No. 24-1427

IN THE UNITED STATES COURT OF
APPEALS FOR THE SEVENTH CIRCUIT

JEANNE HEDGEPETH,

Plaintiff-Appellant,

v.

JAMES A. BRITTON, ET AL.,

Defendants-Appellees.

On Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division
Case No. 1:21-cv-03790
The Honorable Judge Manish S. Shah

REPLY BRIEF OF PLAINTIFF-APPELLANT

Christine Svenson
CHALMERS, ADAMS, BACKER & KAUFMAN, LLC
345 N. Eric Drive
Palatine, IL 60067
(312) 437-8629
csvenson@chalmersadams.com

Paul J. Orfanedes
Counsel of Record
Meredith L. Di Liberto
JUDICIAL WATCH, INC.
425 Third Street SW
Suite 800
Washington, DC 20024
(202) 437-56262
porfanedes@judicialwatch.org
mdiliberto@judicialwatch.org

November 8, 2024

Counsel for Plaintiff-Appellant

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases **Page**

STATE STATUTES

OTHER AUTHORITIES

Plaintiff-Appellant Jeanne Hedgepeth, by counsel, respectfully submits this reply brief responding to brief of Defendants-Appellees ("Defendants").

I.

Defendants' Claim Preclusion Arguments Lack Merit.

1. Defendants double down on their extraordinary claim that their own decision, made after the close of fact discovery in this lawsuit, is a final judgment on the merits entitled to preclusive effect. Defendants devote the bulk of their brief to the issue, but their arguments lack merit. They identify no case in U.S. jurisprudence in which a defendant, in the middle of a lawsuit, rendered for itself a dispositive decision on the ultimate issue in that lawsuit, then successfully argued to the court that it was bound by the defendant's decision in the same way that the court is bound by an earlier final judgment. Hedgepeth will address a few points raised in Defendants' answer brief.

2. Defendants ignore the fact that, at the time Hedgepeth filed this Section 1983 lawsuit on July 15, 2021, not only had the ISBE hearing examiner not issued her non-binding findings of fact and recommendation to the Board, but the Board had not formally or even finally terminated Hedgepeth's employment. The ISBE hearing took place on March 10 and April 9, 2021, not as Defendants assert on March 10 and April 9, 2020 (Defs' Br. at 7), and by law the hearing examiner's non-binding findings of fact and recommendation were due no less than 30 days after the hearing, or by May 10, 2021. 105 ILCS § 5/24-12(d)(7). When Hedgepeth filed suit, she had been suspended without pay for a year. The hearing examiner

did not issue her non-binding findings of fact and recommendation until October 22, 2022, more than 15 months after Hedgepeth filed suit and approximately 18 months late. Defendants did not formally fire Hedgepeth until November 10, 2022, after litigating Hedgepeth's Section 1983 claim for nearly 16 months. Regardless, it plainly is not the case that Hedgepeth litigated her dismissal to a conclusion administratively, then sought a second bite at the apple in a Section 1983 lawsuit, as Defendants intimate. This lawsuit had been pending—and was actively litigated by Defendants—for more than a year before the hearing examiner issued her non-binding finding of fact and recommendation and Defendants adopted those findings and recommendation in deciding to fire Hedgepeth.

3. The Board is not a regulatory agency (*East Food & Liquor, Inc. v. United States*, 50 F.3d 1405 (7th Cir. 1995)), a licensing authority (*Gallaher v. Hasbrouk*, 3 N.E.3d 913 (Ill. App. 2013)), a pension board (*Schratzmeier v. Mahoney*, 617 N.E.2d 65 (Ill. App. 1993)), or even a merit board. *Goodwin v. Bd. of Trustees of the Univ. of Illinois*, 442 F.3d 611 (7th Cir. 2006).[1] The Board is an employer, and its decision to terminate Hedgepeth's employment was an employment decision, not a judicial decision. *Beggs v. Bd. of Educ. of Murphysboro*

[1] Defendants' attempt to distinguish *Goodwin* falls flat. Claim preclusion failed in *Goodwin* for at least two reasons: (1) the hearing officer's findings of fact were not final or otherwise binding on the Merit Board, and the Merit Board failed to adopt the hearing officer's findings; and (2) the issues before the Merit Board were not identical to the issue before the Court. *Goodwin*, 442 F.3d at 621. Defendants cite only the latter. Defs' Br. at 20. Hedgepeth submits that, what distinguishes *Goodwin* is the fact that the Merit Board was not the employer, as is the case here.

Cmty. Unit School Dist. No. 186, 45 N.E.3d 722, 735 (Ill. App. 2015), 72 N.E.3d 288 (2016) (*quoting* 97th Gen. Assem., Senate Proceedings, Apr. 14, 2011, at 294-95 (statements of Senator Lightford) ("The board is the employer and they should have that right [to make the final decision regarding termination]."). The fact that Defendants' decision to fire Hedgepeth may have been preceded by the ISBE hearing examiner's non-final findings of fact and a recommendation does not change the conclusion that Defendants' decision was that of an employer, not a court of law or equivalent adjudicative body. Defendants also identify nothing in the Illinois School Code demonstrating that, when the Legislature took final adjudication authority away from the ISBE, it intended to turn local school boards into courts of law or their equivalent. Defendants' entire argument rests on a false construct.[2]

4. Relatedly, Defendants' invocation of the seven "safeguards" outlined in *Reed v. AMAX Coal Co.*, 971 F.2d 1295 (7th Cir. 1992) for determining when an agency acts in a judicial capacity misses the obvious. Defendants did not afford Hedgepeth any of the safeguards identified in *Reed*. The hearing was held before the ISBE, not Defendants. And even if the ISBE hearing arguably satisfied the first six safeguards, it plainly did not satisfy the seventh—final findings of fact and conclusions of law. There is no dispute that the ISBE hearing examiner's findings and recommendation were not final. Defendants try to pound their square-peg

---

[2] Defendants also err when they insist that Hedgepeth claims the decision of a school board "is not and cannot be final." Defs' Br. at 24. Hedgepeth does not dispute that the Board's November 20, 2022 decision was final in the sense that it formally ended her employment. Hedgepeth disputes that it is the final judgment of a court of law or its equivalent.

argument into *Reed*'s round hole without answering the fundamental question—raised by the Legislature's determination to make local school boards, not the ISBE, the final decisionmaker in tenured teacher terminations—about what to do when a separate state agency provides a hearing to an employee but is not the final decisionmaker. This question did not arise in *Univ. of Tenn. v. Elliot*, 478 U.S. 788 (1986) and was not decided in that case. The Board's decision to fire Hedgepeth is and should be treated exactly as what it was—the decision of an employer.

5. Defendants suggest they had no authority to dismiss Hedgepeth other than through the procedures specified in the Illinois School Code. Defs' Br. at 20. That may be the case, but it does not make local school boards—which are elected bodies—into administrative agencies or adjudicative tribunals, and it does not mean federal courts are obligated to give preclusive effect to local school boards' employment decisions. Defendants identify nothing in the Illinois School Code demonstrating that the Legislature even considered let alone intended that, when it revised the code in 2011, it was turning elected local school boards into administrative agencies or adjudicative tribunals. Moreover, there is certainly no indication that the Legislature intended for the employment decisions of such entities to be given preclusive effect in courts of law.

6. Another obvious flaw with treating the Board's decision to fire Hedgepeth as the decision of a court of law or its equivalent is, as Hedgepeth demonstrated in her opening brief, the obvious biases, conflicts of interest, and prejudgment of the individual board members named as actual defendants in this

federal lawsuit—a majority of the Board—who voted to fire Hedgepeth. Defendants do not deny these biases, conflicts, and prejudgment, nor could they. Hedgepeth sued the board members and the District for violating her First Amendment rights 16 (sixteen) months before the board members purportedly sat in judgment on what Defendants assert are the very same First Amendment claims raised in Hedgepeth's lawsuit. Defendants do not refute Hedgepeth's showing that preclusive effect may be denied where an administrative procedure falls below the minimum requirements of due process or unfairness would result. *See*, *e.g.*, *Goodwin*, 442 F.3d at 621; *Garcia v. Vill. of Mt. Prospect*, 360 F.3d 630, 634 (7th Cir. 2004) (citing *Kremer v. Chem. Constr. Corp.*, 456 U.S. 461, 481-82 (1982)). Under what system of justice is it considered fair for a defendant to sit in judgment on claims asserted against him or her—especially where the defendant has already testified under oath in his or her own defense—then give preclusive effect to that defendant's decision? Defendants cite no such case. Their reliance on *Goodwin* is misplaced because the university employee there did not bring suit against the university and university officials until more than 18 months after the final decision and order that was claimed to be entitled to preclusive effect. *Goodwin*, 442 F.3d at 616-17. The university and university officials were not both defendants and judges at the same time on the same claim. Nor had they testified under oath in their own defense before becoming the judges. Defendants' argument misses the point of *Goodwin*.

7. It is no response for Defendants to assert that Hedgepeth could have raised the issue of their bias, conflicts of interest, and prejudgment in a new

administrative review action in state court after having already brought her Section 1983 claim in federal court.[3] As Hedgepeth's case law makes clear, preclusive effect may be denied under both state and federal law if it would be unfair or if administrative procedures fell below due process standards. *Locurto v. Guiliani*, 447 F.3d 159, 171 (2d Cir. 2006) says so expressly, despite Defendants' failed attempt to distinguish it. Not only did the individual board members named as defendants have pecuniary interests in the outcome of Hedgepeth's Section 1983 lawsuit, but they plainly made up their minds about Hedgepeth's speech long before they voted to terminate her on November 20, 2022, including when they voted to initiate Hedgepeth's termination on July 16, 2020; when they answered and began defending themselves against Hedgepeth's Section 1983 lawsuit on September 10, 2021 (Dkt. 20); and at their depositions before the close of fact discovery on August 15, 2022. Dkt. 29. Defendants do not and cannot dispute any of these facts. Like the decisionmakers in *Locurto* after the administrative hearings in that case, these individual defendants—a majority of the Board—were anything but neutral arbitrators. As in *Locurto*, "collateral estoppel does not attach." 447 F.3d at 171. Whether a separate action could have or should have been brought is a separate, unrelated, and irrelevant matter.

---

[3] Defendants object that an administrative review action in state court would not be a "second lawsuit." Arguably, it would have been a third – the first being the ISBE hearing on the Board's July 16, 2020 proposal to fire Hedgepeth, the second being this Section 1983 lawsuit, filed July 15, 2021, and the third being a state court action seeking review of the Board's November 20, 2022 decision to fire Hedgepeth.

8. Also without basis is Defendants' complaint that the board members' obvious biases, conflicts of interest, and prejudgment are of Hedgepeth's own making. Hedgepeth exercised her right to file suit when no findings and recommendation had been forthcoming more than 90 days after the ISBE hearing, after the hearing officer missed the statutory deadline for issuing findings and a recommendation, and after Hedgepeth had been suspended without pay for a year. That Hedgepeth exercised her right to bring suit in federal court does not obviate or diminish these obvious biases, conflicts of interest, and prejudgments or otherwise negate state and federal law recognizing that preclusive effect should be denied when unfairness results or the administrative process fell below the minimum requirements of due process.

9. If anything, Defendants' protestations about Hedgepeth choosing to file this federal lawsuit rather than await the outcome of the ISBE hearing and the Board's action following that outcome reinforce Hedgepeth's argument that Defendants could have and should have raised a "claim splitting" objection in July 2021, when Hedgepeth filed suit, but failed to do so and therefore waived any preclusion affirmative defense. The proper time for asserting a preclusion affirmative defense was when Defendants answered. They cannot claim to have been unaware that Hedgepeth had an ISBE hearing. The District had participated in the hearing and its witnesses testified at it. They could have sought a stay of Hedgepeth's Section 1983 lawsuit pending the ISBE hearing examiner's issuance of her findings and recommendation and Defendant's action on those findings and

recommendations. They also could have asserted their preclusion affirmative defense in their September 10, 2021 answer. They have never offered any justification for why they failed to do either. They acquiesced to Hedgepeth's lawsuit by actively litigating Hedgepeth's Section 1983 claim at a time when they knew the ISBE hearing examiner's non-binding findings and recommendation remained pending. Their focus on the timing of their own, subsequent adoption of those findings and recommendation is misplaced.

II.

Defendants Fail to Refute Hedgepeth's Showing That Material Factual Disputes Precluded Summary Judgment on Hedgepeth's Section 1983 Claim.

1. Hedgepeth demonstrated in her opening brief that factual disputes precluded granting summary judgment on Hedgepeth's Section 1983 claim. If anything, Defendants' brief highlights these disputes. Defendants continue to mischaracterize Hedgepeth's posts in a manner that Hedgepeth disputed in the trial court and in her opening brief and continues to dispute. Defendant's mischaracterizations of the posts begs the question—who determines the proper meaning of the speech at issue? Hedgepeth submits it should be the trier of fact, not the defendants or, on summary judgment, the court. Indeed, it is error to do otherwise. *Moser v. Las Vegas Metro. Police Dep't*, 984 F.3d 900, 908 (9th Cir. 2021) ("In short, a factual dispute exists over the objective meaning of [the plaintiff's] statement . . . the district court, however, did not resolve this factual dispute over

the objective meaning of [the plaintiff's] statement and instead adopted [the defendant's] reading of it. That was error.").

2. Most significantly, Hedgepeth disputes Defendants' assertion that her posts were "racially inflammatory." Defs' Br. at 44. She demonstrated otherwise, including by providing expert testimony demonstrating that her posts were "not racist . . . Instead, she expressed viewpoints rooted in black conservative thought and statistical data that challenge the dominant racial narratives." Plf's Br. at 9-10. She also demonstrated that her posts presented "an important perspective." *Id.* at 10. Defendants run roughshod over Hedgepeth's evidence, wrongfully attributing to her a serious moral failing—racism. Defendants' zeal to mislabel Hedgepeth as a racist despite Hedgepeth's showing otherwise only further demonstrates that the proper reading of Hedgepeth's posts could not and should not have been decided on summary judgment. It also demonstrates the extreme animus Defendants have towards Hedgepeth, which presents a further factual dispute about whether Defendants' decision to terminate Hedgepeth was an improper pretext.[4]

3. Defendants also grossly distort particular aspects of Hedgepeth's posts. By any plain reading of the posts, Hedgepeth did not "suggest that people who believe in racism 'have been hoodwinked.'" Defs' Br. at 5. Nor did she "suggest that racism would disappear if only the black community would 'wake up.'" *Id.*

---

[4] Defendants' citation to *Bennett v. Metro. Gov't of Nashville & Davidson City*, 977 F.3d 530 (6th Cir. 2020) further confirms that Defendants dismissed Hedgepeth's posts as racist. *See* Defs' Br. at 44. The citation falsely equates the posts—which invoked prominent black thinkers and used undisputedly accurate statistics—with an employee's use of the "N-word." *Id.*

Defendants' claims otherwise simply show their animosity towards Hedgepeth and present additional factual dispute about whether Defendants' decision to terminate Hedgepeth was a pretext.

4. Hedgepeth also disputes Defendants' assertion that her posts disrupted summer school. Defs' Br. at 36 ("Teachers and students informed the principal that summer school was being interrupted . . . ."). As Hedgepeth demonstrated in her opening brief, Defendants admitted Hedgepeth's speech did not disrupt classroom or instructional activities or after-school or extracurricular activities. Dkt. 77, ¶ 41. Defendants did not argue otherwise in the district court and therefore waived any such assertion on appeal. Raising it for the first time in their answer brief is disingenuous, if not desperate.

5. Hedgepeth also disputes Defendants' claims about the number of communications received by the District. Defendants assert that the District received 113 emails, but by Hedgepeth's count, which is based on the set of emails Defendant produced to Hedgepeth in discovery, the District received only 76 unique emails. *Compare* Defs' Br. at 12 *with* Plf's Br. at 11. Defendants' assertion that "[n]o factual dispute exists that the District received 113 emails related to Hedgepeth's post" is just plain wrong. Defs' Br. at 12. Even more significantly, Defendants do nothing to refute Hedgepeth's showing that, of these 76 emails, only 6 were from PHS parents (3 were supportive of Hedgepeth; 2 were critical) and only 3 were from students (1 was supportive of Hedgepeth; 2 were critical), and of the 58 written comments concerning Hedgepeth submitted for the June 18, 2020 board

meeting, only 3 were from PHS parents and only 2 were from PHS students. Plf's Br. at 11-12. Nor do Defendants do anything to refute Hedgepeth's demonstration that only 4 persons commented on Hedgepeth at the July 16, 2020 meeting at which the Board voted to initiate Hedgepeth's termination (2 were supportive of Hedgepeth; 2 were critical). *Id.* at 12. Plainly, the matter had died down by the July 16 2020 meeting, and Defendants' bald, unsupported assertions otherwise do not refute the evidence.

III.

Defendants Violated Hedgepeth's Right to Free Speech and the District Court Misapplied *Pickering*.

1. Defendants devote remarkably little attention to the First Amendment analysis. They make no effort to respond to Hedgepeth's demonstration that, because her speech was neither at work nor about work and did not even tangentially involve the fact of her employment, she should not have been treated any differently from any other member of the public, whom Defendants have no authority to punish for engaging in free speech. Plf's Br. at 33-34 (citing *Pickering v. Bd. of Educ.*, 391 U.S. 563, 574 (1968)). Nor did Defendants even respond to Hedgepeth's argument that *Pickering* balancing has no basis in the text, structure, or history of the First Amendment and, because it requires courts to undertake ad hoc, open-ended balancing of incomparable values, does not provide helpful guidance to resolve concrete cases. *Id.* at 34, n.9 (citing *Bennett*, 977 F.3d at 553 (Murphy, J., concurring)).

2. Instead, Defendants chose for their first *Pickering* balancing argument an issue the District Court rejected, a fact Defendants now ignore. Specifically, Defendants argue that Hedgepeth's speech impaired her relationships with colleagues. Defs' Br. at 35. But when Defendants made this argument in the District Court, Hedgepeth objected to Defendants' evidence, and the District Court sustained that objection. "[Defendants] do not identify facts properly supported in the record to show that Hedgepeth's speech was disruptive to the District's interest in maintaining harmony among co-workers, so I find this justification to be unsupported for purposes of summary judgment." Dkt. 83, p. 26, n.15 (A26, n.15). Defendants did not cross-appeal this ruling and do not even try to demonstrate that it was wrong. It was correct and should not be considered as part of any *Pickering* balancing.

3. Defendants' other *Pickering* balancing argument relies on the claim that Hedgepeth's speech caused "disruption" in the form of emails, phone calls, and comments at board meetings—what Defendants describe as "public outcry."[5] Defs' Br. at 36. Defendants make no effort to rebut Hedgepeth's showing that such "disruption" is no disruption at all for purposes of *Pickering* balancing because *Pickering* balancing disruption must be a direct result of the speech, not the result of reaction to the speech. Plf's Br. at 41-42 (citing *Oldridge v. Layton*, Nos. 22-3284, 23-3070, 2024 U.S. App. LEXIS 10688, *9 (10th Cir. May 2, 2024); *Berger v.*

[5] Defendants' argument about Hedgepeth's ability to carry out her duties is essentially the same because it relies on the same predicate—the emails, phone calls and comments at board meetings.

Battaglia, 779 F.2d 992, 1000 (4th Cir. 1985); *Flanagan v. Munger*, 890 F.2d 1557, 1567 (10th Cir. 1989)). Indeed, anything less is essentially crediting a "heckler's veto"—limiting, prohibiting, or punishing free speech because of negative reaction to that speech.

4. Additionally, claims of disruption caused by erroneous, uninformed, self-interested, or politically motivated public reactions to speech should be given no weight in *Pickering* balancing. All were present in the reactions to Hedgepeth's speech, or at a minimum Hedgepeth presented a genuine dispute of fact about the substance of the reactions to her posts. A case in point is Defendants' citation to an email from a purportedly concerned parent "uncertain as to whether Hedgepeth intended to 'encourage others to be violent.'" Defs. Br. at 38. The purported concern is patently absurd. It is a gross mischaracterization of Hedgepeth's posts to suggest that Hedgepeth encouraged or even arguably encouraged violence. The same is true for claims that Hedgepeth's posts were racist. They were anything but racist, especially if properly understood as being rooted in Black conservative thought and undisputedly accurate statistics. And as Hedgepeth demonstrated in her opening brief, some of the emails critical of her posts appear to have been part of a concerted effort organized by a politically ambitious local activist who later succeeded in getting elected to the Board. Plf's Br. at 11. The District Court erred by giving such substantial weight to purported disruption caused by such reactions, while failing to give Hedgepeth's speech its due weight.

5. Even if the Court were to credit the emails and comments, Defendants fail to overcome Hedgepeth's right to free speech because the emails and comments did not affect Hedgepeth's students or classroom or her ability to teach her students in that classroom. That Defendants read and responded to emails and comments does not translate into the type of disruption required by *Pickering* and *Connick v. Myers*, 461 U.S. 138 (1983) to outweigh Hedgepeth's speech. Hedgepeth's interest in speaking freely must be balanced against Defendants' interest in "promoting effective and efficient public services." *Gustafson v. Jones*, 290 F.3d 895, 909 (7th Cir. 2002). The public service at issue is teaching. Not only have Defendants admitted that Hedgepeth's speech did not disrupt classroom or instructional activities or after-school or extracurricular activities (Dkt. 77, ¶ 41), but they have not and cannot demonstrate that receiving, reading, and responding to emails and comments affected the effective and efficient operation of the school. Defendants cannot show anything above a ministerial annoyance, which is not the type of disruption that is required to punish Hedgepeth's free speech.

6. Defendants' disruption argument also ignores the role Defendants themselves played in the "public outcry." Rather than stating that they could not comment on personnel matters, Defendants publicly cast aspersions on Hedgepeth and her posts. Defs' Br. at 6 (citing Dkt. 54-2, ¶¶ 5-6). They created the false impression that the posts were inappropriate—asserting that the posts did not "reflect the values or principles of District 211" and apologizing for "any harm or disrespect" they may have caused—and implied that Hedgepeth was a racist. *Id.*

Doing so not only mischaracterized Hedgepeth's posts but also fanned the flames of what Defendants would later argue was disruption.

7. On Hedgepeth's side of the scale, Defendants misconstrue the *Pickering* balancing factors as set out in *Gazarkiewicz v. Town of Kingsford Heights*, 359 F.3d 933, 943-44 (7th Cir. 2004), claiming that Hedgepeth's speech was entitled to less weight because it was not "vital," "novel," or "informed by specialized knowledge." Defs' Br. at 39-41. But *Garzarkiewicz* does not say the speech at issue must be "vital," "novel," or "informed by special knowledge." It says the "matter [must be] one on which *debate* was vital to informed decisionmaking." *Gazarkiewicz,* 359 F.3d at 943 (*quoting Greer v. Amesqua*, 212 F.3d 358, 371 (7th Cir. 2000)) (emphasis added). Defendants excise the most important word: debate. Debate has been an integral aspect of First Amendment rights since the dawning of our Nation and one vigorously protected by the judiciary. *See e.g.*, *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949); *De Jonge v. Oregon*, 299 U.S. 353, 364-365 (1937). Neither the District Court nor Defendants properly considered whether Hedgepeth's posts regarded a matter in which debate was vital to informed decisionmaking. The answer is obviously yes. Considering that at the time much of the nation was engaged in vigorous debate over George Floyd's death, the subsequent riots, and race, racism, and race relations in the United States, it would be a strange conclusion to say that Hedgepeth's posts did not concern a matter about which debate was vital to informed decisionmaking. And in fact, by admitting that they were not knowledgeable about the individuals and statistics Hedgepeth cited in her

posts, Defendants demonstrated that Hedgepeth did in fact make a valuable contribution to these debates. *See*, *e.g.*, Dkt. 77, ¶ 7.

8. Defendants cite *Garcetti v. Ceballos*, 547 U.S. 410 (2006) and *Lane v. Franks*, 573 U.S. 228 (2014) for the proposition that speech must be "novel"—which is what the District Court found—or based on specialized knowledge to be entitled to substantial weight. Defs' Br. at 39-41. Neither case stands for such a proposition. Unlike here, both *Garcetti* and *Lane* concerned employee speech that was about work. It was in that work-related context that the U.S. Supreme Court found that "exposing governmental inefficiency and misconduct is a matter of considerable significance" and therefore employee speech about such matters is entitled to substantial weight on the employee's side of the scale. *Garcetti*, 547 U.S. at 425. *Garcetti* and *Lane* do not, however, support the proposition only such speech is entitled to the greatest weight or that Hedgepeth's speech must have been "uniquely informed by virtue of her employment" to be entitled to the greatest weight. Defendants and the District Court erred in this regard.[6]

9. Defendants claim their reliance on the public reaction to Hedgepeth's posts to punish Hedgepeth's speech is not a heckler's veto because a heckler's veto involves "outsiders seeking to silence unpopular opinions" and the commenters—both those who submitted emails and those who submitted comments for either of

---

[6] Defendants also dismiss some of Hedgepeth's speech as "jokes." Defs' Br. at 11; *see also id.* at 40. Hedgepeth demonstrated that her speech included satire, which has a long history of being protected under the First Amendment. Plf's Br. at 36-37 (citing *Novak v. City of Parma*, 932 F.3d 421, 428 (6th Cir. 2019)).

the two board meetings—were "students, parents, and members of the District community." Defs' Br. at 49. Nowhere do Defendants define what they mean by the "District community," who is or is not a member of that community, or how (or even if) Defendants ascertained that a particular commenter was a member of the "District community." In addition, knowing whether a commenter is a student, parent, or member of the "District Community"—however Defendants define that term—necessarily relies on examining and assessing the contents of the commenter's speech. Hedgepeth objected to the comments as being hearsay, but the District Court overruled that objection. Defendants try to defend that ruling by arguing that the comments were not offered for the truth of the matter, but Defendants' argument misses the point. If, as they argue in their brief, the heckler's veto determination hinges on who is reacting to the speech—*e.g.*, whether the commenter is a student, parent, member of the District community, or outsider—it was imperative to take into account the truth of a comment's content, including commenter's description of his or her identity and the substance of their comment. The bulk of Defendants' purported disruption evidence should have been held to be inadmissible.

10. Defendants rely on *Craig v. Rich Twp. High School Dist. 227*, 736 F.3d 1110 (7th Cir. 2013) and *Melzer v. Board of Education*, 336 F.3d 185 (2d Cir. 2003) to argue that the Board's decision was not a heckler's veto. *Craig* held that students at the high school where the plaintiff worked were not outsiders for purposes of a heckler's veto given the unique relationship between the students and

the plaintiff, a guidance counselor and basketball coach. 736 F.3d at 1121. Similarly, *Melzer* held that parents of students at the high school where the plaintiff in that case worked as a teacher were not outsiders for purposes of a heckler's veto. 336 F.3d at 199. Again, however, the overwhelming majority of persons who provided comments about Hedgepeth's posts were neither students nor parents. Only a handful were students or parents, and approximately half supported Hedgepeth. *See* Section II, ¶ 5, *supra.* Crediting the comments of the others plainly amounted to a heckler's veto.

11. Even with respect to the students and parents (but also with respect to other commenters), Defendants' heckler's veto argument fails to take into account the fundamental issue about what a public employer can or cannot do when students' and parents' reaction to an employee's speech is neither fair nor reasonable. Could a public employer fire a teacher if students and parents react strongly enough and negatively enough to a teacher's speech, undertaken in a personal capacity and neither at work nor about work, even if the teacher's speech is objectively true? Is a teacher prohibited from speaking out away from work, in his or her personal capacity, about the issues of the day, because doing so might cause controversy regardless of whether the speech is properly understood? Defendants provide no answer. Nor, for that matter, does the *Pickering* balancing test as applied by the District Court, when the employer's claimed interest is in avoiding disruption caused by "public outcry" to employee speech.

IV

Conclusion.

1. For the foregoing reasons and for the reasons set forth in her opening brief, Hedgepeth respectfully requests that this Court reverse the judgment of the District Court.

Dated: November 8, 2024

Respectfully submitted,

Paul J. Orfanedes
Counsel of Record
Meredith L. Di Liberto
JUDICIAL WATCH, INC.
425 Third Street SW
Suite 800
Washington, DC 20204
(202) 437-5626
porfanedes@judicialwatch.org
mdiliberto@judicialwatch.org

Christine Svenson
CHALMERS, ADAMS, BACKER
& KAUFMAN, LLC
345 N. Eric Drive
Palatine, IL 60067
(312) 437-8629
csvenson@chalmersadams.com

Counsel for Plaintiff-Appellant

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT

1. Pursuant to Fed. R. App. P. 32(g), the undersigned counsel for the Plaintiff Appellant Jeanne Hedgepeth certifies that this brief complies with the type-volume limits of Circuit Rule 32(c) because the brief contains 4,948 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief has been prepared in a proportionally spaced typeface using Microsoft Word in font size 12, Century Schoolbook typeface for the text and footnotes. *See* Cir. R. 32(b).

/s/ Paul J. Orfanedes
Paul J. Orfanedes

CERTIFICATE OF SERVICE

I hereby certify that on November 8, 2024, I electronically filed the foregoing Reply Brief of Plaintiff-Appellant with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I also certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/EFF system to all parties of record, namely:

William R. Pokorny
Sally J. Scott
Hailey M. Golds
Franczek, P.C.
300 S. Wacker Drive, Suite 3400
Chicago, IL 60606

/s/ Paul J. Orfanedes
Paul J. Orfanedes