allegations of misconduct, including sexual misconduct, which, if substantiated, would warrant consideration for license suspension, revocation, or formal reprimand" under State Board Rules. Tenn. Board of Ed. Rule 0520-02-03-.09(2)(a). A superintendent must also report certain criminal convictions. *Id.* Thus, aside from criminal convictions, school districts only report to the State Board misconduct that, if substantiated, could result in a formal reprimand under State Board rules or a suspension or revocation of an educator's license. The types of misconduct that can result in such discipline by the State Board are listed in Rule 0520-02-03-.09(3):

> (3) The State Board may revoke, suspend, formally reprimand, or refuse to issue or renew an educator's license or may refuse to issue a temporary permit for any of the following reasons:
>
> (a) Conviction of a felony;
>
> (b) Conviction of possession of illegal drugs;
>
> (c) Being on school premises, school property, at a school-related activity involving students, or on official school business, while

[10] Even Principal Thorne himself used the terms interchangeably in his Amended Complaint. [*See* Am. Comp., ECF No. 10, ¶¶ 4, 21, 26, 38, 47, 88, 89, 92, 93 (referring to "administrative leave"); Am. Compl., ECF No. 10, ¶¶ 39, 56, 68, 73, 88, 91, 92 (referring to a "suspension.")].

possessing, consuming, or under the influence of alcohol or illegal drugs;

(d) Falsification or altering of a license or permit or documentation required for licensure or permit;

(e) Inappropriate physical contact with a student;

(f) Failure to report as required under paragraph (2) of this Rule;

(g) Noncompliance with security guidelines for state-mandated tests, and/or TCAP or successor test;

(h) Denial, formal reprimand, suspension, or revocation/surrender of a license or certificate in another jurisdiction for reasons which would justify denial, formal reprimand, suspension, or revocation under this Rule;

(i) Other good cause as defined in subparagraph (1)(k) of this Rule;[11]

or

(j) Any offense contained in paragraphs (4) and/or (5) of this Rule.[12]

Tenn. Board of Education Rule 0520-02-03-.09(3). Thus, neither Tennessee law nor the State Board rules required that a report be made to the State because he was not accused of misconduct that could have resulted in suspension or revocation of his educator license or in a formal reprimand by the State Board.

3. Principal Thorne's "Nonpublic Forum" is Inapposite.

Principal Thorne's "nonpublic forum" argument is and always has been a red herring. Controlling caselaw dispositively establishes that the "nonpublic forum" argument does not apply

[11] "Other good cause" is defined as "[c]onduct that calls into question the fitness of an educator to hold a license including, but not limited to, violation of any provision in the Teacher Code of Ethics as contained in T.C.A. §§ 49-5-1001, et seq." Tenn. Board of Education Rule 0520-02-03-.09(1)(k).

[12] The Tennessee State Board of Education's Rule 0520-02-03 can be found here: https://publications.tnsosfiles.com/rules/0520/0520.htm

to Principal Thorne's claims because the speech at issue is not protected speech. In *Cornelius v. NAACP Legal Defense and Educational Fund, Inc*., 473 U.S 788 (1985), the Supreme Court of the United States observed that, before determining whether speech occurred in a public or nonpublic forum, it must determine whether the speech at issue is speech protected by the First Amendment, "for, if it is not, we need go no further." *Id*. at 797. Therefore, if speech is not protected by the First Amendment in the first instance, the forum is irrelevant. In deciding not to dismiss Principal Thorne's claim for violation of the First Amendment, the Court ignored dispositive legal authority.

For the reasons stated herein and in the School District's Motion to Dismiss Amended Complaint and supporting Briefs [ECF No. 15, 17, 35], Principal Thorne's claim for violation of the First Amendment should be dismissed with prejudice.

B. Plaintiff Does Not State a Viable Claim for Violation of the Fourteenth Amendment's Due Process Clause.

The Court also erred in failing to consider dispositive legal precedent when it denied the School District's motion to dismiss Principal Thorne's Fourteenth Amendment due process claim, which fails for the same reasons as his "vagueness and overbreadth" argument under the First Amendment. Principal Thorne lacks standing to challenge the constitutionality of District Policies as applied to him because he cannot establish a concrete harm. Principal Thorne was not disciplined for violation of any policy, and he did not suffer an adverse employment action.

To succeed on a due process claim based upon a vague policy, a plaintiff "must establish that a 'life, liberty, or property' interest is implicated by the government's conduct." *West v. Kentucky Horse Racing Commission*, 425 F. Supp. 3d 793, 805 (E.D. Kent. 2019) (quoting *Thomas v. Cohen*, 304 F.3d 563, 576 (6th Cir. 2002)). "First, the court must determine whether the interest at stake is a protected liberty or property right under the Fourteenth Amendment." *Thomas*, 304 F.3d at 576. "Only after identifying such a right" does the court "consider whether the deprivation

of that interest contravened notions of due process." *Id*. "Property interests are not created by the Constitution." *Id*. (quoting *Cleveland v. Bd. of Educ. of Loudermill*, 470 U.S. 532, 538 (1985)). "Instead, they are 'created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law[.]'" *Id.* "A protected property interest is defined by the terms of the state document creating the interest." *Williams v. Shelby County Board of Education*, No. 2:17-cv-02050-TLP-jay, 2020 WL 3816234 (W.D. Tenn. July 7, 2020) (citing *Kelley v. Shelby County Board of Education*, 751 Fed. App'x 650, 657 (6th Cir. 2018)).

Principal Thorne does not allege that he was dismissed from his employment, suffered loss of pay or benefits, or was otherwise subject to an action by the District that amounts to the loss of life, liberty, or property. [*See generally* Am. Compl.]; *see also Peltier v . U.S*., 388 F.3d 984, 988 (6th Cir. 2004) (finding that "a suspension with pay and full benefits pending a timely investigation into suspected wrongdoing is not an adverse employment action."); *Dendinger v. Ohio*, 207 Fed. Appx. 521, 527 (6th Cir. 2006) ("We have repeatedly held, however, that neither an internal investigation into suspected wrongdoing by an employee nor that employee's placement on paid administrative leave pending the outcome of such an investigation constitutes an adverse employment action."). Rather, Principal Thorne complains that he was suspended pending an investigation, an action expressly permitted by the Teacher Tenure Act. Tenn. Code Ann. § 49-5-511(a)(3); *see also Peltier v . U.S*., 388 F.3d 984, 988 (6th Cir. 2004) (finding that "a suspension with pay and full benefits pending a timely investigation into suspected wrongdoing is not an adverse employment action."); *Dendinger v. Ohio*, 207 Fed. Appx. 521, 527 (6th Cir. 2006) ("We have repeatedly held, however, that neither an internal investigation into suspected wrongdoing by an employee nor that employee's placement on paid administrative leave pending the outcome of such an investigation constitutes an adverse employment action.")

Under the Tennessee Tenure Act, "tenured teachers have a constitutionally protected property interest in continued employment and the school board must afford due process before the teacher is terminated." *Id*. at *6 (citing *Kelley v. Shelby County Board of Education*, 198 F. Supp. 3d 842, 854 (W.D. Tenn. 2016)). But the Due Process Clause does not prevent employment actions that are allowed under the Tenure Act. *Id*. (stating that due process does not prevent an employment action where "the statute that creates the property interest specifically provides" for such an action). As explained above, the same statute that creates any property interest in Principal Thorne's employment – the Teacher Tenure Act – also expressly permits suspension of a tenured teacher for up to 90 days pending an investigation into a complaint. Tenn. Code Ann. 49-5-511(a)(3). Thus, the Teacher Tenure Act clearly defines the "process" that is "due" when teachers are suspended or dismissed. Principal Thorne alleges no facts that could establish that the School District did not comply with the due process procedures required under the Teacher Tenure Act. Principal Thorne was not denied due process.

III. DELAY IN THIS CASE IS PREJUDICIAL TO THE SCHOOL DISTRICT.

The Federal Rules of Civil Procedure must be "construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding." Fed. R. Civ. P. 1. The School District filed its Motion to Dismiss on April 16, 2021 [ECF No. 15]. Though the court heard oral argument on the School District's Motion to Dismiss on at least three occasions [ECF No. 34, 38, 44] and received supplemental briefing at its request [ECF No. 35 & 37], it did not issue a ruling until April 11, 2025, almost four years after the motion was filed. [ECF No. 60, 64]. The Court did not address any of Principal Thorne's individual claims or provide any legal analysis supporting denial of the School District's Motion

to Dismiss, which, as this Honorable Court had acknowledged, presents relevant case law that "looms large" over Principal Thorne's claims. [ECF No. 62, PageID 273].

The delayed ruling and lack of legal analysis are unfairly prejudicial to the School District for several reasons. First, the School District might ultimately have to try this case five or six years after Principal Thorne was put on leave in January 2021. Memories are fading, and many relevant fact witnesses are no longer employed by the District. Second, in the absence of a written order analyzing the pertinent legal arguments with respect to Principal Thorne's individual claims, the School District cannot fully assess the legal merits of its defenses or the likelihood of success on summary judgment, at trial, or on appeal. In turn, this uncertainty makes settlement at a judicial settlement conference unlikely because the School District cannot meaningfully assess its legal risk or the value of Principal Thorne's claims. As explained herein and in its prior motions incorporated herein by reference and as previously acknowledged by this Honorable Court, the School District has raised meritorious arguments which seriously undermine the viability of Principal Thorne's claims. Principal Thorne has not offered any legal authority that could establish that he has pleaded a cognizable cause of action under the First or Fourteenth Amendments. Especially without an explanation of the reasons for denial of its Motion to Dismiss after four years, the School District is prejudiced by its inability to consider or understand the Court's reasoning.

This Honorable Court has alluded more than once to its belief that this matter should be settled. At the hearing on February 17, 2022, the Court said "But it looks like this would be a very—a relatively simple case to resolve to everyone's satisfaction." [ECF No. 62, PageID 275]. The Court reiterated this belief more than three years later at the most recent status conference on April 11, 2025, ordering the parties to participate in a judicial settlement conference and stating

that it hoped the School District would "pursue it in earnest." [ECF No. 64, PageID 314]. Of course, it is perfectly appropriate for a court to encourage and aid settlement. *In re NLO, Inc.*, 5 F.3d 154 (6th Cir. 1993). But a court should not attempt to coerce a settlement. *Id.* Indeed, "Rule 16 was not intended to require that an unwilling litigant be sidetracked from the normal course of litigation." *Id.* (internal citations omitted). Due to the importance of the legal issues in this case and the unusual procedural posture, the School District presents relevant legal authority in its present motion in the interest of transparency and to preserve all arguments for appeal.

CONCLUSION

For the reasons stated herein, the School District respectfully requests that the Court's interlocutory order denying the School District's Motion to Dismiss and be revised to reflect that the School District's long-pending Motion to Dismiss is GRANTED and Principal Thorne's Amended Complaint is dismissed in its entirety. Alternatively, the School District respectfully moves the Court to enter an Order analyzing the substantive legal issues and addressing the merits of each of Plaintiff's claims individually.

Respectfully Submitted,

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CERTIFICATE OF CONSULTATION

Pursuant to Local Rule 7.2(a)(1)(B), counsel for Defendants hereby affirms that the parties consulted as to the relief requested in the foregoing Motion but were not able to resolve the issues raised therein.

/s/Jamie L. Morton
Jamie L. Morton

CERTIFICATE OF SERVICE

This certifies that a copy of the foregoing has been forwarded pursuant to the Court's electronic filing system to the following:

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