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

BRIEF AND REQUIRED SHORT APPENDIX OF PLAINTIFF-APPELLANT

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August 28, 2024

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APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 24-1427

Short Caption: Jeanne Hedgepeth v. James A. Britton, et al.

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party, amicus curiae, intervenor or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statements be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in the front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

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(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P. 26.1 by completing item #3):

Jeanne Hedgepeth

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Judicial Watch, Inc.; Svenson Law Offices; and Chalmers, Adams, Backer & Kaufmann, LLC

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i) Identify all its parent corporations, if any; and

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(4) Provide information required by FRAP 26.1(b) – Organizational Victims in Criminal Cases:

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(5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

N/A

Attorney's Signature: /s/ Paul J. Orfanedes Date: August 28, 2024

Attorney's Printed Name: Paul J. Orfanedes

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☑ **No** ☐

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N/A

(5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

N/A

Attorney's Signature: /s/ A. Christine Svenson Date: August 28, 2024

Attorney's Printed Name: A. Christine Svenson

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☐ **No** ☑

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TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

CASES **PAGE**

FEDERAL STATUTES

FEDERAL RULES

STATE STATUTES

OTHER

JURISDICTIONAL STATEMENT

Plaintiff Jeanne Hedgepeth ("Hedgepeth") brings a single claim under 42 U.S.C. § 1983 for violation of her First Amendment rights. A32. The District Court had subject matter jurisdiction pursuant to 28 U.S.C. § 1331. The District Court granted Defendants' motion for summary judgment in a Memorandum Opinion and Order entered on February 20, 2024. A1-28. This appeal is from the District Court's final judgment, also entered on February 20, 2024. A29. This Court has jurisdiction pursuant to 28 U.S.C. § 1291. Hedgepeth filed a timely notice of appeal on March 19, 2024, twenty-eight days after entry of the final judgment. Dkt. 88; Fed. R. App. 4(a)(1)(A).

STATEMENT OF THE ISSUES

1. Whether District 211's decision to terminate Hedgepeth's employment, issued after Hedgepeth filed this Section 1983 action and, indeed, after the close of fact discovery, is a final judgment on the merits by a judicial or quasi-judicial body such that its factual findings are entitled to preclusive effect.

2. Whether genuine disputes of material fact exist precluding the entry of summary judgment on the merits of Hedgepeth's Section 1983 claim.

3. Whether Defendants are entitled to summary judgment as a matter of law on the merits of Hedgepeth's Section 1983 claim.

STATEMENT OF THE CASE

I. Introduction.

High School Township District 211 ("District 211" or "the district") fired tenured Palatine High School social studies teacher Jeanne Hedgepeth for speech that was neither at work nor about work. Hedgepeth wrote three posts on Facebook criticizing the rioting, looting, and lawlessness that occurred in the aftermath of the May 25, 2020 death of George Floyd. She also commented on race relations in the United States and challenged conventional thinking about racial equity and the tactics of some of the nation's most well-known racial activists. In doing so, she used rhetorical devices, satire, and statistics and invoked Black conservatives and a well-established body of Black conservative thought. She spoke on her own time, after the school year had ended and while vacationing in Florida. At no point did she identify herself as a teacher or District 211 employee.

Hedgepeth and her speech were unfairly maligned as racist, including by District 211 officials. The people who reacted negatively to Hedgepeth's speech made no apparent attempt to understand or interpret the speech and, consequently, condemned it. District 211 initiated dismissal proceedings against Hedgepeth shortly thereafter, citing the public reaction to the speech. In reality, only a handful of actual students and parents of students expressed concern, a truly insignificant number for a school with 2,500 students in a district serving more than 250,000 residents. The teacup tempest calmed down substantially by the time District 211's Board of Education ("the Board") voted to initiate Hedgepeth's

dismissal. Hedgepeth was suspended without pay for more than fifteen months, then unceremoniously fired by the Board after an Illinois State Board of Education hearing officer recommended her termination.

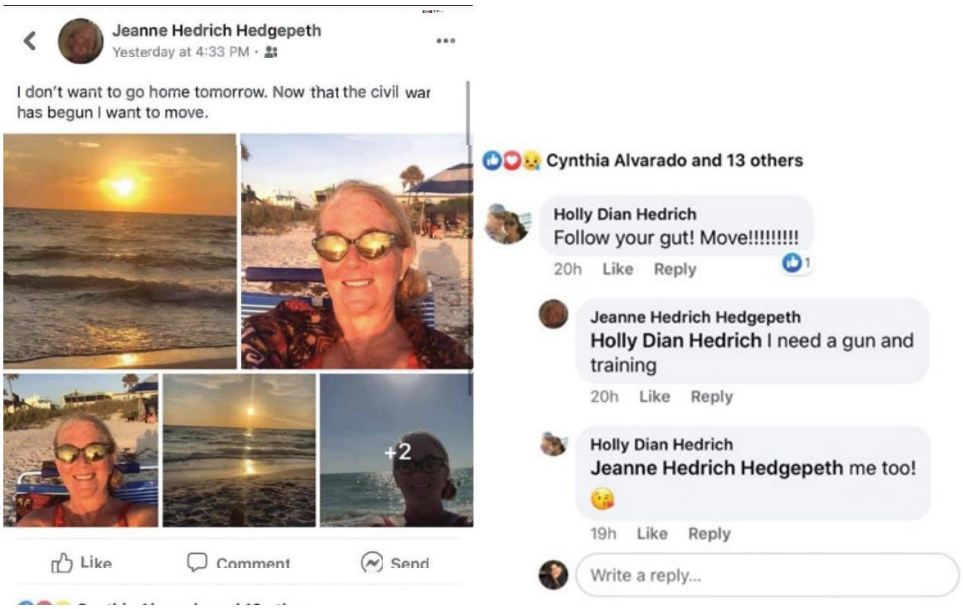
The lesson of District 211's actions toward Hedgepeth is that teachers have three options with respect to speaking about events and issues that touch on race: express only accepted, conventional thought; remain silent; or be publicly shamed as a racist and fired. Surely the First Amendment provides public employees greater protection than that. Hedgepeth's Section 1983 also raises the broader question of whether the balancing test under *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968) applies to speech that is not at or about work, or, if it does apply, how various competing concerns—the employee's interest in the speech versus the employer's interest in efficiently providing government services—should be analyzed and weighed.

II. Plaintiff's Claims.

On or about June 1, 2020, Hedgepeth, a tenured Social Studies teacher at District 211's Palatine High School ("PHS"), posted three comments on Facebook concerning the nationwide riots and looting that followed the May 25, 2020 death of George Floyd. Dkt. 69 at 13-16, ¶¶ 21-23. One post also concerned race and racism in the United States. *Id.* Hedgepeth was vacationing in Florida at the time, as the school year had ended. Dkt. 69 at 13-14, ¶ 21. Neither Hedgepeth's posts nor her Facebook page identified Hedgepeth as a PHS or a District 211 teacher or employee. Dkt. 77, ¶ 2. The posts did not discuss teachers, students, schools, or education. *Id.*

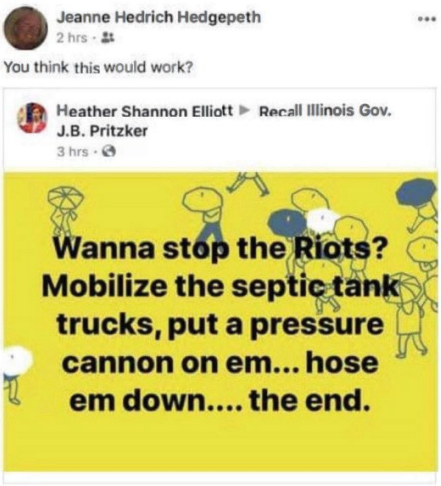
Hedgepeth purposely set her Facebook privacy settings to "private" so that her Facebook page would not be public and only "friends" could see her posts. *Id.*, ¶ 22. It was Hedgepeth's longstanding practice to decline "friend" requests from current students. *Id.*, ¶ 23. She did not ask former students to "friend" her and only accepted "friend" requests from former students who asked her to "friend" them. *Id.*

Hedgepeth's first post included several vacation photos along with the statement, "I don't want to go home tomorrow. Now that the civil war has begun I want to move." Dkt. 69 at 13-14, ¶ 21. A Facebook friend responded, "Follow your gut! Move!!!!!!!!" *Id.* Hedgepeth replied, "I need a gun and training." The Facebook friend retorted, "Me too!":



Id. Hedgepeth later told District 211 Human Resources Director James Britton in a June 3, 2020 interview that the Facebook friend in the post was her sister-in-law, and that Hedgepeth feared for her safety. Dkt. 69 at 19-20, ¶¶ 30 & 33; Dkt. 77, ¶ 10.

Hedgepeth's second post was a repost of a meme that stated, "Wanna stop the riots? Mobilize the septic tank trucks, put a pressure cannon on em.... hose em down... the end." Dkt. 69 at 14-15, ¶ 22. Hedgepeth added, "You think this would work?":



Id. Hedgepeth told Britten in the June 3, 2020 interview that this second post was not serious and intended as a joke, *i.e.*, it was satire. Dkt. 69 at 19 & 21, ¶¶ 30 & 34; Dkt. 77, ¶ 11.

Hedgepeth's third post was part of a longer exchange with a twenty-five-year-old former student of Hedgepeth, Kearra Harris, who had graduated from PHS in 2013. Dkt. 77, ¶ 12. In response to an earlier, no longer available post directed to Hedgepeth in which Harris had referenced "white privilege," Hedgepeth wrote:

> I am about facts, truth seeking and love. I will speak on any topic I choose because I live in a free country. I find the term "white privilege" as racist as the "N" word. You have not walked in my shoes either so do not make assumptions about me and my so called privilege. You think America is racist? Then you have been hoodwinked by the white liberal establishment and race baiters like Jesse Jackson and Al Sharpton. Travel the world and go see that every nation has racism and some more than others but few make efforts such as we do to mitigate or eliminate it. I have lived and seen.

> The people I am informed by about the black experience in America are actually some of the smartest people in America. And it so happens they are black. I highly recommend studying Thomas Sowell who is now retired and in his 80's. A treasure. A truth seeker, does REAL research and analysis. Candace Owens is one of the smartest most courageous women in America and Larry Elders speaks the truth with a great sense of humor and FACTS not feelings. They are who I listen to when it comes to facts about the black experience in America. Don't you think there is a deeper problem than racism when 50% of murders in America are committed by 13% of the population? Do you think there might be a subtle genocide of black babies when most planned parenthoods are put in poor neighborhoods and that 30% of abortions are black babies, black women only make up 7% of the U.S. population. The greatest power you have is what you believe about yourself, what have Democrats, mainstream media and intellectuals in ivory towers been telling the black community to believe about themselves for forty years? Wake up and stop believing them, then things will change.

Dkt. 69 at 15-16, ¶ 23; Dkt. 77, ¶ 15.

On or about June 1, 2020, District 211 Superintendent Lisa Small directed Britton to investigate Hedgepeth's posts. Dkt. 69 at 16, ¶ 24. As part of that investigation, Hedgepeth met with Britton on both June 1, 2020 and June 3, 2020. Dkt. 69 at 19, ¶ 30. Britton ultimately recommended to Small that Hedgepeth be fired. *Id.* a 24, ¶ 40; Dkt. 77, ¶ 4. Small accepted Britton's recommendation and, in a June 12, 2020 meeting with Hedgepeth, Britton, and a union representative, informed Hedgepeth that she had decided to recommend to the Board that Hedgepeth be fired. *Id.*

The Board considered Hedgepeth's termination at meetings on June 18, 2020 and July 16, 2020. Dkt. 45, ¶ 24; Dkt. 69 at 25, ¶ 43. Britton prepared a memo to Small before the second meeting setting forth the grounds for Hedgepeth's dismissal. Dkt. 67, ¶ 2.

At the July 16, 2020 board meeting, a majority of board members – Kimberly Cavill, Anna Klimkowicz, Robert J. LeFevre, Jr., Steven Rosenblum, and Edward M. Yung – voted to accept Small's recommendation and commenced dismissal proceedings against Hedgepeth. Dkt. 67, ¶¶ 3 & 4. Hedgepeth was suspended without pay in the interim. *Id.*, ¶ 3. Transcripts of two closed-door sessions of the July 16, 2020 meeting document Small's presentation to the Board and the Board's deliberations. Dkt. 77, ¶ 25. Hedgepeth subsequently requested a non-binding hearing before the Illinois State Board of Education ("ISBE"), as was her right under Illinois law. Dkt. 67, ¶ 5. The hearing did not occur until the Spring of 2021, however. *Id.*

There is no dispute that Hedgepeth spoke as a private citizen and that her speech addressed matters of public concern. A16. There also is no dispute that Hedgepeth's posts were a substantial or motivating factor in Defendants' decision to fire Hedgepeth. Dkt. 45, ¶ 33; Dkt. 77, ¶ 3. There are disputes about facts used by the District Court in its *Pickering* balancing, however.

A. Disputes of Fact Regarding the Proper Characterization of Hedgepeth's Speech.

One such dispute is how Hedgepeth's posts should be read. The notice of charges against Hedgepeth claimed that the posts used "racially charged language," revealed Hedgepeth's "biases," and used "words that devalue and demean." *See, e.g.*, Dkt. 77, ¶ 5. Hedgepeth disputes that her posts were any of these things.

Hedgepeth testified that the "Civil War" post expressed her concern about the rioting, looting, and destruction that occurred in the wake of George Floyd's death

and the increasing division in the country. Dkt. 77, ¶ 9. She demonstrated that numerous other commentators, including renowned economist, social philosopher, and political commentator Dr. Thomas Sowell, had used this same language – a rhetorical device – in the same manner. *Id.* She also testified that the post reflected her concern for her and her teenage daughter's personal safety. *Id.*, ¶ 10. By contrast, Britton read the post to refer to the Black Lives Matter movement, which on its face it did not, and deemed it inflammatory. Dkt. 77, ¶ 54. Small read the post as demonstrating that Hedgepeth "does not want to be in the area in which she teaches," which she deemed "a problem" that bore negatively on District 211. *Id.* Board member Klimkowicz deemed the post "offensive" because "I think the term 'war' is – is – you know, people are getting hurt." *Id.* Board member Cavill asserted that the post "implies desire or a willingness to participate in this perceived 'civil war,'" twisting Hedgepeth's concern far beyond anything expressed in her actual speech. *Id.*

Hedgepeth testified that her "Wanna Stop the Riots" post was satire and expressed her concern that the riots be stopped. Dkt. 77, ¶ 11. According to Hedgepeth, "it seemed like nobody seemed to care" that Black-owned businesses were being destroyed by the rioting. *Id.* Defendants claimed that Hedgepeth advocated literally spraying sewage on rioters. *Id.*, ¶¶ 11 & 55. Britton went further, claiming that Hedgepeth advocated spraying PHS students with urine and feces. *Id.*, ¶ 55. Hedgepeth was not aware of any PHS or District 211 student, family member of a student, former student, or even any Palatine or District 211

residents who had participated in the rioting, looting and violence in the Chicago area. Dkt. 77, ¶ 11.

Multiple disputes exist about Hedgepeth's exchange with Harris. Defendants even dispute the content of this "long post." Defendants claim Hedgepeth asserted that the term "White Privilege" is as offensive as the "N word." Dkt. 77, ¶ 21. But the post plainly asserted that Hedgepeth found the term "White Privilege" as racist as the "N word," not as offensive as the "N word." *Id.* Hedgepeth acknowledged that the two terms are not equally offensive and did not have the same history. *Id.*

Hedgepeth demonstrated that her comments in the "long post," including her critique of the term "White privilege," her reference to Black murder statistics, her question about whether America is racist, and her reference to "race baiters," were well-rooted in contemporary Black conservativism and influenced by Dr. Sowell, political commentator and California gubernatorial candidate Larry Elder, and activist and speaker Candace Owens. Dkt. 77, ¶ 17. Hedgepeth also demonstrated that her comments on the Black abortion rate and reference to "Black genocide" were well-rooted in Black conservative and Black pro-life thought and echoed U.S. Supreme Court Justice Clarence Thomas' concurrence in *Box v. Planned Parenthood of* Indiana, 139 S. Ct. 1789 (2019) regarding the impact of the eugenics movement on Black Americans. Dkt. 77, ¶ 18. She also presented expert testimony to this effect. *Id.* Hedgepeth's expert, Dr. Carol M. Swain, concluded that Hedgepeth's

> social media comments and postings are not racist statements. Instead, she expressed viewpoints rooted in black conservative thought

> and statistical data that challenged the dominant racial narratives pushed by the [National Education Association] and [National School Board Association].

Id., ¶¶ 19 & 20. Dr. Swain characterized Hedgepeth's comments as "an important perspective" and noted that "the views [Hedgepeth] expressed run counter to the dominant racial narratives promoted by progressive organizations." *Id.*, ¶ 20. Dr. Swain also confirmed that Hedgepeth's statistics, which Defendants did not even bother to verify, were accurate. *Id.*, ¶¶ 19 & 20. Indeed, they never claimed Hedgepeth's statistics were false. *Id.*, ¶ 19.

Defendants admit that Hedgepeth has substantial knowledge and background in political and social issues and current affairs derived from her formal and informal training and twenty-five years of experience teaching social studies. Dkt. 77, ¶ 8. Defendants also admit that Britton, Small, and the board members who voted to terminate Hedgepeth had never heard of Dr. Sowell, Mr. Elder, or Ms. Owens. Dkt. 77, ¶ 7. Defendants' claim that Hedgepeth's posts are racist and demeaning is not only incorrect but also lacks a basis in knowledge.

B. Disputes of Fact About Defendants' Claims of Disruption.

Another key dispute concerns Defendants' claim of disruption. Defendants admit that Hedgepeth's speech did not disrupt classroom or instructional activities or after-school or extracurricular activities. Dkt. 77, ¶ 41. Their claim of disruption stems from third parties' reactions to Hedgepeth's speech, not from the speech itself,

and the parties dispute that reaction and its purported magnitude and impact.[1] Hedgepeth disputes that District 211 received the 113 emails it claims to have received in response to the posts. *Id.* By Hedgepeth's count, the district received only 76 unique emails. *Id.* Of these 76, only six were from PHS parents.[2] *Id.* Three parents supported Hedgepeth, two were critical of Hedgepeth, and one only offered a comment. *Id.* Only three were from PHS students. One PHS student supported Hedgepeth and two were critical of her. *Id.* The remaining emails were from the public. *Id.* Of these, twenty were based on templates that appear to have been part of an organized effort led by a politically ambitious local activist, Tim McGowan. *Id.*; *see also id.*, ¶¶ 46 & 48. One District 211 board member who voted against Hedgepeth's firing, described the emails as "orchestrated" and "part of an organized network from a community activist to discredit a teacher of over 20 years." *Id.*, ¶ 46. McGowan met with board members Cavill and Yung during this time period to discuss running for District 211's board. *Id.*, ¶ 48. He was elected to the Board the following year. *Id.*

Hedgepeth also disputes Defendants' assertion about the written comments submitted for the June 18, 2020 board meeting. The overwhelming majority of comments were from members of the public, not PHS students or parents or even

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[1] District 211 serves a community of over 250,000 persons and operates five high schools and two alternative high schools. Dkt. 77, ¶ 57. In 2020, District 211 had approximately 1,400 employees. *Id.* PHS had approximately 180 teachers and 2,500 students. *Id.*

[2] Three others were from parents of students in other District 211 high schools.

District 211 students or parents. Dkt. 77, ¶ 45. Of the 76 comments submitted to the Board, 18 did not even mention Hedgepeth. *Id.* Of the 58 comments that mentioned Hedgepeth, 14 were supportive of Hedgepeth and 44 were critical. Only 3 were from PHS parents and only 2 were from PHS students. *Id.* One PHS parent was supportive of Hedgepeth. *Id.* Like the emails, the written comments about Hedgepeth displayed similarities that demonstrated a common origin or design. *Id.*; *see also id.*, ¶ 46.

Only four persons commented on Hedgepeth at the July 16, 2020 board meeting. Dkt. 77, ¶ 44. Thirteen commented on other matters. *Id.* Of the four comments concerning Hedgepeth, two were supportive and two were critical. *Id.* The matter had plainly died down by the July 16, 2020 meeting.

Hedgepeth also disputes that public comments at board meetings constitute disruption at all. District 211 holds regular board meetings at which the public is allowed to comment. Dkt. 69 at 25, ¶ 43; Dkt. 77, ¶ 43. District policy requires at least 30 minutes be set aside for public comment, and it was not uncommon in 2020 and 2021 for the Board to allow 60 minutes of public comment, even if only to read comments when meetings were held remotely. Dkt. 69 at 24, ¶ 42; Dkt. 77, ¶ 43. There is no dispute that comments were read at the June 18, 2020 meeting during the allotted public comment time. Dkt. 69 at 25, ¶ 43; Dkt. 77, ¶ 43. Additional time was not allotted. Dkt. 69 at 25, ¶ 43. The minutes of the June 18, 2020 and July 16, 2020 meetings show that the Board carried out its regular business at both

meetings and was not limited or prohibited from doing so in any meaningful way. Dkt. 77, ¶ 47.

Hedgepeth also disputes that the media coverage of her posts was anything but local, brief, and superficial. Dkt. 77, ¶ 36. A Daily Mail internet tabloid report merely rehashed local coverage. *Id.*

The written charges against Hedgepeth did not use the words "disruptive" or "disruption." *Id.*, ¶ 35. Small did not use the word "disruption" when she addressed the Board on July 16, 2020. Dkt. 77, ¶ 37. Board member Cavill expressly disavowed basing her vote on emails, "I'm not making that decision because I've got 100 emails in front of me." *Id.*, ¶ 38.

C. Disputes of Fact About Hedgepeth's Ability to Carry Out Her Duties.

Hedgepeth also disputes that her posts affected her ability to carry out her duties or otherwise interfered with her job performance. Hedgepeth demonstrated that she avoided sharing her opinions in her classroom and that students "don't need to know my opinions." Dkt. 69 at 22, ¶ 36. She would not have shared the views she expressed in Facebook in the classroom "unless [she] gave both sides." *Id.*

Hedgepeth demonstrated that Britton made no effort to investigate how she treated students of different backgrounds in her classroom. *Id.* If Britton had done so, he would have learned that Hedgepeth went to great effort to encourage respect for diverse viewpoints and to make her classroom a place where her students, many of whom came from different backgrounds and different countries, felt welcome and had a positive sense of community and belonging. Dkt. 77, ¶ 31. Her classroom was

a place where students have "respect for each other." Dkt. 69 at 22, ¶ 36; *see also* Dkt. 77, ¶ 32. Hedgepeth's classroom displayed photographs of Dr. Martin Luther King and Mahatma Ghandi, African proverbs, a quote from Dr. King, the word "Dignity," and PHS's motto, "Integrity, Respect, and Achievement." Dkt. 77, ¶ 32. Hedgepeth was very involved in recognizing and promoting diversity at PHS. *Id.*, ¶ 29. She proposed having a daily "homeroom," which the school implemented, to give the school's diverse student body a greater sense of community. *Id.* She created a monthly "Pirates in the Hall" video series in which students were asked their opinions on a variety of topics. *Id.* She also organized and moderated all-school forums for students and staff to discuss issues of concern, including sex and gender. *Id.* Hedgepeth's "Pirates in the Hall" video series included filming, directing, editing, and narrating a video shown to the entire school just before classes became virtual in early 2020 about the benefits of diversity at PHS. *Id.*, ¶¶ 29 & 31. Hedgepeth also was very involved in PHS's anti-bullying program and was the sponsor of the Gay, Straight Alliance at PHS. *Id.*, ¶ 29. Hedgepeth's teaching evaluations were always "excellent," or, when the rating system changed, "proficient," including her most recent evaluation at the time. *Id.*, ¶ 26. Only two years before, she received an ISBE "Those Who Excel" award for her teaching. *Id.*, ¶ 30.

D. Disputes of Fact About Defendants' Motives.

Finally, the parties also dispute whether Defendants' decision to fire Hedgepeth was a pretext for their dislike for Hedgepeth's speech. Small was

"appalled" by the speech and declared that Hedgepeth's "biases of racism are definitely showing." Dkt. 69 at 60, ¶ 52. She deemed the posts "disrespectful, demeaning of other viewpoints, and racist." Dkt. 69 at 32, ¶ 55. Britton described Hedgepeth's speech as biased against Black Americans. Dkt. 77, ¶ 52. Cavill dismissed Hedgepeth's exchange with Harris as "traffic[king] in racial stereotypes and racial tropes" and "a racist conclusion." *Id.* Klimkowicz thought Hedgepeth's exchange with Harris could be considered racist. *Id.* Board member Yung dismissed Hedgepeth as a racist. *Id.* Hedgepeth obviously disputes these assertions.

III. The Course of Proceedings.

On July 15, 2021, Hedgepeth filed this Section 1983 action against District 211, board members Cavill, Klimkowicz, LeFevre, Rosenblum, and Yung, Superintendent Small and Human Resources Director Britton for violation of her First Amendment right to freedom of speech. A1; Dkt. 67, ¶ 6. Although the ISBE hearing had taken place, no findings or recommendation had been issued when Hedgepeth filed suit. *Id.*

Defendants' original Answer, filed September 10, 2021, did not assert any "claim splitting," collateral estoppel or res judicata defense. Dkt. 67, ¶ 7. Instead, Defendants actively litigated this matter over the course of more than a year, including engaging in extensive discovery. Dkt. 29 (noting that fact discovery closed on August 15, 2022).

On October 26, 2022, the ISBE hearing officer issued non-binding findings of fact and a recommendation that the district dismiss Hedgepeth. Dkt. 67, ¶ 9. On November 10, 2022, a majority of the Board, including Cavill, Rosenblum, Klimkowicz and a fourth member new to the Board since Hedgepeth filed this lawsuit, voted in favor of a resolution adopting the ISBE hearing officer's non-binding findings of fact and recommendation. *Id.* ¶¶ 10 & 11. Hedgepeth was formally dismissed for cause. *Id.* In adopting the resolution, the Board "consider[ed] the Hearing Officer's report . . . in reaching its decision," incorporated the Hearing officer's findings "as the basis for the dismissal," and accepted the hearing officer's "recommendation that the dismissal of [Plaintiff] be sustained." *Id.*, ¶¶ 12-13.

Hedgepeth chose not to seek review of the Board's November 10, 2022 resolution in an Illinois circuit court. *Id.*, ¶ 14. It was not until January 9, 2023, nearly eighteen months after Hedgepeth filed this action, that Defendants moved to amend their answer to assert preclusion as an affirmative defense. Dkt. 38. Hedgepeth opposed the motion, but the District Court allowed the amendment, which was filed on January 26, 2023. Dkt. 43, 44, & 45. The District Court declined Hedgepeth's request to reopen discovery into the Board's adoption of the resolution.[3] Dkt. 44.

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[3] Hedgepeth submits that refusing to reopen fact discovery—which she could have used to explore bias and conflicts of interest issues—constituted an abuse of discretion. *See Patton v. MFS/Sun Life Fin. Distribs.*, 480 F.3d 478, 491-92 (7th Cir. 2007) (denying a compelling reason to reopen discovery is an abuse of

Defendants moved for summary judgment on May 18, 2023. Dkt. 52-54. Hedgepeth cross-moved for summary judgment on Defendants' preclusion affirmative defense. Dkt. 56-57. The District Court did not allow Hedgepeth to file a reply on her cross-motion. Dkt. 65. On February 20, 2024, the District Court granted Defendants' motion, denied Hedgepeth's cross-motion, and entered judgment for Defendants. A1-29.

SUMMARY OF THE ARGUMENT

The District Court committed at least three errors in giving preclusive effect to the District's adoption of the ISBE hearing officer's non-binding factfindings. First, the non-binding factfinding and accompanying recommendation were not final when the hearing officer issued them on October 26, 2022. They subsequently had to be adopted by the Board before Hedgepeth could be terminated on November 10, 2022. When the Board adopted the hearing officer's otherwise non-binding factfindings and recommendation, it was acting as an employer. The Board was not acting as an adjudicative body, court, or administrative agency reviewing an employer's action. The Board's mere incorporation and acceptance of the ISBE's non-binding, pre-termination findings and recommendation does not convert the resolution into a judicial decision. No adjudicatory type of review was undertaken by the Board.

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discretion); *see also Tricarico v. Marion Gen. Hosp.*, No. 20-0092, 2020 U.S. Dist. LEXIS 202732 (N.D. Ind. Oct. 30, 2020) (the prejudice created by amending the complaint and adding an affirmative defense amendment was not undue because it was offset by permitting additional discovery).

Assuming that the resolution was adopted in a judicial capacity, preclusive effect is still not warranted because the board members who voted for the resolution were anything but neutral arbiters. Not only had they prejudged the matter when they voted to initiate termination proceedings against Hedgepeth on July 16, 2020, but three of the four board members had been named as defendants and had already testified against her in discovery in this lawsuit before voting to terminate her on November 20, 2022. Thus, at the time that the Board was purportedly acting in an adjudicatory capacity deciding Hedgepeth's fate, a majority of the members who voted to terminate were in an adverse litigation position to her, had testified against her, and had a financial stake in the outcome. Nowhere else in America can one serve as a party, witness, and judge in the same lawsuit. These board members were obviously biased and conflicted. If they had truly been acting in a judicial capacity, they would have been required to recuse themselves or would have been recused. Their participation in the decision to terminate Hedgepeth did not satisfy the minimum requirements of due process and fundamental fairness. It was error to give preclusive effect to their decision.

The District Court also erred in finding no genuine disputes of fact about at least four material issues: Defendants' characterizations of Hedgepeth's speech; Defendants' claims of disruption; Hedgepeth's ability to carry out her duties; and Defendants' motives. These disputes precluded entry of summary judgment in Defendants' favor.

Finally, the District Court erred in its *Pickering* balancing. It gave far too little weight to Hedgepeth's speech, which should have been given the highest constitutional protection because it directly addressed some of the most consequential public events and issues of the time. It also gave too little weight to the undisputed fact that Hedgepeth's speech was not at or about work and concerned subjects about which debate is vital to informed decisionmaking. In addition, the District Court gave far too much weight to the public reaction to Hedgepeth's speech. Not only did the public plainly misunderstand if not misconstrue the speech, but Defendants overstated the public's reaction, which had largely dissipated by the July 16, 2020 meeting. The District Court erroneously credited this reaction as both disruptive to the district and evidence that Hedgepeth was unable to carry out her duties as a teacher. Not only was such weight not warranted, but it effectively enforced a "heckler's veto" and taught students a lesson in intolerance and censorship.

ARGUMENT

I. This Court's Review of the District Court's Judgment is *De Novo*, and Summary Judgment Is Only Appropriate When No Jury Could Reasonably Find For The Non-Moving Party.

Appellate courts review district courts' summary judgment rulings *de novo*. *Gazarkiewicz v. Town of Kingsford Heights*, 359 F.3d 933, 939 (7th Cir. 2004). In deciding whether genuine dispute of material fact exists, the Court views the evidence and draws all reasonable inferences in the non-moving party's favor. *Id.* Summary judgment is appropriate if "the movant shows that there is no genuine

dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The relevant inquiry is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52 (1986).

II. Defendants' Decision to Fire Hedgepeth Is Not Entitled to Preclusive Effect.

The District Court held that the Board's November 10, 2022 resolution—adopted after Defendants completed fact discovery in this matter and litigated Hedgepeth's Section 1983 claim for nearly sixteen months—was a final judgment on the merits entitled to preclusive effect. A10 & A12. It made at least three errors in doing so. Some background on "for cause" dismissals of tenured public-school teachers in Illinois is necessary.

For cause dismissals are governed by Section 5/24-12(d) of the Illinois School Code. *See* 105 Ill. Comp. Stat. § 5/24-12(d). Before 2011, when a school board sought to dismiss a tenured teacher for cause, the teacher had the right to request an evidentiary hearing before the ISBE, after which a hearing officer made a final decision on the dismissal. *See Beggs v. Bd. of Educ. of Murphysboro Cmty. Unit Sch. Dist. No. 186*, 45 N.E.3d 722, 734 n.6 (Ill. App. 2015), *aff'd* 72 N.E.3d 288 (2016). A dissatisfied teacher or school board could seek judicial review in an Illinois circuit court. *Id.*

The Illinois legislature revised this process in 2011 to reduce the ISBE's authority and increase local school boards' authority. Under the 2011 revision, the

school board, not the ISBE, makes the ultimate decision. *Beggs*, 45 N.E.2d at 734. A teacher has the right to request a hearing before the ISBE, but the hearing officer issues only non-binding factual findings and a recommendation, which the school board may accept, reject, or supplement. *Id.*, 105 Ill. Comp. Stat. §§ 5/24-12(d)(3), (7) & (8). "The legislature reformed the School Code to eliminate the hearing officer as the final decision maker." *Beggs*, 72 N.E.3d at 305.

In *Univ. of Tenn. v. Elliott*, 478 U.S. 788 (1986), the Supreme Court held that state administrative factfindings made in a judicial capacity may be given preclusive effect in subsequent Section 1983 actions. "[W]hen a state agency acting in a judicial capacity resolves disputed issues of fact properly before it which the parties have had adequate opportunity to litigate, federal courts must give the agency's factfinding the same preclusive effect to which it would be entitled in the State' courts." *Elliott,* 478 U.S. at 799 (cleaned up). Illinois courts apply a seven-part test to determine whether a state agency acted in a judicial capacity, including asking whether an evidentiary hearing was held at which counsel was present and was allowed the opportunity to examine and cross-examine witnesses, introduce and object to exhibits, and present written arguments, and whether the agency issued final findings of fact and conclusions of law. *Reed v. Amax Coal Co.*, 971 F.2d 1295, 1300 (7th Cir. 1992).

There is no dispute that the ISBE hearing officer did not issue binding, final findings of fact and conclusions of law. The District Court's first error was to treat the ISBE hearing results and the Board's November 10, 2022 resolution adopting

those results as if it were a single act. A11-13. The resolution was the result of different acts by the ISBE and the District 211 board, each of which played separate roles. First, District 211, through the Board, initiated termination proceedings against Hedgepeth. Next, the ISBE held a pre-termination hearing at which District 211's counsel served as prosecutor and District 211's officials served as witnesses for the prosecution. After the hearing, the ISBE's hearing officer issued non-binding findings and a recommendation. Finally, the Board adopted those findings and recommendation in its November 10, 2022 resolution. The resolution was final in the sense that it formally terminated Hedgepeth's employment and was subject to review in circuit court, but it plainly was not the act of a single, neutral entity conducting a post-termination review of earlier, executive action.[4] To treat the resolution as the outcome of such a review fundamentally misconstrues its nature. Neither the District Court nor Defendants cited any case in which the non-final outcome of a pre-termination administrative hearing combined with the subsequent adoption of that outcome by the entity seeking the termination was together held to constitute a final adjudication entitled to preclusive effect under Illinois law. *Taylor v. City of Lawrenceburg*, 909 F.3d 177 (7th Cir. 2018) is not such a case because, not only was it decided under Indiana law, but the Court in *Taylor* did not consider the issue. The Board's November 10, 2022 resolution

[4] The District Court misconstrued Hedgepeth's argument in this regard. Hedgepeth did not argue that the Board's action was not final because she did not seek circuit court review. A13. She argued that the Board's action was executive action. Whether Hedgepeth initiated a second, separate action in state court challenging her termination would not have changed the resolution's "finality."

terminating Hedgepeth's employment was the action of an employer, not a court or administrative agency reviewing the action of an employer. The Board acted in an executive capacity, not a judicial capacity, when it adopted the resolution.

The District Court's second error was to dismiss the obvious bias and conflict of interest of the board—particularly Cavill, Klimkowicz, and Rosenblum—in voting to fire Hedgepeth on November 10, 2022. The District Court concluded that any prejudice Hedgepeth suffered was her own fault because she could have raised this issue in a second lawsuit filed in state court. A14.

Under Illinois law, preclusive effect "should not be applied unless it is clear that no unfairness will result." *Goodwin v. Bd. of Trs. of the Univ. of Ill.*, 442 F.3d 611, 621 (7th Cir. 2006). Even if preclusive effect is allowed under state law, a federal court may deny preclusion if the state administrative procedure fell below the minimum requirements of due process. *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)).

It is beyond dispute that "due process requires a hearing by an impartial tribunal." *Bakalis v. Golembeski*, 35 F.3d 318, 325-26 (7th Cir. 1994). Individuals sitting in judgment on whether to terminate an employee cannot be impartial where they have been involved in a "running controversy" with the employee and have spoken out publicly against the employee before deciding the employee's fate. *Id.* at 326. Having a pecuniary interest in the outcome is also disqualifying. *Head v. Chicago Sch. Reform Bd. of Trs.*, 225 F.3d 794, 804 (7th Cir. 2000). Minimum due

process also is denied where the proposing official is the deciding official. In *Locurto v. Giuliani*, 447 F.3d 159 (2d Cir. 2006), a case cited by the District Court albeit for a different proposition (A23), the Court denied preclusive effect to the outcome of administrative hearings in which the ultimate decision makers—the heads of New York City's police and fire departments—who had proposed before the hearings that police officer and firefighters in question be dismissed. *Locurto*, 447 F.3d at 171. "As such, the [employees] did not receive hearings before neutral arbitrators, and collateral estoppel does not attach to the findings of those hearings." *Id.*

"Frankly, the Board is an inherently interested party." *Beggs*, 45 N.E.3d at 735. It is neither disinterested, nor impartial, and has personal if not financial interest in the results of a hearing. *Id.* Board members Cavill, Klimkowicz, and Rosenblum and a fourth board member new to the Board since Hedgepeth filed suit, Curtis Bradley, voted to terminate Hedgepeth when they adopted the November 10, 2022 resolution.[5] Cavill, Klimkowicz, and Rosenblum, along with previous board members Lefevre and Yung, had voted to initiate dismissal proceedings against Hedgepeth on July 16, 2021. Dkt. 67, ¶¶ 3 & 4. They and the other defendants also had defended and were continuing to defend themselves against Hedgepeth's Section 1983 claim and had sharply criticized Hedgepeth's speech before adopting

[5] Cavill, Rosenblum, Klimkowicz and Bradley, constituted a majority of the seven-member board. Two other members, Mark Cramer and Peter Dombrowski, voted against firing Hedgepeth. The remaining member, Tim McGowan, abstained. Dkt. 67, ¶¶ 10 & 11.

the November 10, 2022 resolution and throughout the course of this litigation.[6] They plainly prejudged the matter before the November 10, 2022 vote. Their status as defendants in this lawsuit also gave them and District 211 an obvious pecuniary interest. They were anything but neutral, impartial arbiters.

The inquiry is not, as the District Court held, whether Hedgepeth could have filed a second lawsuit in state court challenging this obvious bias and conflict of interest. It is whether having such obviously biased and conflicted decisionmakers decide Hedgepeth's fate comported with due process or was otherwise unfair such that preclusive effect should be granted to the November 10, 2022 resolution. Again, *Locurto* is instructive. In *Locurto*, the Court found that, while the availability of post-termination review may satisfy due process, it does not mean that availability is sufficient to confer preclusive effect upon pre-termination hearing findings. *Locurto*, 447 F.3d at 171, n.4. Neither Defendants nor the District Court cite any Illinois authority for the proposition that the mere availability of post-termination hearing review remedies this bias for purposes of granting preclusive effect.

The authority cited by the District Court, *Nowak v. St. Rita High Sch.*, 757 N.E.2d 471 (Ill. 2001), imposes further a limitation on preclusion. A14. After

[6] Cavill, Klimkowicz, and Rosenblum were deposed, as were Small, Britton, and board members LeFevre and Yung. Dkt. 28 at 1. Fact discovery closed on August 15, 2022, before the Board adopted the November 10, 2022 resolution. Dkt. 29.

reiterating that issue preclusion is an equitable doctrine, the Court in *Nowak* declared:

> In deciding whether the doctrine of collateral estoppel is applicable in a particular situation, a court must balance the need to limit litigation against the right of a fair adversary proceeding in which a party may fully present his case. In determining whether a party has had a full and fair opportunity to litigate an issue in a prior action, those elements which comprise the practical realities of litigation must be examined.

Id. at 478. It is neither equitable nor does it make practical sense to say that Hedgepeth, after the close of fact discovery, should have put this lawsuit on hold and initiated a second lawsuit in state court to challenge the obvious bias and conflicts of interest that marred the November 10, 2022 resolution. Doing so would have been counter to the "practical realities of litigation," a waste of judicial resources, and contrary to the interests of justice. It also would turn the preclusion doctrine on its head because a second lawsuit would have increased the litigation burdens on the parties and the courts, not lessen them.

Finally, the District Court erred in finding that Defendants' failure to object in a timely manner to Hedgepeth's purported "claim splitting" did not bar Defendants' preclusion defense. A10, n.9 (citing *Rein v. David A. Noyes & Co.*, 665 N.E.2d 1199, 1207 (Ill. 1996)). Claim splitting is an "aspect of the law of preclusion" and "prohibits a plaintiff from suing for part of a claim in one action and then suing for the remainder in another action." *Rein*, 665 N.E.2d at 1206 (cleaned up). An affirmative defense, preclusion may be waived or, in the context of claim-splitting, acquiesced. *Lawler v. Peoria Sch. Dist. No. 150*, 837 F.3d 779, 785 (7th Cir. 2016)

(claim splitting); *Jaskolski v. Daniels*, 427 F.3d 456, 460 (7th Cir. 2005) (issue preclusion). Defendants did not object to or seek a stay of this action when Hedgepeth filed suit even though they knew the hearing examiner would be issuing findings and recommendation but had not yet done so. They only sought to amend their answer and affirmative defenses on January 9, 2023, nearly eighteen months after Hedgepeth filed suit and nearly five months after fact discovery closed. Dkt. 38. Defendants plainly acquiesced to Hedgepeth's purported claim splitting, and the District Court erred in not rejecting Defendants' preclusion defense on this ground.[7]

Indeed, Hedgepeth's Section 1983 claim is no different from the claim in *Davis v. Bd. of Educ.*, No. 12-1051, 2016 U.S. Dist. LEXIS 134174 (C.D. Ill. Sept. 29, 2016) in this regard. In *Davis*, the Court found that the defendant school board acquiesced to the plaintiff teacher's purported claim splitting where, like here, the teacher filed a lawsuit in federal court *before* any final decision had been reached on the teacher's dismissal. *Id.* at **18-19. The Court in *Davis* even noted that "there is authority authorizing the stay of the federal action until the conclusion of the state court proceedings." *Id.* at *17. *Davis* is different in one important regard. *Davis* was decided before the fundamental change in Illinois law in 2011 that made the Board, not to the ISBE, the final decision maker on teacher terminations.

[7] The single case cited by the District Court addressed acquiescence in the context of claim preclusion but did not hold that acquiescence was irrelevant to preclusion generally or issue preclusion in particular. A10, n.9 (citing *Rein*, 665 N.E.2d at 1207.

III. Genuine Disputes of Material Fact Preclude Summary Judgment In Defendants' Favor.

The District Court erred in finding no disputes of at least four facts material to the *Pickering* balancing test, which has been described as the "heart of the First Amendment analysis" in retaliation claims like the claim brought by Hedgepeth. *McGreal v. Ostrov*, 368 F.3d 657, 675 (7th Cir. 2004). These disputes are: (1) Defendants' characterizations of Hedgepeth's speech; (2) Defendants' claims of disruption; (3) Hedgepeth's ability to carry out her duties; and (4) Defendants' motives.

A public employee bringing a First Amendment retaliation claim must prove that: (1) she engaged in constitutionally protected speech; (2) she suffered a deprivation likely to deter protected speech; and (3) her protected speech was a substantial or motivating factor in the deprivation. *Harnishfeger v. United States*, 943 F.3d 1105, 1112 (7th Cir. 2019). For an employee to demonstrate that her speech is constitutionally protected she first must show that the speech related to a matter of public concern. *Id.* at 1113. Second, the employee must show that she spoke as a citizen, not as an employee. *Id.* If the employee makes both showings, the burden shifts to the employer to prove that its interest in promoting the efficiency of the public service it performs outweighs the employee's interest in commenting on the matter as a citizen. *Id.* at 1115. It is this balancing that is known as the *Pickering* balancing test.

Whether an employer has met its *Pickering* burden is a question of law, but underlying factual disputes must be resolved by the factfinder.[8] *See*, *e.g.*, *Moser v. Las Vegas Metro. Police Dep't*, 984 F.3d 900, 907-08 (9th Cir. 2021); *McGreal*, 368 F.3d at 680); *Gorman-Bakos v. Cornell Coop. Extension*, 252 F.3d 545, 557-58 (2d Cir. 2001). The factfinder's role is to resolve factual disputes necessary for the Court to make its legal determination. *Moser*, 984 F.3d at 911.

First, Hedgepeth disputes that Defendants read and understood or otherwise characterized her posts correctly or reasonably. Defendants' testimony demonstrates they did not. Defendants mischaracterized the posts, in some instances grossly, declaring that Hedgepeth wanted to participate in a civil war and advocated spraying PHS students with wastewater. Dkt. 77, ¶¶ 11, 54 & 55. They distorted the "long post," asserting that Hedgepeth declared the term "White privilege" to be as offensive as the "N word," when her actual words correctly described both terms as being rooted in race. *Id.*, ¶9. They misunderstood Hedgepeth's references to Dr. Sowell, Mr. Elder, or Ms. Owen and failed to recognize that, far from being racist, many of the ideas Hedgepeth expressed were derived from these individuals and from Black conservative thought. Indeed, Defendants did not even know Dr. Sowell, a nationally renowned academic and

[8] The District Court correctly found no genuine dispute that Hedgepeth's speech addressed matters of public concern, that Hedgepeth spoke in her personal capacity, or that Hedgepeth suffered an adverse action. A16. There also is no genuine dispute that Hedgepeth's speech was a substantial or motivating factor in Defendants' decision to fire her. *Id.*

public intellectual, Mr. Elder, a prominent radio host and California gubernatorial candidate, or Ms. Owen, an activist and speaker. *Id.*, ¶ 7. They also made no effort to verify Hedgepeth's factually accurate statistics before mischaracterizing the post. *Id.*, ¶¶ 19 & 20. As in *Moser*, in which the Court reversed the entry of summary judgment in favor of an employer because disputes of fact existed about the objective meaning of the employee's speech, summary judgment should be reversed here. *Moser*, 984 F.3d at 908.

The District Court also erred in finding no dispute of fact about the disruption District 211 claims to have experienced. A21 & 23; *see also id.* at A26. The District Court found that Hedgepeth "does not dispute, for example, that the district received 113 emails related to her Facebook posts or that 44 public comments submitted to the June board meeting expressed criticism of her." *Id.* at 23. But Hedgepeth did dispute those assertions. Hedgepeth also demonstrated that whether disruption occurred is not a simple fact, but a conclusion based on underlying facts. She showed that District 211 received only 76 emails, not 113, of which only 6 were from PHS parents, 3 of which supported Hedgepeth, 2 were critical, and the remaining email was only a comment. Dkt. 77, ¶ 41. She also showed that 3 of the emails were from PHS students, 1 of which was supportive and 2 were critical. *Id.* With respect to the public comments at the June board meeting, Hedgepeth demonstrated that only 3 were from PHS parents and only 2 were from PHS students. Dkt. 60, ¶ 45. She demonstrated further that only 4 persons commented about her at the July board meeting, demonstrating that the matter

had subsided by that date. Dkt. 77, ¶¶ 43 & 47. Moreover, Hedgepeth showed that District 211 requires the Board set aside time for public comment at its meetings, that no additional time had been allotted for the two meeting at which persons commented about Hedgepeth, and that the minutes of the meetings show the Board carried out its regular business and was not limited or prohibited from doing so in any meaningful way.

She also showed that there was no dispute that her posts did not disrupt classroom or instructional activities or extracurricular activities. She disputed some such facts directly, drew distinctions about other facts cited by Defendants, and identified additional facts that countered District 211 claim that Hedgepeth's posts caused disruption. She disputed the scale, nature, and impact of Defendants' claims of disruption. Such disputes must be resolved by the factfinder, not the court on summary judgment. *Moser*, 984 F.3d at 911 (reversing summary judgment were disputes of fact existed about government's claims of disruption); *Gorman-Bakos*, 252 F.3d at 557-58 (same).

Third, a genuine dispute exists about Hedgepeth's ability to carry out her duties. Hedgepeth, a highly rated and award-winning educator, presented facts showing that she did not share her opinions in her classroom, that her classroom was a safe and accepting learning environment, and that she had a demonstrated history of recognizing and promoting diversity at PHS, including her work on anti-bullying, sponsoring the school's Gay, Straight Alliance, and "Pirates in the Hall" video shown schoolwide. Dkt. 77, ¶ 29. Moreover, any analysis of Hedgepeth's

fitness for her job depends at least in part on the objective meaning of her speech. The one cannot consider the one without the other, and, as Hedgepeth has demonstrates, a genuine dispute exists about the objective meaning of her speech. *Moser*, 984 F.3d at 909 n.6. The existence of these disputes about Hedgepeth's ability to carry out her precludes entry of summary judgment. *McGreal*, 368 F.3d 681-82.

Finally, a genuine dispute exists about whether Defendants' termination of Hedgepeth was due to legitimate concern about disruption or because Defendants disliked or disagreed with Hedgepeth's speech. *See McGreal*, 368 F.3d at 680 (reversing summary judgment where a genuine dispute existed about the employer's motive); *Gorman-Bakos*, 252 F.3d at 558 (same). Hedgepeth presented ample evidence demonstrating that Defendants had extremely negative reactions to her speech. That evidence included Small's assertion that she was appalled by Hedgepeth's speech, which Small said showed "biases of racism," Britton's description of the speech as biased against Black Americans, and board members' more direct accusations of racism. Dkt. 69 at 60, ¶ 52; Dkt. 77, ¶ 55. The District Court found that "[w]hether individual defendants viewed Hedgepeth's speech as inflammatory or racist does not diminish the evidence in the record that external complaints about her speech amounted to significant disruption." A24. But that finding impermissibly weighed the evidence instead of only determining whether a genuine dispute exists. The evidence about Defendants' extreme reaction to Hedgepeth's speech, especially when combined with evidence showing Defendants'

distortions of the posts, admitted lack of awareness of Black conservative thought on which the "long post" was based, and failure to make any effort to verify Hedgepeth's statistics in the "long post," is not so one-sided that a reasonably jury could not have found the termination was not a pretext. *Anderson*, 477 U.S. at 251-52.

IV. The District Court Erroneously Applied the *Pickering* Balancing Test.

As described *supra*, the *Pickering* balancing test weighs a public employee's right to speak as a citizen on a matter of public concern against the employer's interest in "promoting the efficiency of the public services it performs through its employees."[9] *Pickering*, 391 U.S. at 568; *see also Myers v. Hasara*, 226 F.3d 821, 826 (7th Cir. 2000). When "the fact of employment is only tangentially and insubstantially involved in the subject matter of [a] public communication made by a teacher," however, "it is necessary to regard the teacher as the member of the general public [she] seeks to be." *Pickering*, 391 U.S. at 574. There was no relation between the fact of Hedgepeth's employment and the subject matter of her speech.

[9] Plaintiff respectfully submits that *Pickering*'s actual holding, which was limited to speech by employees that is knowingly or recklessly false (*Pickering*, 391 U.S. at 574-75), has been largely ignored and the much-discussed *Pickering* balancing test is a misreading of the case that has no basis in the text, structure, or history of the First Amendment. *See*, *e.g.*, *Bennett v. Metro. Gov't of Nashville & Davidson Cnty.*, 977 F.3d 530, 553 (6th Cir. 2020) (Murphy, J., concurring). The test requires courts to undertake legislature-like, ad hoc, open-ended balancing of incomparable values, a task that does not provide helpful guidance to resolve concrete cases. *Id.* at 547, 553. Plaintiff recognizes that the Court is obligated to follow *Pickering* but urges that an alternate test be adopted.

She should not have been treated any differently than any other member of the public, which Defendants have no authority to punish for engaging in free speech.

Even assuming it was correct for the District Court to apply the *Pickering* balancing test, it gave less weight to Hedgepeth's substantial interest in her speech than it should have, and it gave more weight to Defendants' claims than they deserved. It also failed to take account of the fact that, because Hedgepeth's speech was not at or about work, Defendants' authority to punish Hedgepeth for her speech was at its lowest ebb, if not non-existent. *Eberhardt v. O'Malley*, 17 F.3d 1023, 1027 (7th Cir. 1994). The less an employee's speech has to do with the employee's place of work, the less justification the employer is likely to have to punish the employee for the speech. *Id.* The result of these and other errors was a significantly flawed *Pickering* balancing test.

A. The District Court Failed to Recognize That Plaintiff's Speech Occupied the Highest Rung in the Hierarchy of First Amendment Values.

Speech regarding matters of public concern has enjoyed robust First Amendment protection since the ratification of the Bill of Rights. *See 303 Creative LLC v. Elenis*, 600 U.S. 570, 571 (2023) ("The freedom of thought and speech is indispensable to the discovery and spread of political truth . . . [I]f there is any fixed star in our constitutional constellation, it is the principle that the government may not interfere with an uninhibited marketplace of ideas.") (cleaned up). "[S]peech concerning public affairs is more than self-expression; it is the essence of self-government." *Snyder v. Phelps*, 562 U.S. 443, 452 (2011). "Accordingly, speech on

public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection." *Id.* Even speech that may be deemed offensive is protected. *Matal v. Tam*, 582 U.S. 218, 223 (2017) ("Speech may not be banned on the ground that it expresses ideas that offend"). Indeed, "the proudest boast of our free speech jurisprudence is that we protect the freedom to express the thought that we hate." *Id.* at 246 (cleaned up). It is the responsibility of the courts "to ensure that citizens are not deprived of fundamental rights by virtue of working for the government." *Connick v. Myers*, 461 U.S. 138, 147 (1983).

The District Court correctly found no dispute that Hedgepeth spoke as a private citizen on matters of public concern. A16. Not all speech on matters of public concern is equal, however. Speech more substantially related to a matter of public concern requires a greater showing by a public employer to permit the employer to restrict or punish the speech. *Connick*, 461 U.S. at 152; *see also Thompson v. Bd. of Educ.*, 711 F. Supp. 394, 407 (N.D. Ill. 1989). Consequently, the degree to which the speech touches on matters of public concern is an essential part of *Pickering* balancing. *See Craig v. Rich Twp. High Sch. Dist. 227*, 736 F.3d 1110, 1119 (7th Cir. 2013). This analysis is antecedent to and separate from anything on the employer's side of the scale. The parties disputed the proper characterization of Hedgepeth's speech and therefore the weight to be accorded to that speech. The District Court erroneously resolved that dispute and undervalued the weight of the speech.

Despite saying that it accepted Hedgepeth's "characterization" of her speech, the District Court found that the speech was on the "less serious, less significant end of the spectrum of works of public commentary" because of the type of expression and the medium: Facebook posts. A19. Neither the District Court nor Defendants offered any legal authority to justify deeming speech on Facebook or other forms of social media less deserving of First Amendment protection.[10] *Id.* Similarly, neither the Supreme Court nor this Court has ever held that satire or "back-and-forth discussion with a friend" diminishes the weight accorded speech.[11] In fact, it is precisely because other individuals—Hedgepeth's Facebook friends—viewed and shared the posts that they became an issue. Nor did the District Court offer any authority for its proposition that Hedgepeth's speech should be given less weight because Hedgepeth was not "offering novel commentary" but instead her comments were "informed by Black conservative thought and supported by statistics." A19. Speech is not less valuable because it is not original, *i.e.*, the speech was informed by others or by a school of thought. Nor is it less valuable

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[10] According to a Pew Research Center study, in 2020, 36% of U.S. adults reported regularly getting news on Facebook. More than 50% reported regularly getting news on social media. Pew Research Center, "News Consumption Across Social Media in 2021," (Sept. 20, 2021), found at https://www.pewresearch.org/journalism/2021/09/20/news-consumption-across-social-media-in-2021/.

[11] "Our nation boasts a long history of protecting parody and satire." *See Novack v. City of Parma*, 932 F.3d 421, 428 (6th Cir. 2019). Memes are the most commonly used vehicles for satire and parody today. Alva Noe, "How Memes Harken Back to Pre-Internet Times," NPR (Jan. 6, 2017), found at: https://www.npr.org/sections/13.7/2017/01/06/507133264/how-memes-harken-back-to-pre-internet-times.

because it is supported by statistics. If anything, the opposite is the case. The Black conservative thinkers, Black school of thought that influenced Hedgepeth's posts, and the undisputedly accurate statistics Hedgepeth cited gave enhanced credibility to the speech. Consequently, it should have been given even more weight, not less.

The District Court also found that Hedgepeth's speech was not the type that "demands 'particularly convincing reasons' by defendants to justify its restriction." A19 (citing *Gustafson v. Jones*, 117 F.3d 1015 (7th Cir. 1997)). *Gustafson*, which concerned a new Milwaukee police policy regarding the deployment of police officers, held that because the speech at issue touched on a matter of "strong public concern," the employer needed to offer "particularly convincing reasons to suppress it." *Gustafson*, 117 F.3d at 1019. Hedgepeth's speech concerned topics at least equally if not more compelling than a new local police policy—the riots, looting, and violence raging across the nation following the death of George Floyd and race and racism in the United States. Hedgepeth did more than just "touch on" these issues. She used statistics Defendants did not challenge and invoked prominent conservative Black Americans—she recommended studying Dr. Thomas Sowell's work—and a well-established body of Black conservative thought. Dkt. 77, ¶¶ 17 & 18. Her speech should have been given the highest rung of First Amendment protection. *Connick,* 461 U.S. at 145. Diminishing the importance of Hedgepeth's speech was a substantial error and resulted in a flawed *Pickering* balancing test.

B. The District Court Failed to Properly Analyze Defendants' Side of the Scale.

This Court has identified seven "interrelated" elements to be considered in analyzing the employer's side of the scale in a *Pickering* balancing test:

> (1) Whether the speech would create problems in maintaining discipline or harmony among co-workers; (2) whether the employment relationship is one in which personal loyalty and confidence are necessary; (3) whether the speech impeded the employee's ability to perform her responsibilities; (4) the time, place and manner of the speech; (5) the context in which the underlying dispute arose; (6) whether the matter was one on which debate was vital to informed decisionmaking; and (7) whether the speaker should be regarded as a member of the public.[12]

Gazarkiewicz, 359 F.3d at 943-44 (quoting *Greer v. Amesqua*, 212 F.3d 358, 371 (7th Cir. 2000)).

1. The District Court Failed to Analyze and Give Significant Weight to Factors That Weigh in Hedgepeth's Favor.

The District Court cited these seven factors but did not address all of them and focused instead on the purported disruption caused by Hedgepeth's speech and Hedgepeth's ability to perform her duties as a teacher. A17, A21-26. The District Court did not address "maintaining discipline or harmony among co-workers" except to note that Defendants failed to present any admissible evidence on the point. A26, n.15. It also did not address "personal loyalty and confidence," neither of which were implicated by Hedgepeth's speech. There was never any suggestion

[12] Hedgepeth submits that, if the answer to the last element is yes, it is dispositive, and the employer cannot lawfully punish the employee. Otherwise, the employer would be exceeding its authority.

that personal loyalty was required for Hedgepeth's teaching position, to whom such loyalty was owed, or that Hedgepeth breached it. Nor was there a claim that Hedgepeth violated any confidences. The nature of Hedgepeth's speech—being neither at work nor about work—negates any such claim. Neither of these factors added anything to Defendants' side of the scale.

The District Court also did not address whether debate on the subject matter of Hedgepeth's speech is "vital to informed decisionmaking." This factor weighs strongly in Hedgepeth's favor. It cannot reasonably be disputed that debate about the riots, looting, and violence that followed George Floyd's death and race and race relations in the United States is "vital to informed decisionmaking." Such debate should, in the American tradition, be "uninhibited, robust, and wide open." *Rankin v. McPherson*, 483 U.S. 378, 387 (1987). Hedgepeth's "long post," in particular, was precisely that, even if some individuals misunderstood or misconstrued her perspective and falsely labeled it as racist. Hedgepeth challenged Harris—a twenty-five-year-old adult, not a student or child—to reconsider accepted, conventional narratives on race and race relations in the United States. Dkt. 77, ¶ 15. She did so boldly but also respectfully, beginning the with the words, "I am about facts, truth seeking and love." *Id.* She explained her thought process, identified Dr. Sowell and others as persons who have influenced her thinking, and encouraged Harris to study the work of Dr. Sowell in particular. *Id.*, ¶ 17. She also provided accurate statistics. *Id.*, ¶ 18. If anything, more discussion and debate—not censorship—about the ideas of Dr. Sowell, Dr. Walter Williams, Robert

Woodson, Dr. Glenn Loury, Dr. John McWhorter, Ian Rowe, Shelby Steele, and a host of other thinkers who have challenged the accepted, conventional thought on race and race relations is vital to informed decisionmaking. Dkt 69-6. (Swain Decl.) The same is true for debate informed by undisputedly accurate statistics like those referenced by Hedgepeth. The District Court's failure to consider and give ample weight to this factor plainly marred the outcome of the balancing test.

Finally, the District Court did not specifically address the "time, place, and manner" of Hedgepeth's speech and whether Hedgepeth should "be regarded as a member of the general public." Both weigh heavily in Hedgepeth's favor, as again, Hedgepeth's speech was neither at work nor about work. It was not even during the school year. School had ended and Hedgepeth was on vacation in Florida. Dkt. 69 at 13-14, ¶ 21, Dkt. 67, ¶ 1. She did not identify herself as a District 211 employee or even as a teacher. Dkt. 77, ¶ 2. She used her own Facebook page, which was set to "private." *Id.*, ¶ 22. Neither her page nor her comments attempted to influence anyone by virtue of her public employment. She also took reasonable steps to avoid having her Facebook page associated with her work, such as declining "friend" requests from students, not making "friend" requests to former students, and only accepting "friend" request from former students who asked her to "friend" them. *Id.*, ¶¶ 22 & 23. There is no allegation, much less any evidence that she used District 211 resources. Contrast this with the public employee in *Hicks v. Ill. Dep't of Corr.*, No. 23-1091, 2024 U.S. App. LEXIS 18021 (7th Cir. July 23, 2024), who deliberately linked himself with his employer by including a written description and

a photo on his Facebook page. The Court in *Hicks* held that by publicly and deliberately linking his public employment to his public Facebook page the employe risked associating his posts with his employer, risked adverse public and legal exposure, and created conflict with his responsibilities as a supervisor. *Id*. at *17; *see also Craig*, 736 F.3d at 1118 (public employee deliberately linked his book with his work as a public high school coach and guidance counselor).

While it is not required for courts to tackle every element in every case, failing to address relevant elements produces a flawed balancing. *See e.g., Kokkinis v. Ivkovich*, 185 F.3d 840, 845 (7th Cir. 1999) (Court refers to "factors that *should be* considered.") (emphasis added). The District Court's failure to consider and analyze the importance of debate on the subject matter of Hedgepeth's speech, the time, place, and manner of the speech, and whether Hedgepeth should be regarded as a member of the general public tainted its analysis.

2. The District Court Erred in Giving Significant Weight to Defendants' Claim of Actual Disruption.

The District Court found Hedgepeth's speech caused "significant disruption to the District's operations," which it described as "interfer[ing] with operations by diverting resources to field the concerns raised by parents, teachers, community members, and administrators."[13] A26. Any such disruption is not disruption caused directly by the speech, which in some circuits is a requirement. *See*, *e.g.*, *Oldridge v. Layton*, Nos. 22-3284, 23-3070, 2024 U.S. App. LEXIS 10688, *9 (10th

[13] Hedgepeth disputes that Defendants' presented evidence of concerns raised by teachers. *See* A26, n.15.

Cir. May 2, 2024); *Berger v. Battaglia*, 779 F.2d 992, 1000 (4th Cir. 1985); *Flanagan v. Munger*, 890 F.2d 1557, 1567 (10th Cir. 1989). This is not a case in which a teacher was spending class time extolling the virtues of MAGA or the Harris-Walz ticket when she is supposed to be teaching calculus. Nor is it a case in which a teacher is arguing loudly with a colleague in the teacher's lounge about a union issue or leaking confidential information about school finances to a reporter. It is disruption caused purely by third parties' reaction to speech that was away from school and not about the school and was not even made when school was in session.

The District Court cited to a handful of such third-party communications. A21-23. This includes: 113 emails received about the posts, a press statement prompted by media attention, and 44 comments submitted to the June Board meeting. *Id.* The District Court concluded that Defendants were "forced to divert resources from the normal operations of school services to address Hedgepeth's posts." A23. Hedgepeth has raised a host of challenges to these third-party communications, including to their number and nature, and demonstrated *supra* that it was error for the District Court to have resolved this factual dispute in Defendants' favor on summary judgment.

But even assuming that the District Court's treatment of this factual dispute was correct, Defendants have not identified any actual disruption that was significant. Defendants admit that Hedgepeth's speech did not disrupt classroom or instructional activities or after-school or extracurricular activities. Dkt. 77, ¶ 41. Accordingly, the district's core functions were unaffected by the speech. Reading

and responding to emails and issuing a press release hardly amount to onerous tasks outside the normal course of business for school administrators, and reading public comments at a board meeting during the time allotted for reading public comments at board meetings is not a disruption at all. And nowhere in the District Court's opinion or in the record is there any evidence that resources were actually diverted from normal operations to read and respond to emails, issue a release, or read public comments at a board meeting. Any such finding is a supposition or an inference, that, on a motion for summary judgment, should have been drawn in Hedgepeth's favor, not Defendants' favor. *Gazarkiewicz*, 359 F.3d at 939. The evidence also plainly shows that the public reaction had largely died down by the July 16, 2020 meeting. Only four persons even spoked about Hedgpeth at the meeting. Dkt. 77, ¶ 44. Two were supportive and two were critical. *Id.* None of the purported actual disruption was sufficient to outweigh Hedgepeth's substantial speech interests.

3. The District Court Erred in Giving Significant Weight to Defendants' Claims About Hedgepeth's Ability to Carry Out Her Duties.

The District Court also found that school officials reasonably predicted Hedgepeth would be unable to carry out her duties as a teacher. A24-26. Like its disruption assessment, the District Court based this assessment predominately on "concerns expressed by the community" in the aforementioned emails and public comments. A24. The District Court found these community concerns *touched on* Hedgepeth's ability to be unbiased, her ability to build trusting relationships, her

past conduct, and concerns about voicing opposing views on sensitive subjects in her classroom. *Id*. In other words, save for past conduct concerns, the District Court's analysis of Hedgepeth's ability to carry out her duties is based on the same facts on which it relied for its actual disruption analysis.

Again, Hedgepeth disputed the nature and number of these communications. She also disputed as a factual matter that she was not able to carry out her duties, citing her demonstrated history of working to promote diversity and inclusion at PHS and past evaluations and awards she had received. *See*, *e.g.*, Dkt. 69 at 22, ¶ 36; Dkt. 77, ¶¶ 29, 31 & 32. Thus, at least two aspects of the District Court's analysis is based on disputed facts. The record also is devoid of any evidence that, in her twenty-five years of teaching, Hedgepeth ever previously had a complaint from a student, parent, or co-worker that she treated her students in a racially biased manner, that minority students distrusted her, or that opposing opinion on sensitive subjects were unwelcomed in her classroom.

Additionally, Hedgepeth objected on hearsay grounds to these communications. The District Court overruled the objections, asserting that the communications were not admissible for the truth of their contents but for their effect on the Board and because they were present sense impressions. A5, n.4. The District Court found that the communications "provided a reasonable basis for defendants to conclude that Hedgepeth's ability to perform her responsibilities as a teacher was compromised." A24. It even quoted some of them. A21-22; A24. But any such effect on the Board rested squarely on the content of the communications,

not simply the fact that the Board received them. Neither Defendants nor the District Court explain how it is possible for Defendants to make predictions about Hedgepeth's teaching abilities based on these communications without taking into account their content and assuming they are true. *See*, *e.g.*, *United States v. Cruse*, 805 F.3d 795, 810 (7th Cir. 2015) ("Whether a particular statement is hearsay will most often hinge on the purpose for which it is offered.") (cleaned up). Nor did the District Court explain how the communications could be present sense impressions when no such foundation was laid or could have been laid without the authors of the communications testifying. It was further error for them to be considered for summary judgment purposes. Fed. R. Civ. P. 56(b)(2).

These disputed communications are even less probative in the context of demonstrating that Hedgepeth's ability to teach was compromised than they are in demonstrating actual disruption. Even if every one of the aforementioned emails and public comments was negative – and the records clearly shows this is not the case – they constitute an incredibly small percentage of the student body at the time, an even smaller percentage of the overall number of students Hedgepeth has taught over time, and an infinitesimally smaller percentage of the overall "community" referred to by the District Court. This is not like cases in which a teacher's speech reasonably threatened to cause parents to boycott or remove their children from a school that employed a teacher who was self-described pedophile, *Melzer v. Bd. of Educ.,* 336 F.3d 185, 199 (2d Cir. 2003), or to cause students to avoid seeking guidance from a counselor who professed an inability to refrain from

sexualizing females, *Craig,* 736 F.3d at 1119-20. It is more akin to a case in which a small but vocal group sought to silence a teacher who gave an unflattering interview to a local newspaper. *See e.g., Thompson*, 711 F. Supp. at 405-408.

4. The District Court Erred by Effectively Crediting A "Heckler's Veto".

Because Hedgepeth's posts occupied the highest rung of First Amendment protection, Defendants needed to provide a substantial counterweight to fire her. They failed to do so, relying almost exclusively on arguments rooted in negative public reactions to her speech, only a handful of which were from actual PHS parents or students. That reliance raises yet another concern – whether Hedgepeth's dismissal was based on a "heckler's veto."

As this Circuit has recognized, "[I]t is true that to suppress expression on the basis of the angry reaction that it may generate is precisely what the 'heckler's veto' cases … forbid in the name of the free-speech clause of the First Amendment." *Gernetzke v. Kenosha Unified Sch. Dist. No. 1*, 274 F.3d 464, 467 (7th Cir. 2001). The District Court's holding extends what was set up as an exception—the rare situations where public employees do not enjoy the freedom to speak—to become the rule where some subset of the public—however that might be identified or defined—objects to an employee's speech. The *Pickering* balancing test was meant to strike a balance between the interests of the public employee's right to speak on matters of public concern and the interests of the State, as an employer, in maintaining the "efficiency of the public services" it provides. *Pickering*, 391 U.S. at 568. *Pickering* was not meant to silence opposing views or chill public employees' speech, but that

is the effect of the District Court's decision. From protecting a teacher who authored and published a letter to the editor critical of his school board to firing a teacher who, while on vacation, posted comments on her private Facebook page about some of the most consequential public events and issues of the times is quite a leap.

Many members of the public who submitted comments plainly did not like or agree with Hedgepeth's speech. The District Court credited these comments, finding that "[t]he government's interest in maintaining public perception is an inherent part of its operations." A23. The District Court cited *Rankin* and *Locurto* in giving substantial weight to the public reaction to Hedgepeth's speech, but *Rankin* held no such thing, and the Court in *Locurto* was concerned about countering a "widespread public perception of police officers and firefighters as racist." *Id.* (quoting *Locurto*, 447 F.3d at 178). The District Court identified no such widespread perception about teachers in general or District 211 or PHS teachers in particular that needed to be countered. The District Court also did not define or limit the parameters of what constitutes "the public" when giving effect to the public's view. Nor was there an assessment of those members of the public who were neither PHS or District 211 parents or students to determine whether they were truly part of a public relevant to PHS and District 211. Are all public comments entitled to equal weight no matter what the source? And how should organized or orchestrated efforts like the one that targeted Hedgepeth be weighed? How does this new-found reliance on public comment treat political opportunists or

persons with political agendas, like McGowan, who was instrumental in the effort against Hedgepeth and appears to have used the occasion as a vehicle for getting himself elected to the Board? The District Court's decision also does not take into account what weight, if any, should be given to public perception when that perception is incorrect, an overreaction or distortion, or otherwise problematic. In effect, the District Court's decision legitimizes the heckler's veto as counterweight in *Pickering* balancing with little analysis, using disruption as a guise.

Hedgepeth agrees that students and parents are not "outsiders," but status as a student or parent does nothing to limit the substantial harm to free speech that results from crediting a "heckler's veto." If anything, it is especially important in an educational context to support viewpoint diversity and demonstrate that tolerance for alternate if unpopular views is vital. As the Supreme Court declared in *Mahanoy Area Sch. Dist. v. B.L.*, 594 U.S. 180 (2021), albeit about off-campus student speech, the protection afforded by the First Amendment "must include the protection of unpopular ideas, for popular ideas have less need for protection." 594 U.S. at 190. "[S]chools have a strong interest in ensuring that future generations understand the workings in practice of the well-known aphorism, 'I disapprove of what you say, but I will defend to the death your right to say it.'" *Id.*

The student email quoted by the District Court is a case in point. *See* A24 (quoting Dkt. 54-3 at 26-28). The student, a member of the class of 2022 and therefore approximately 16 years old at the time, appears steeped in the current, conventional thinking about race and race relations and plainly does not appear to

have considered any viewpoint other than his or her own. *See*, *e.g.*, Dkt. 54-3 at 27 ("Ms. Hedgepeth insinuates that white privilege has not affected her."). He or she dismissed Hedgepeth's "long post" as "severely misinformed" and "ignorant" and called for her immediate dismissal. Dkt. 54-3 at 27 ("I, along with several other people, want affirmative and immediate action against Ms. Hedgepeth . . . she should no longer have a place as staff at PHS.").[14] The student demonstrates not the slightest understanding that others might see the world differently. Teaching students that the proper reaction to a teacher's speech—neither at work nor about work—is to cause enough disruption to have the teacher fired is a lesson toxic not only to free speech, but also to the habits and attitudes necessary to democracy. Conversely, teaching students that, however much they may disagree with others' speech, they must learn to coexist in the common project of learning—or, in the future, of work or of self-government—is a necessary part of American public education. Indeed, even if a student protest occurs, it offers an opportunity for the school to teach the protesters that they have a right to protest (so long as they do not disrupt classes) but have no entitlement to government censorship. Defendants failed abjectly to teach these lessons. Instead, students learned a lesson of intolerance and censorship of speech they appear not to have understood or even tried to understand. The District Court's decision giving substantial weight to the negative comments about Hedgepeth's speech as a disturbance and evidence that

[14] The District Court credited that the student was writing on behalf of other students as well as himself or herself, although there is no way of verifying that fact from the content of the email alone. A21 ("[S]tudents shared that . . . .").

Hedgepeth was unable to carry out her duties as a teacher reinforces and reaffirms that unfortunate lesson.

"Apprehension of disturbance is not enough to overcome the right to freedom of expression." *Flanagan*, 890 F.2d at 1567. Not all controversies or disagreements rise to the level of disruption; some may simply be an inconvenience. In a society that protects the right to be controversial in speech, attempting to "buy peace" to quell the anger of a reactionary crowd at the expense of an individual's right of free speech and debate is not acceptable. *See Berger*, 779 F.2d at 1001. And there is simply no precedent to support the District Court's expansion of government power over its employees to include firing them for hostile reactions to speech neither at work nor about work:

> [A] function of free speech under our system of government is to invite dispute. It may best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech, though not absolute, is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest.

Terminiello v. Chicago, 337 U.S. 1, 4 (1949) (internal citations omitted). Without crediting the public reaction to Hedgepeth's speech, Defendants are left with no disruption and no predictions about Hedgepeth's ability to serve as a teacher. If the "heckler's veto" is removed from the balancing – as it should be – there is nothing on Defendants' side of the scale to counterbalance Hedgpeth's substantial interest in her speech.

C. Weighing the Facts Found by the ISBE Hearing Examiner and Adopted by District 211's Board Does Not Change the Outcome.

Many of the same errors that marred the District Court's *Pickering* balancing based on its factfindings also marred any application of the balancing test based on the factfindings adopted by the Board in its November 10, 2022 resolution. The latter factfindings are those contained in the ISBE hearing examiner's non-binding factfindings and recommendation issued on October 26, 2022 (A42-A78), as adopted by the Board on November 10, 2022 (A141-43). At the outset, Hedgepeth disputes the "facts" contained in the report as conclusions based more on the characterization and dislike of her speech than on actual evidentiary facts. Defendants' factfindings contain misrepresentations and personal opinions that produced skewed balancing that is not supported by the evidence in the record.

In the event the Court affirms the preclusive effect of the district's November 10, 2022, a separate analysis of the facts as found by the ISBE hearing examiner and adopted by the district does not change the outcome of the *Pickering* balancing test. The District Court identified four basic "predicate facts" decided by the factfindings: (1) the community response was significant and "largely negative" questioning Hedgepeth's ability to function as a teacher; (2) administrators spent significant time dealing with the community response; (3) the posts caused significant community unrest; and (4) Hedgepeth's relationship with the community was harmed and threatened to harm the district's relationship with the community. A15. None of these facts alter the *Pickering* balancing above.

First, the findings do not alter the fact that Hedgepeth's speech was not at work or about work. *Eberhardt*, 17 F.3d at 1027. Nor was her speech associated with work or even linked in any way to her job, the school, or the district. *Compare Hicks*, 2024 U.S. App. LEXIS 18021 at *9. Second, the findings do not alter the fact that Hedgepeth's speech involved matters of substantial public concern, placing her speech on the highest rung of protected First Amendment activity. *Connick*, 461 U.S. at 152. And lastly, the findings of purported disruption do not outweigh Hedgepeth's protected speech or transform the Defendant's "heckler's veto" into a legitimate reason to fire Hedgepeth. *Gernetzke*, 274 F3d at 467. Even if Defendants are allowed to be the judges of the facts, Hedgepeth should have prevailed.

CONCLUSION

For the foregoing reasons, Hedgepeth respectfully requests that this Court reverse the judgment of the District Court.

Dated: August 28, 2024

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT

1. Pursuant to Fed. R. App. P. 32(g), the undersigned counsel for the appellant certifies that this brief complies with the type-volume limits of Circuit Rule 32(c) because the brief contains 13,900 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 August 28, 2024, I electronically filed the foregoing Brief and Required Short Appendix of Plaintiff-Appellant and accompanying Plaintiff-Appellant's Appendix 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 on August 28, 2024, I electronically served the foregoing on the following parties using the CM/EFF system:

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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

PLAINTIFF-APPELLANT'S REQUIRED SHORT APPENDIX

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August 28, 2024

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INDEX OF REQUIRED SHORT APPENDIX

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JEANNE HEDGEPETH,

Plaintiff,

v.

JAMES A. BRITTON, KIMBERLY CAVILL, ANNA KLIMKOWICZ, ROBERT J. LEFEVRE, JR., STEVEN ROSENBLUM, LISA A. SMALL, EDWARD M. YUNG, and TOWNSHIP HIGH SCHOOL DISTRICT 211,

Defendants.

No. 21 CV 3790

Judge Manish S. Shah

MEMORANDUM OPINION AND ORDER

Jeanne Hedgepeth, a high school social studies teacher, wrote a series of Facebook posts in response to the George Floyd protests. After receiving emails and calls about the posts, the school district initiated an investigation, determined that Hedgepeth had violated district policies, and dismissed her. Hedgepeth requested a hearing before the Illinois State Board of Education. Based on the hearing officer's findings and recommendation for her dismissal, the school district dismissed Hedgepeth for cause. She did not seek judicial review of the dismissal in a circuit court. Hedgepeth brings this suit against Township High School District 211, its Board Members, Superintendent Lisa Small, and Human Resources Director James Britton under 42 U.S.C § 1983 alleging that defendants violated Hedgepeth's First Amendment rights when they dismissed her. Defendants move for summary judgment on claim and issue preclusion as well as on the First Amendment claim.

Plaintiff moves for summary judgment only as to the preclusion defense. For reasons discussed below, defendants' motion for summary judgment is granted and plaintiff's motion for summary judgment is denied.

I. Legal Standards

A motion for summary judgment may be granted when "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "A dispute of fact is genuine if the evidence is such that a reasonable jury could return a verdict for the nonmoving party … [and] [t]he substantive law of the dispute determines which facts are material." *Runkel v. City of Springfield*, 51 F.4th 736, 741 (7th Cir. 2022) (internal citations omitted). I view all the facts and draw reasonable inferences in favor of the non-moving party to determine whether summary judgment is appropriate. *See Uebelacker v. Rock Energy Coop.*, 54 F.4th 1008, 1010 (7th Cir. 2022). These standards apply equally to cross-motions for summary judgment, *Blow v. Bijora, Inc.*, 855 F.3d 793, 797 (7th Cir. 2017), and I consider evidence from both motions to ensure that there is no material dispute. *Torry v. City of Chicago*, 932 F.3d 579, 584 (7th Cir. 2019).

II. Background

A. Hedgepeth's Disciplinary History

Hedgepeth worked for twenty years as a social studies teacher at Palatine High School until her dismissal in 2020. [67] ¶ 1; [69] ¶ 4.[1] Hedgepeth was disciplined twice before her termination.[2] Hedgepeth's first suspension in 2016 occurred after she presented a lecture about the presidential election results during which she used phrases like "f-ing lie" and "fricking deported." [54-2] at 199. She was suspended without pay for one day for using inappropriate language in violation of district policies and was warned that similar incidents would result in additional disciplinary measures and possible termination. [54-2] at 200. Hedgepeth's second suspension in 2019 involved an exchange with a student where she told them, among other things, "You haven't even done your fucking homework." [54-2] at 202. The District

[1] Bracketed numbers refer to entries on the district court docket. Referenced page numbers are taken from the CM/ECF header placed at the top of filings. The facts are largely taken from the parties' responses to Local Rule 56.1 statements where both the asserted fact and the opposing party's response are set forth in one document. *See* [67], [69], [78]. Any fact not properly controverted is admitted. N.D. Ill. Local R. 56.1(e)(3); *see Cracco v. Vitran Exp., Inc.*, 559 F.3d 625, 632 (7th Cir. 2009). Because I did not give plaintiff permission to file a reply brief in support of her cross-motion, she did not have the opportunity to respond to defendants' Local Rule 56.1(b)(3) statement of additional facts. [67] at 6–8. Those facts assert the content of public records, and I take judicial notice of them. *Id.* No response is necessary. I disregard all immaterial facts. *See, e.g*, [78] ¶¶ 15, 24, 29–32, 48, 53. General objections to how facts are characterized, *see* [69] ¶¶ 12–19, 49–50, 55, 57, 63, 68, 74–77 *and* [78] ¶¶ 5–6, 12–13, 52, are sustained and I omit the characterizations and cite to the original language when possible. Where the parties dispute facts and both rely on admissible evidence, I include both sides' versions, understanding that the nonmovant is entitled to favorable inferences.

[2] Hedgepeth asserts that her suspensions are only relevant to the defendants' preclusion defense. But plaintiff's history of suspensions and in particular, the Notice to Remedy issued in 2019, were relevant to her dismissal proceedings and informed the Board's decision. Both parties dispute the characterization of the prior disciplinary proceedings, *see* [78] ¶¶ 33–34, so I cite to the Conference Summaries, [54-2] at 199–208, for the purpose of explaining what the Board considered.

suspended her without pay for four days, issued a Notice to Remedy, and required Hedgepeth to attend six counselor or therapy sessions. [54-2] at 204, 206–08.

B. Facebook Posts

On June 1, 2020, in the midst of the unrest following George Floyd's death, Hedgepeth took to Facebook. [67] ¶ 1; [69] ¶¶ 20–21. In response to news about incidents of rioting and looting, Hedgepeth posted photos from her vacation with the caption, "I don't want to go home tomorrow. Now that the civil war has begun I want to move." [69] ¶ 21. A Facebook friend responded to her post, "Follow your gut! Move!!!!!!!!" to which Hedgepeth replied, "I need a gun and training." [69] ¶ 21. Hedgepeth also reposted a meme that said "Wanna stop the Riots? Mobilize the septic tank trucks, put a pressure cannon on em… hose em down… the end." [69] ¶ 22. She added, "You think this would work?" [69] ¶ 22. Hedgepeth's third post was an exchange via Facebook comments with a former student where she responded in one part, "I find the term 'white privilege' as racist as the 'N' word."[3] [69] ¶ 23; [78] ¶ 12.

[3] Hedgepeth argues that the full conversation with the former student is no longer available and offers her declaration to establish what was said between them. [69-1] ¶¶ 8–10; [78] ¶¶ 12–14. Defendants object that Hedgepeth's characterization is not supported by admissible evidence. Hedgepeth's assertions about what the former student said are not offered for the truth of the matters asserted, but for their effect on Hedgepeth, who has personal knowledge of this exchange. I accept her assertion that the comment was a part of a longer conversation, but I find it immaterial because the Board only acted on what was known to them. The comment before the Board stated, "I am about facts, truth seeking and love. I will speak on any topic I choose because I live in a free country. I find the term 'white privilege' as racist as the 'N' word. You have not walked in my shoes either so do not make assumptions about me and my so called privilege. You think America is racist? Then you have been hoodwinked by the white liberal establishment and race baiters like Jesse Jackson and Al Sharpton. Travel the world and go see that every nation has racism and some more than others but few make efforts such as we do to mitigate or eliminate it. I have lived and seen[.] The people I am informed by about the black experience in America are actually some of the smartest people in America [a]nd it so happens they are black. Ii (sic) highly

By the next day, school principal Tony Medina began receiving messages about Hedgepeth's posts, which were relayed to Superintendent Lisa Small. [69] ¶ 24. The District also began receiving emails, calls, and media outlet inquiries.[4] [69] ¶¶ 27–

recommend studying Thomas Sowell who is now retired and in his 80's. A treasure. A truth seeker, does REAL research and analysis. Candace Owens is one of the smartest and most courageous women in America and Larry Elders speaks the truth with a great sense of humor and FACTS not feelings. They are who I listen to when it comes to facts about the black experience in America. Don't you think there is a deeper problem than racism when 50% of murders in America are committed by 13% of the population? Do you think there might be a subtle genocide of black babies when most planned parenthoods are put in poor neighborhood and that 33% of abortions are black babies, black women only make up 7% of the U.S. population. The greatest power you have is what you believe about yourself, what have Democrats, mainstream media and intellectuals in ivory towers been telling the black community to believe about themselves for forty years? Wake up and stop believing them, then things will change." [69] ¶ 23.

[4] Hedgepeth raises several objections to the defendants' characterization of the volume and nature of the communications received by the District. [69] ¶¶ 27–28, 48. Plaintiff objects to defendants' tally of communications received by Superintendent Small, but Small's testimony is supported by her personal knowledge of communications that were forwarded to her. [54-2] at 479–81; *see* Fed. R. Evid. 602. Her affidavit is itself evidence and does not require additional support. *See* Fed. R. Civ. P. 56(c)(4); *James v. Hale*, 959 F.3d 307, 315 (7th Cir. 2020) (A party may use an affidavit to oppose a motion for summary judgment where "the affidavit (1) attests to facts of which the affiant has personal knowledge; (2) sets out facts that would be admissible in evidence; and (3) shows that the affiant or declarant is competent to testify on the matters stated") (cleaned up). These communications are not hearsay because they are not offered for the truth of the matters asserted, other than as statements of present sense impressions; they are offered for evidence of their effect on the Board. *See* Fed. R. Evid. 803(1). For the same reasons, I overrule plaintiff's objections to Principal Medina's statements about communications he received and his personal opinion on plaintiff's fitness as a teacher. *See* [69] ¶¶ 45–47. Plaintiff offers the Alymer declaration to dispute defendants' characterization of the emails received by the District and the public comments received for the June school board meeting. [69-7] at 68–73. Ultimately, this dispute between the parties is immaterial. By plaintiff's own analysis of the communications, the District received 113 emails related to her speech and 76 comments submitted for the June board meeting. [69-7] at 68–73. I accept for purposes of summary judgment an inference in Hedgepeth's favor that some communications were supportive of her, some emails were based on template forms, and many communications were submitted by members of the public rather than students and parents. *See* [69-7] at 68–73. Even under plaintiff's analysis, however, there were communications from people critical of her, including parents and students. [69-7] at 70–71. Plaintiff also objects to the online news articles offered by defendants. [69] ¶ 29. The news articles are not hearsay because they are not being offered for the truth of the matters asserted, but to prove the effect of media attention on the Board. Newspaper articles are self-authenticating and admissible. *See* Fed. R. Evid. 902(6).

28. In response, the District issued a press statement clarifying that Hedgepeth's posts "do not reflect the values or principles of District 211" and apologizing "for any harm or disrespect that this may have caused." [69] ¶ 29.

Later that week, Hedgepeth met with James Britton, the District's Human Resources Director. Britton reviewed with Hedgepeth her prior disciplinary incidents, the Notice to Remedy she received in 2019, the emails and calls coming into the District about her posts, and provided her an opportunity to explain her statements. [69] ¶¶ 30–37. Britton advised her that an investigation would follow. [69] ¶ 25. Britton prepared a memorandum for Small recounting his investigation on Hedgepeth's conduct and meetings with her; he recommended that she be considered for dismissal. [54-2] at 561–66; [69] ¶ 49.

A week later, Small and Britton met with Hedgepeth to inform her that Small would be recommending that the Board dismiss Hedgepeth. [67] ¶ 2; [69] ¶ 40. Small's recommendation was based on Hedgepeth's prior disciplinary incidents, her Facebook posts, the public reaction and feedback that the District received, and her "lack of any understanding or appreciation for why many people found her comments objectionable." [54-2] at 481–82; [69] ¶ 53. Small concluded that Hedgepeth violated school district policies and could no longer effectively serve as a teacher and recommended her dismissal to the Board.[5]

[5] Small found that Hedgepeth's conduct violated four district policies: (1) Board Policy KA ("School-Community Relations Goals"), which requires district employees to exhibit and maintain "just and courteous professional relationships with pupils, parents, staff members and others"; (2) Board Policy GCA requiring teachers to "provide guidance to students which will promote welfare and proper educational development"; (3) Board Policy GBAD ("Social

The Board allowed public comment at two board meetings. At the June board meeting, at least 58 comments were submitted on the topic of the Facebook posts with some speakers expressing support and some expressing criticism. [69] ¶ 43; [69-7] at 71–72, 90–94. At the July board meeting, more speakers addressed the posts as well as issues of diversity and inclusion.[6] [69] ¶ 60; [69-7] at 110. During the closed portion of the July board meeting, the Board took into account Small's recommendation and provided an opportunity for Hedgepeth and her attorney to respond. [69] ¶ 58. The Board then voted to dismiss Hedgepeth. [67] ¶¶ 3–4; [69] ¶ 61.

The Board served Hedgepeth with the Notice of Charges, Bill of Particulars, and advised her of her right to request a hearing. [69] ¶ 62. The Bill of Particulars stated in part: (1) "The District has received over 135 emails and phone calls expressing concern or outrage about your posts. The communications came from former students, parents, current students and staff. Your postings also received media coverage, including on WGNTV, ABC7, NBC5, Fox 32, the New York Post and the Daily Herald" and (2) "Your position requires you to work with staff and students of all backgrounds and races. Your comments reveal your biases and are inconsistent

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Media and Electronic Communication") requiring that "[a]ny duty-free use must not interfere with the employee's job duties or the school environment and warning that "[i]mproper use of personal technology, social media, or electronic communication for District- or school-related purposes or in a manner that is considered to have nexus to the District or school is subject to disciplinary action"; and (4) Board Policy AF of Compassion, Dignity and Respect that "values and honors the strength and diversity of all individuals." [54-2] at 178–79, 482.

[6] Hedgepeth disputes defendants' characterization of the public comments made at the July board meeting. [69] ¶ 60. The meeting minutes show that two speakers expressed support of Hedgepeth; two speakers addressed "concerning comments"; thirteen speakers addressed the topic of "equity and culture in District 211"; and two speakers addressed suspension data. [69-7] at 110.

with the values the District upholds. They injure and impede the efficiency of the District's provision of services. The District's student population and staff are diverse, and such racially charged language disrupts the provision of educational services. You have lost the trust and respect of colleagues and students." [54-2] at 593–94.

C. State Board Hearing

Hedgepeth requested a dismissal hearing before a neutral hearing officer of the Illinois State Board of Education. [67] ¶ 5; [69] ¶ 62. The officer conducted the hearing on March 10 and April 9, 2021; Hedgepeth had the opportunity to call witnesses, offer documents into evidence, cross-examine witnesses, and present arguments. [69] ¶ 65.

On October 26, 2022, the hearing officer issued a report with findings of fact and recommendation.[7] [67] ¶ 9; [69] ¶ 67. The officer considered three issues: (1) whether Hedgepeth's Facebook posts violated the 2019 Notice to Remedy; (2) whether Hedgepeth engaged in conduct which constitutes irremediable cause for her dismissal; and (3) whether the Facebook posts were protected speech under the First Amendment. [54-2] at 620–21. Based on her findings of fact, the hearing officer determined that Hedgepeth's posts violated her Notice to Remedy issued in 2019. [54-

[7] Hedgepeth objects to the hearing officer's report on hearsay grounds and argues that it is only relevant as to the defendants' preclusion defenses. [69] ¶¶ 67–77. The report was a public report containing factual findings pursuant to an administrative hearing by an officer of the Illinois State Board of Education and plaintiff does not suggest that the circumstances indicate a lack of trustworthiness. *See* Fed. R. Evid. 803(8)(A)(iii)–(B). It is not excluded by the rule against hearsay. *Id.* I overrule plaintiff's objection to relevance for the same reason I overruled her objection to the conference reports—the hearing officer's findings and recommendation for dismissal were relevant to the school district's decision, and in turn, relevant to evaluating her First Amendment challenge to that decision.

2] at 631–33. Hedgepeth's conduct was irremediable because it "compromised, beyond repair… her ability to continue to function effectively in her role" and her posts "destroyed any possibility that she could be viewed as a fair and honest arbiter in the students' expressions of different perspectives." [54-2] at 634–35. The hearing officer applied the *Pickering* balancing test and found that Hedgepeth's First Amendment rights were not violated by her dismissal. [54-2] at 635–39; *Pickering v. Bd. of Ed. of Twp. High Sch. Dist. 205, Will Cnty., Illinois*, 391 U.S. 563 (1968). While Hedgepeth's posts touched on matters of public concern, the interest of the District in promoting the efficiency of its educational services to students outweighed her speech interests. [54-2] at 639.

The Board adopted the hearing officer's findings of fact and accepted the recommendation to dismiss Hedgepeth. [67] ¶ 10; [69] ¶ 78. The Board then approved a resolution and order dismissing Hedgepeth for cause on November 10, 2022. [67] ¶ 10; [69] ¶ 78. Hedgepeth did not seek judicial review of the Board's order in a circuit court. [67] ¶ 14; [69] ¶ 80. While the hearing officer's decision was pending, Hedgepeth filed this suit for violation of her First Amendment rights under 42 U.S.C. § 1983 on July 15, 2021.[8] [1].

[8] Hedgepeth also filed a lawsuit against Tim McGowan in the Circuit Court of Cook County alleging defamation and tortious interference with a contract on February 17, 2021. [67-1] at 43, 68–69. That court granted defendant McGowan's motion for summary judgment on June 26, 2023. [67-1] at 68–69. The court determined that Hedgepeth was dismissed for cause based on her own conduct, Hedgepeth did not appeal her dismissal under Illinois Agency Law, the determination by District 211 was final, and Hedgepeth was collaterally estopped from arguing that her dismissal was wrongful or based on alleged statements of McGowan. [67-1] at 68–69.

III. Analysis

A. Preclusion

Defendants argue that Hedgepeth's First Amendment claim is barred by both issue and claim preclusion. The law of the state of the judgment controls the preclusion analysis, so Illinois law applies here. *See Allen v. McCurry*, 449 U.S. 90, 96 (1980). I am required to give the same preclusive effect to a state court judgment as any Illinois court rendering judgment would give it. 28 U.S.C. § 1738; *Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367, 373 (1996). But when there is no state court judgment, the federal common-law doctrine of preclusion applies. *See Univ. of Tennessee v. Elliott*, 478 U.S. 788, 799 (1986). Unreviewed state agency findings are entitled to the same preclusive effect that a state court would afford them so long as the agency was acting in a judicial capacity and resolved issues that the parties had an adequate opportunity to litigate.[9] *Id.* at 799.

Hedgepeth argues that the Board was acting in an "executive" rather than judicial capacity, so its judgment is not entitled to preclusive effect. [56] at 8. An agency acts in a judicial capacity if the proceeding involved adequate safeguards: "(1) representation by counsel, (2) pretrial discovery, (3) the opportunity to present

[9] Illinois courts grant both claim and issue preclusive effect to unreviewed state agency judgments that are "adjudicatory, judicial, or quasijudicial in nature." *Vill. of Bartonville v. Lopez*, 2017 IL 120643, ¶ 71–72. In federal courts, the preclusive effect of unreviewed agency decisions is limited to factfinding. *Allahar v. Zahora*, 59 F.3d 693, 696 (7th Cir. 1995). In this case, issue preclusion resolves the dispute, so I do not address the defendants' claim preclusion defense. [53] at 10–11; [66] at 11–14. And I do not address plaintiff's arguments that defendants acquiesced to claim-splitting, [56] at 12–13, because acquiescence is not relevant to issue preclusion. *See generally Rein v. David A. Noyes & Co.*, 665 N.E.2d 1199, 1207 (Ill. 1996) (citing to the Restatement (Second) of Judgments § 26 (1982) (discussing acquiescence in the context of claim preclusion)).

memoranda of law, (4) examinations and cross-examinations at the hearing, (5) the opportunity to introduce exhibits, (6) the chance to object to evidence at the hearing, and (7) final findings of fact and conclusions of law." *Reed v. AMAX Coal Co.*, 971 F.2d 1295, 1300 (7th Cir. 1992). Hedgepeth was afforded a full hearing with counsel, the opportunity to call witnesses, offer documents into evidence, cross-examine witnesses, and present arguments. [69] ¶ 65. The hearing officer issued findings of fact and recommendation for dismissal, which the Board adopted in full. [69] ¶ 78; [54-2] at 643–45. This is sufficient to establish that the Board acted in a judicial capacity.

Under Illinois law, issue preclusion, or collateral estoppel, applies if "(1) the issue decided in the prior adjudication is identical with the one presented in the suit in question, (2) there was a final judgment on the merits in the prior adjudication, and (3) the party against whom estoppel is asserted was a party or in privity with a party to the prior adjudication." *Gumma v. White*, 833 N.E.2d 834, 843 (Ill. 2005). A judgment is final for issue preclusion purposes when the possibility of appellate review has been exhausted. *In re A.W.*, 896 N.E.2d 316, 321 (Ill. 2008). Unlike claim preclusion, issue preclusion is limited to what was actually litigated and determined in an earlier proceeding. *See Gumma*, 833 N.E.2d at 843. There is no dispute that the third element is satisfied here.

One issue decided by the Board and the issue presented in this suit are identical—whether the Board violated Hedgepeth's First Amendment rights by dismissing her. [54-2] at 635–39. The third issue that the hearing officer explicitly

addressed was, "[w]hether Ms. Hedgepeth's Facebook posts at issue were protected speech pursuant to the First Amendment." [54-2] at 621. Based on her findings of fact, the hearing officer applied the *Pickering* test and determined that Hedgepeth's speech touched on matters of public concern, but the District's interest in promoting efficiency of providing educational services outweighed her speech interests. [54-2] at 635–40. And the determination of Hedgepeth's First Amendment defense was necessary to the Board's judgment of termination for cause, so the first element of issue preclusion is satisfied. [54-2] at 631.[10]

The Board's dismissal was a final judgment on the merits. The Illinois School Code governs the dismissal of tenured teachers. *See* 105 ILCS 5/24-12. A tenured teacher who is dismissed may request a full hearing before a neutral hearing officer through the Illinois State Board of Education. 105 ILCS 5/24-12(d)(1). After receiving the hearing officer's report with findings of fact and recommendation,[11] the school

[10] Hedgepeth's objection that the hearing officer could not hear her § 1983 claim for monetary damages does not defeat issue preclusion, which looks at the identity of issues. *See Mir v. State Farm Mut. Auto. Ins. Co.*, No. 1:19-CV-1225, 2020 WL 1265417, at *5 (C.D. Ill. Mar. 16, 2020), *aff'd*, 847 Fed. App'x 347 (7th Cir. 2021) ("A claim is essentially a remedy for a specified wrong, whereas an issue is a matter of law or fact determined by a prior proceeding."). As for claim preclusion, the difference in available remedies does not foreclose that defense either. *See Balcerzak v. City of Milwaukee, Wis.*, 163 F.3d 993, 997 (7th Cir. 1998) (rejecting litigant's argument that seeking a remedy under § 1983 in federal court defeats claim preclusion because the argument "if accepted, would undercut claim preclusion in every case where a constitutional issue was posed as a defense to a civil service commission or police board action"); *see also Abner v. Illinois Dep't of Transp.*, 674 F.3d 716, 720 (7th Cir. 2012) (applying Illinois law and finding claim preclusion barred federal suit where the proof required in the state administrative proceeding and federal § 1983 action was the same, the two suits arose from the same cause of action, and the state civil service commission could have heard the litigant's allegations of harassment and retaliation).

[11] The recommendation must address whether: "(i) the conduct at issue occurred, (ii) the conduct that did occur was remediable, and (iii) the proposed dismissal should be sustained." 105 ILCS 5/24-12(d)(8).

board is required to issue a written order either retaining or dismissing the teacher for cause. 105 ILCS 5/24-12(d)(8). The order must incorporate the officer's findings of fact, but the board may modify or supplement the findings of fact if they are against the manifest weight of the evidence. 105 ILCS 5/24-12(d)(8). The decision of the school board is final unless reviewed under the Administrative Review Law, which requires any action to review a final administrative decision to be filed within 35 days of service of the decision. *See* 105 ILCS 5/24-12(d)(8)–(d)(9), 5/24-16; 735 ILCS 5/3-102–103.[12]

Hedgepeth's failure to appeal the Board's decision under the Illinois School Code means that the Board's decision constituted a final judgment on the merits. After Hedgepeth's hearing and the officer's determination, the Board approved a resolution and order dismissing her for cause. [69] ¶ 78. This decision was final under Section 24-(d)(9) unless she filed an action for review in the circuit court within 35 days after she was served with the Board's decision on November 15, 2022. *See* 105 ILCS 5/24-12(d)(9), 5/24-16; 735 ILCS 5/3-102–03; [69] ¶ 79. She did not file an action for judicial review, so the Board's judgment is entitled to preclusive effect under Illinois law. [67] ¶ 14; [69] ¶ 80; *see also Vill. of Bartonville v. Lopez*, 2017 IL 120643, ¶ 51 (finding that preclusion barred defendants from relitigating a termination decision in arbitration proceedings where defendants failed to seek administrative review of the police board's termination of defendant officer). Hedgepeth argues that

[12] Section 5/24-16 provides that the Administrative Review Law applies to and governs proceedings for judicial review of a school board decision to dismiss for cause. 105 ILCS 5/24-16.

there was no circuit court review of the Board's decision, so there is no judgment to give preclusive effect to. [56] at 9. But there is no circuit court judgment because she did not seek review, and Hedgepeth cites no authority for the proposition that a litigant can evade finality by not appealing. *See Taylor v. City of Lawrenceburg*, 909 F.3d 177, 181 (7th Cir. 2018) (applying preclusion under Indiana law and finding a board's termination decision final even though the litigant withdrew appeal from judicial review).

All the requirements of issue preclusion are met here, but Illinois courts do not apply preclusion unless "it is clear that no unfairness results to the party being estopped." *Nowak v. St. Rita High Sch.*, 757 N.E.2d 471, 478 (Ill. 2001). Hedgepeth argues that giving preclusive effect to the defendants' dismissal would be unfair and prejudicial because defendants are "inherently conflicted" and cannot be the "final arbiters" of her federal civil rights claim against them. [56] at 11. But any prejudice to Hedgepeth by giving preclusive effect to the Board's dismissal is a consequence of her own choices. She had the right under Illinois law to file for administrative review with the circuit court if she believed the Board was biased and the judgment to be unfair. State court review provides the opportunity for a party to challenge an administrative decision for these reasons, but she opted not to do so.

Issue preclusion applies to facts resolved at the agency level, not conclusions of law. *See Allahar v. Zahora*, 59 F.3d 693, 696 (7th Cir. 1995). In some cases, giving issue-preclusive effect to an agency's findings of fact leaves little room for a contrary conclusion of law. *See, e.g.*, *Taylor*, F.3d at 181 (finding that issue preclusion barred

a First Amendment claim where the board's findings as to causation and improper bias in a termination decision precluded subsequent litigation). The result of the *Pickering* balancing test is a legal conclusion, but it contains predicate factual determinations. *Gustafson v. Jones*, 290 F.3d 895, 906 (7th Cir. 2002). Among the predicate facts resolved before the agency here were whether there was an actual disruption and the scale of the disruption. The hearing officer found that there was a significant and largely negative response from the community, questioning Hedgepeth's ability to represent the District and function as a teacher; school administrators spent a significant amount of time, in meetings and by phone calls, addressing these concerns; the posts caused significant unrest among current students, parents, coworkers, and the community; caused extra workload for administrators; harmed Hedgepeth's relationship to the community and to District students and parents; and threatened to harm their relationship to the District. [54-3] at 614–17, 632, 634–35, 640. Issue preclusion bars Hedgepeth from relitigating these predicate facts, and they establish that Hedgepeth's posts interfered with the regular operation of the school district. With that, the outcome of the *Pickering* test necessarily follows—as discussed below, the District's interests in efficient provision of its services outweighed Hedgepeth's speech interests. Hedgpeth's speech was not protected by the First Amendment, and she cannot relitigate her First Amendment claim in this court.

B. First Amendment Claim

Even if issue preclusion did not bar Hedgepeth from relitigating her First Amendment claim, no material facts are in dispute and summary judgment in favor of defendants on the merits is appropriate. To bring a claim for retaliation under the First Amendment, Hedgepeth must establish that: (1) she engaged in constitutionally protected speech; (2) she suffered a deprivation likely to deter protected speech; and (3) her protected speech was a motivating factor in her termination. *See Harnishfeger v. United States*, 943 F.3d 1105, 1112–13 (7th Cir. 2019). Only the first element is in dispute. [78] ¶ 3.

Whether a government employee's speech is protected under the First Amendment is a question of law that may require "predicate factual determinations." *Gustafson*, 290 F.3d at 906. Hedgepeth must show that she spoke as a private citizen on a matter of public concern. *See Harnishfeger,* 943 F.3d at 1113 (citing *Garcetti v. Ceballos*, 547 U.S. 410, 418 (2006) and *Connick v. Myers*, 461 U.S. 138, 147 (1983)). Defendants do not dispute these two elements, so the burden shifts to them to show that the District's interest as an employer in "promoting the efficiency of the public services it performs" outweighs Hedgepeth's speech interests. *See* [76] at 5; *Pickering v. Bd. of Ed. of Twp. High Sch. Dist. 205, Will Cnty., Illinois*, 391 U.S. 563, 568 (1968). Speech on matters of public concern loses its First Amendment protection if a government employer's management interests outweigh its employee's free-speech interests. *Kristofek v. Village of Orland Hills*, 832 F.3d 785, 795 (7th Cir. 2016).

In weighing the competing interests under the *Pickering* balancing inquiry, relevant factors include:

> (1) whether the speech would create problems in maintaining discipline or harmony among co-workers; (2) whether the employment relationship is one in which personal loyalty and confidence are necessary; (3) whether the speech impeded the employee's ability to perform her responsibilities; (4) the time, place and manner of the speech; (5) the context in which the underlying dispute arose; (6) whether the matter was one on which debate was vital to informed decisionmaking; and (7) whether the speaker should be regarded as a member of the general public.

Kristofek, 832 F.3d at 796 (quoting *Greer v. Amesqua*, 212 F.3d 358, 371 (7th Cir. 2000)). If an employee's speech touches upon a matter of "strong public concern," then the government must show a higher degree of potential or actual disruption to justify the restriction. *See Craig v. Rich Twp. High Sch. Dist. 227*, 736 F.3d 1110, 1119 (7th Cir. 2013); *see also Waters v. Churchill*, 511 U.S. 661, 673 (1994) (noting that a court may give "substantial weight to government employers' reasonable predictions of disruption"). On the other hand, "the less serious, portentous, political, significant the genre of expression," the less demanding the showing that the government must make. *Eberhardt v. O'Malley*, 17 F.3d 1023, 1026 (7th Cir. 1994). The extent of an employee's authority and interactions with the public also bears on the degree of government interest in preventing disruption. *See Rankin v. McPherson*, 483 U.S. 378, 392 (1987) (holding that the government's interest in discharging a low-level employee did not outweigh her speech interests where the employee's position was limited to clerical work and did not involve law enforcement activity). Special consideration is given in the context of school-employee speech by virtue of the position of trust that a teacher in a public school occupies. *See Craig*, 736 F.3d at 1119

(noting that the employee's position as a public school counselor working closely with students involved "an inordinate amount of trust and authority"); *see also Melzer v. Bd. of Educ. of the City Sch. Dist. of the City of New York*, 336 F.3d 185, 198 (2d Cir. 2003) (recognizing that a public school teacher's "position by its very nature requires a degree of public trust not found in many other positions of public employment" so disruption caused by a teacher's speech can warrant discipline action against the teacher).

Even when viewing the undisputed facts in the light most favorable to Hedgepeth, defendants' interest in addressing the disruption caused by her Facebook posts outweighed her speech interests. Hedgepeth's three Facebook posts, though varying in content and form, clearly touched on a matter of public concern—political unrest and race in the wake of police violence. *See Connick,* 461 U.S. at 147–48 (looking to the "content, form, and context of a given statement, as revealed by the whole record" to determine whether speech addresses a matter of public concern). While Hedgepeth's speech satisfies this threshold to reach *Pickering* balancing, it does not rise to the level of public-employee speech that warrants a stronger showing of disruption by the government. Public-employee speech may hold "special value" because the employee "gain[s] knowledge of matters of public concern through their employment." *Lane v. Franks*, 573 U.S. 228, 240 (2014). For example, a government employee who reports misconduct or exposes corruption is well-situated to bring those issues to light, and the public's interest in receiving that information is particularly strong. *See Garcetti*, 547 U.S. at 425. Although it involved politically salient issues,

Hedgepeth's speech does not afford it special weight. I accept her characterization of the posts: (1) the "civil war" post where she commented "I need a gun and training" was a reference to political division and personal safety concerns; (2) the "Wanna Stop the Riots?" post was satirical rather than a literal call for violence against protesters, and (3) the exchange with the former student about the term "white privilege" was informed by Black conservative thought and supported by statistics. [68] at 13–17. None of this suggests that Hedgepeth's speech was informed by specialized knowledge gained through her public employment or that she was offering novel commentary to the fraught political moment. Her chosen genre and medium of expression—hyperbolic or satirical social media posts and a back-and-forth discussion with a friend—are toward the less serious, less significant end of the spectrum of works of public commentary. In her own telling, she was joking and otherwise sharing the views of others. Her speech was on a matter of public concern, but it was not the type of public-employee speech that demands "particularly convincing reasons" by defendants to justify its restriction. *See Gustafson v. Jones*, 117 F.3d 1015, 1019 (7th Cir. 1997).

Both parties dispute the importance of Hedgepeth's post being shared on her personal Facebook page and whether she flouted district policy by accepting Facebook friend requests from former students. [68] at 17; [76] at 7–8. Hedgepeth was on vacation and her profile did not expressly identify her as a Palatine High School teacher. [69] ¶ 21; [78] ¶ 2. Speech made outside of the workplace may be less disruptive to the "efficient functioning of the office." *See Rankin*, 483 U.S. at 388–89.

On the other hand, posting on a social media platform carries the risk of amplification. *See Liverman v. City of Petersburg*, 844 F.3d 400, 407 (4th Cir. 2016) ("A social media platform amplifies the distribution of the speaker's message—which favors the employee's free speech interests—but also increases the potential, in some cases exponentially, for departmental disruption, thereby favoring the employer's interest in efficiency."). Unlike the government employee in *Harnishfeger*, nobody leaked Hedgepeth's posts through extensive digging. *See Harnishfeger,* 943 F.3d at 1118. Hedgepeth admits that she accepted friend requests from former students. [78] ¶ 23. The parties dispute whether it was formal district policy that teachers were instructed to unfriend former students with younger siblings still attending a school or if this was a "mere suggestion." [69] ¶ 10. Even in drawing this inference in favor of Hedgepeth, it is undisputed that her posts had their own momentum to reach a wide audience, including District 211 constituents, and reflected on the public's perception of Hedgepeth as a teacher. *See* [69] ¶ 48; [54-3] at 8–275.

Hedgepeth devotes much of her briefing to assert that her posts were not racist. Regarding the third post, she offers expert testimony to support her point that her comments were influenced by Black scholars who have made similar assertions. [68] at 15–16; [69-6] at 39–65. She argues that her comments about "Black genocide" were supported by statistics of the "Black murder rate and Black abortion rate."[13] [68] at

[13] Hedgepeth also argues that defendants made no effort to verify the truth of her statements in the third post, so the defendants do not meet their burden under *Pickering*. [68] at 16. But defendants did not pursue Hedgepeth's dismissal based on a belief that her posts were false. [76] at 12. False speech or speech made with reckless disregard of the truth is not entitled to First Amendment protection, but that does not mean the government must establish the

15. But the other side of *Pickering* balancing weighs the government's legitimate interest in minimizing disruption, and Hedgepeth's intent and meaning behind her posts do not diminish the impact of her speech on the District's operations. After all, a public employee must also "by necessity… accept certain limitations on his or her freedom" when entering public service. *Garcetti*, 547 U.S. at 418.

Defendants offer ample undisputed evidence of actual disruption caused by Hedgepeth's Facebook posts.[14] By the time the Board voted to dismiss Hedgepeth in July, the District had received 113 emails about her posts. [69] ¶ 48; [69-7] at 68. The record contains many examples of students and parents expressing concern about Hedgepeth's fitness as a teacher. In an email to Board Member Cavill, students shared that "[a]s students of color, we feel angered by Ms. Hedgepeth's statements and feel that she should no longer have a place as staff at PHS… We don't want a teacher at Palatine who believes we are being dramatic when a racist act has been done against us. We want a teacher who understands what we are going through and how the obstacles presented to us for simply being of different color." [54-3] at 26–28.

falsity of her statements in order to prevail under *Pickering* balancing. *See Greer v. Amesqua*, 212 F.3d 358, 373 (7th Cir. 2000) (internal citation omitted) ("Recklessly false statements by a public employee enjoy no First Amendment protection, and from this principle Greer wrongly extrapolates that speech which is factually true therefore must be absolutely protected. However, we have never held that an employer must prove the falsehood of the employee's statement before disciplining the employee based on that speech.")

[14] Hedgepeth attempts to impose a limitation on when defendants' claim of disruption can be "measured." [68] at 21–22. She argues that disruption must be measured only up until Small's recommendation to the Board for Hedgepeth's dismissal. *Pickering* balancing prohibits consideration of "hypothetical concerns that a governmental employer never expressed." *See Harnishfeger,* 943 F.3d at 1116. Instead, I must look to what the District's concerns "really were." *Id.* But the events leading up to the Board's decision to dismiss Hedgepeth were not hypothetical and are relevant to the assessment of actual disruption that defendants were responding to.

One email by a parent urged a response by the District: "I don't believe Hedgepeth is the only teacher with the same beliefs. I hope that there will be anti bias training, discrimination training, diversity speakers for teachers and students." [54-3] at 73–74. Another parent email expressed concern that Hedgepeth's post about the civil war and needing a gun was "very alarming" and that she was unclear on whether the post "was meant to intimidate those with views different than her, or if it was mean [sic] to encourage others to be violent." [54-3] at 86–89. The posts also attracted media attention and prompted the District to issue a press statement. [69] ¶ 29; [54-2] at 542–48.

Defendants' actions to dismiss Hedgepeth based on public reaction to her speech did not amount to a "heckler's veto." The First Amendment generally prohibits the suppression of unpopular speech because of audience reaction; but in this context, students and parents are not a mere audience. *See Melzer*, 336 F.3d at 199. The concerns raised by students and parents regarding Hedgepeth's role as a teacher were a reasonable consideration for the District. Students and parents are not "outsiders" attempting to silence speech, but "participants in public education, without whose cooperation public education as a practical matter cannot function." *Id*. Hedgepeth notes that the community reaction included comments in support of her. *See, e.g.*, [54-3] at 13–16. But support expressed in Hedgepeth's favor does not negate the District's justification in responding to criticism and feedback. *See Melzer*, 336 F.3d at 198 ("It is true that some parents and students expressed support for Melzer as a person harmlessly expressing his ideas. It is nonetheless entirely reasonable for the Board

to believe that many parents and students had a strong negative reaction to him, and that such a reaction caused the school to suffer severe internal disruption.").

Hedgepeth also makes a variety of objections about the scale of the disruption; the fact that many comments were made by general members of the public rather than parents or teachers; and that some of the emails sent to the District were based on form templates. [68] at 22–24. Hedgepeth may dispute defendants' characterization of the comments, but she does not dispute, for example, that the district received 113 emails related to her Facebook posts or that 44 public comments submitted to the June board meeting expressed criticism of her. [69] ¶ 27; [69-7] at 68, 71–72. While the concerns of parents and teachers are particularly relevant to weighing a school district's interest in restricting teacher speech, comments raised by members of the public are not irrelevant. The government's interest in maintaining public perception is an inherent part of its operations. *See Rankin*, 438 U.S. at 390–391; *see also Locurto v. Giuliani*, 447 F.3d 159, 178 (2d Cir. 2006) (finding that the government may "legitimately regard as 'disruptive' expressive activities that instantiate or perpetuate a widespread public perception of police officers and firefighters as racist"). Nor does the fact that some of the emails sent to the District were based on recycled language suggest that the disruption was in fact minimal or overblown. The bottom line is that the District was forced to divert resources from the normal operations of school services to address Hedgepeth's posts.

Some of the defendants expressed personal opinions disapproving of her speech, so Hedgepeth argues that the District's justifications for her dismissal are

pretextual. [68] at 26–28. Defendants do not dispute that Superintendent Small, for example, was "appalled" by Hedgepeth's speech. [78] ¶ 52. Board member Cavill commented that the third post invoked "racial stereotypes and racial tropes." [78] ¶ 52. Whether individual defendants viewed Hedgepeth's speech as inflammatory or racist does not diminish the evidence in the record that external complaints about her speech amounted to significant disruption.

Hedgepeth argues that defendants do not show that her speech actually interfered with her job performance. [68] at 19. A government employer is not required to show actual interference with an employee's ability to perform her job duties to prevail under *Pickering* balancing, but the assessment must be reasonable and supported by evidence rather than "mere speculation." *See Craig*, 736 F.3d at 1119. The concerns expressed by community members constituted actual disruption, but it also provided a reasonable basis for defendants to conclude that Hedgepeth's ability to perform her responsibilities as a teacher was compromised. These concerns touched on her ability to be unbiased in her role as a teacher, particularly to students of color. *See, e.g.,* [54-3] at 53 (email by family member of a current PHS student), 73 (email by parent of current student in Hedgepeth's homeroom class). Administrators also shared this concern. In recommending Hedgepeth's dismissal to Small and Britton, Principal Medina raised his concern about Hedgepeth's posts negatively reflecting on her ability to be an effective teacher and build "a trusting relationship with students" given the "substantial minority population" at the school. [54-3] at 2–3. He also based this concern on her past conduct "involving intemperate outbursts

in the presence of students." [54-3] at 2. Small's recommendation of dismissal to the Board was based on her view that the "overwhelming negative response to Hedgepeth's posts made it clear that many students would not feel that they could safely voice their opinions regarding sensitive subjects such as race in Hedgepeth's classroom." [54-2] at 482. Moreover, the District's assessment about Hedgepeth's ability to perform her duties was also reasonably informed by her prior disciplinary history, which included, among other things, unprofessional conduct violating district policy while speaking to students. [54-2] at 202–04, 206–08. In Hedgepeth's case, there was also an investigation and dismissal hearing regarding her fitness as a teacher, violation of district policies, and ability to continue in the role. *See Bennett v. Metro. Gov't of Nashville & Davidson Cnty., Tennessee*, 977 F.3d 530, 544 (6th Cir. 2020) ("There is no precedent requiring further disruption to an office environment once the government confirms violations of policy and ascertained disruption."); *see also Fenico v. City of Philadelphia*, 70 F.4th 151, 168 (3d Cir. 2023) (noting deference to "employers' reasonable interpretations of employee speech and predictions of disruption" especially where an internal investigation into the conduct has occurred). The Board's judgment about Hedgepeth's compromised ability to perform her role as a teacher was not based on mere generalizations or speculation but actual concerns reflected in the comments and inquiries that the District received. All of these factors taken together constituted a reasonable basis for her dismissal. *See Craig*, 736 F.3d

at 1120 (finding the school district "reasonably predicted" that plaintiff's book would cause apprehension among female students in seeking his help as a counselor).[15]

Undisputed facts in the record show that Hedgepeth's posts caused significant disruption to the District's operations. The posts interfered with operations by diverting resources to field the concerns raised by parents, teachers, community members, and administrators; and those concerns also reasonably informed the prediction that Hedgepeth had compromised her ability to do the job. Those management interests outweighed Hedgepeth's speech interests as a matter of law under *Pickering*. Defendants did not violate plaintiff's First Amendment rights by dismissing her.

C. Qualified Immunity

Defendants also move for summary judgment on a qualified immunity defense. [53] at 14–15. Qualified immunity protects government officials who "make reasonable but mistaken judgments about open legal questions." *Ashcroft v. al-Kidd*, 563 U.S. 731, 743 (2011). Government officials are entitled to qualified immunity unless their conduct violated a constitutional right that was "clearly established" at the time. *See Tousis v. Billiot*, 84 F.4th 692, 697 (7th Cir. 2023). In the context of *Pickering* balancing where "a wide gray area between the clearly legal and the clearly

[15] Defendants also point to Hedgepeth's speech impairing her ability to maintain close working relationships with her colleagues. [53] at 12. They 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.

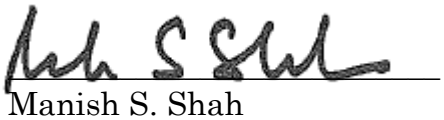
illegal" exists, an official is afforded the "the benefit of the doubt" if a case falls within the gray area. *Gustafson*, 117 F.3d at 1021.

Unlike the defendants in *Harnishfeger* or *Gustafson* who terminated an employee based on speech that neither caused actual disruption nor supported a reasonable belief about potential disruption, the undisputed record here shows that the Board's dismissal of Hedgepeth was based on evidence of actual disruption *See Harnishfeger,* 943 F.3d at 1121; *Gustafson*, 290 F.3d at 913. There may be grounds for debate over the amount of disruption caused by and the value of Hedgepeth's speech, but any mistake in the balancing would be reasonable. Hedgepeth has not demonstrated that the Board's *Pickering* analysis was plainly incompetent or a knowing violation of the law. *See Lopez v. Sheriff of Cook Cnty.*, 993 F.3d 981, 988 (7th Cir. 2021) (qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law") (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986)). The individual defendants are entitled to summary judgment based on qualified immunity.

IV. Conclusion

Plaintiff's First Amendment claim is barred by issue preclusion. In the alternative, defendants did not violate plaintiff's First Amendment rights and the individual defendants are entitled to qualified immunity. Defendants' motion for summary judgment, [52], is granted and plaintiff's cross-motion for summary judgment, [55], is denied. Enter judgment in favor of defendants and terminate civil case.

ENTER:



Manish S. Shah
United States District Judge

Date: February 20, 2024

IN THE UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF ILLINOIS

Jeanne Hedgepeth,

Plaintiff,

v.

James A. Britton, et al.,

Defendants.

Case No. 21-cv-03790

Judge Manish Shah

JUDGMENT IN A CIVIL CASE

Judgment is hereby entered (check appropriate box):

☐ in favor of plaintiff(s)
and against defendant(s)
in the amount of $,

which ☐ includes pre–judgment interest.
☐ does not include pre–judgment interest.

Post-judgment interest accrues on that amount at the rate provided by law from the date of this judgment.

Plaintiff(s) shall recover costs from defendant(s).

☒ in favor of defendants James A. Britton, Kimberly Cavill, Anna Klimkowicz, Robert J. LeFevre, Jr., Steven Rosenblum, Lisa A. Small, Edward M. Yung, Township High School District 211, and against plaintiffs Jeanne Hedgepeth.

Defendants shall recover costs from plaintiff(s).

☒ other:

This action was *(check one)*:

☐ tried by a jury with Judge Manish Shah presiding, and the jury has rendered a verdict.
☐ tried by Judge Manish Shah without a jury and the above decision was reached.
☒ decided by Judge Manish Shah on a motion.

Date: 2/20/2024

Thomas G. Bruton, Clerk of Court

/Susan McClintic , Deputy Clerk

CERTIFICATE OF RULE 30(d) COMPLIANCE

Pursuant to Circuit Rule 30(d), I, Paul J. Orfanedes, certify that all materials required by Circuit Rule 30(a) are included in Plaintiff-Appellant's Required Short Appendix.

August 28, 2024

/s/ Paul J. Orfanedes
Paul J. Orfanedes

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

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November 8, 2024

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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

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[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.

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[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.*

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[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

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[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.

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Respectfully submitted,

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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
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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:

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