IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

KATHY McCORD,

Plaintiff,

v.

SOUTH MADISON COMMUNITY SCHOOL CORPORATION,

Defendant.

No. 1:23-cv-00866-RLY-CSW

PLAINTIFF'S COMBINED REPLY IN SUPPORT OF HER MOTION FOR PARTIAL SUMMARY JUDGMENT AND RESPONSE IN OPPOSITION TO DEFENDANT'S CROSS-MOTION FOR SUMMARY JUDGMENT

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LOCAL RULE 7-1 STATEMENT OF ISSUES

1. South Madison concedes that it fired Kathy McCord because of her speech in an interview with a journalist, during which she spoke as a private citizen as a matter of public concern. Her speech is thus protected unless South Madison can carry its burden of showing that its interests in restricting her speech outweigh her interest in speaking. Has it carried that burden?

2. In late 2021, the federal government asked South Madison for information about certain policies as part of a Title IX investigation. South Madison responded by describing its directive not to notify parents, which forms part of the basis for this lawsuit. Was that directive a policy, practice, or custom under *Monell*?

3. By requiring McCord not to notify parents about changing students' names and pronouns, and by instructing other employees to do the same, it is undisputed that South Madison compelled McCord to speak a message to which she objected.

   (a) Did McCord have an official duty to hide that information from parents?

   (b) Did South Madison engage in viewpoint discrimination by threatening to punish, and in fact punishing, McCord based on her viewpoint?

4. McCord's objections to South Madison's directive arose from her sincerely held religious beliefs. Because that directive substantially burdens those beliefs, and because it is neither neutral nor generally applicable, it triggers the protections of the Free Exercise Clause and Indiana's Religious Freedom Restoration Act. Has South Madison proved that its directive satisfies both strict scrutiny and the compelling-interest test?

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INTRODUCTION

South Madison fired Kathy McCord because of her speech as a private citizen to a journalist about a matter of public concern. It never argues otherwise. Instead, it argues that the journalist then made false statements based on McCord's speech. But when South Madison fired McCord, the only details it had about McCord's *own* speech was that the journalist's statements did not accurately reflect the information she had given him. The undisputed facts now back that up. The statements cited by South Madison to fire McCord were made by the journalist, not her. Not only that, South Madison's concessions show none of them were false—certainly not in any material sense. And it is undisputed that the article was based on multiple sources and did not disrupt South Madison's operations.

As to McCord's other claims, South Madison has now conceded that it "does not contend there remain material facts in dispute precluding summary judgment for McCord." (Doc. 59, SMCSC Br. 20.) South Madison's concessions also make clear that its arguments fail as a matter of law. It told the Department of Education it had a policy of not notifying parents, so its *Monell* argument falls flat. And it is undisputed South Madison compelled McCord to speak over her objection. Yet it argues she had an official duty to hide information from parents about their own children, which can't be right. Finally, it is undisputed that McCord's direct supervisor knew about her religious objections to South Madison's directive. Because it granted a nonreligious accommodation to another employee, the directive receives strict scrutiny, a difficult test to satisfy that South Madison flunks here.

Based on South Madison's concessions, the undisputed facts entitle McCord to summary judgment. *See Cincinnati Ins. Co. v. Leighton*, 403 F.3d 879, 885 (7th Cir. 2005) ("The fact that Cincinnati had filed its own motion for summary judgment—in which it maintained that no disputed issues of material fact existed—put it on notice that summary judgment for either party was a possibility.").

MATERIAL FACTS IN DISPUTE

The undisputed facts do not entitle South Madison to summary judgment. Far from it. They now conclusively establish that McCord prevails on each of her claims.

While none of the material facts are in dispute, South Madison's factual recitations do include some assertions that are "not supported by admissible evidence." S.D. Ind. L.R. 56-1(f)(1)(B). Per Local Rule 56-1, McCord points out the evidentiary flaws below. But the Court need not rule on any evidentiary questions to grant summary judgment for McCord.

SMCSC SMF ¶¶ 10, 15. South Madison wrongly attempts to answer a legal question with fact testimony—testimony that is self-contradictory. McCord objects to relying on Superintendent Hall's testimony in an attempt to establish whether certain conduct violates Title IX. And despite Hall's testimony, it is undisputed that, consistent with Indiana law, South Madison currently notifies all parents when students request a name change, gender-related or not. (App. 7.[1]) *See* Ind. Code § 20-33-7.5-2. Finally, SMCSC ¶¶ 10 and 15 are contradictory, because ¶ 15 admits that South Madison requires "[p]arental notification and permission" for certain gender-related accommodations that it does not require for all students.

SMCSC SMF ¶ 14. South Madison's paraphrase of McCord's testimony omits the undisputed fact that she had no input about what information would go on a Gender Support Plan or "how it should be used with students." (App. 613.[2]) Indeed, despite "express[ing] [her] opinion about the parents not being involved," McCord testified: "We were pretty much told how we were going to do it." (*Id.*)

SMCSC SMF ¶ 17. Here, South Madison makes factual assertions that its own

[1] Citations designated "App." are to documents in the Appendix in Support of Plaintiff's Motion for Partial Summary Judgment. (*See* Doc. 50-1 through Doc. 50-7.)

[2] South Madison's excerpts from McCord's deposition were filed without transcript page numbers. (*See* Doc. 58-2.) For clarity, this brief will cite the excerpts included in McCord's summary-judgment Appendix where possible. (*See* App. 610–71, Doc. 50-6 at 52–113.) Otherwise, McCord is including additional excerpts in a Supplemental Appendix.

admissions don't support. It can't create a fact dispute by contradicting itself. In undisputed testimony, Kruer described how South Madison would hide information about a student's name or pronoun change from the student's parents. (Doc. 50, McCord SMF ¶¶ 18–19; *see* App. 450.)

SMCSC SMF ¶¶ 19–20. There is no factual dispute that South Madison was aware of the conflict between McCord's religious objection and the job requirement. She has long maintained she expressed her religious objections to both Taylor and Kruer. (*See* Doc. 1, Verified Compl. ¶¶ 72–77; App. 613–14; Supp. App. 41–43, 45–47, 49–51, 55.[3]) Taylor, McCord's direct supervisor, didn't dispute that he was aware of her objections or her religion. Instead, he answered different questions, testifying that he and McCord never "discuss[ed] [their] religious beliefs at work" (Doc. 58-17 at 8[4]), or that in conversations about her "reason for objecting to the parental notification procedures," she did not "mention her faith or religion" (App. 388). In fact, he and McCord attend the same church, making it unlikely he *could* disclaim awareness of her religious beliefs. (*See* Supp. App. 14, 38.)

SMCSC SMF ¶¶ 21–22. The cited evidence does not support the claim that McCord did not discuss "any objection" with other administrators. Two of the citations to her deposition establish only that she did not "ask for a religious accommodation, *using that term*." (Supp. App. 49 (emphasis added); *accord* Supp. App. 51.) Another just mentions her "religious beliefs" in general. (App. 614.) And the final one only refers to Connie Rickert. (Supp. App. 50.) Elsewhere, Hall himself testified that McCord told him "[s]he didn't think it was right." (Doc. 58-4 at 4–5.)

SMCSC SMF ¶ 23. South Madison cites no evidence here.

SMCSC SMF ¶ 34. South Madison cites no source for many of the quotations.

[3] Citations designated "Supp. App." are to the Supplemental Appendix in Support of Plaintiff's Motion for Partial Summary Judgment, filed contemporaneously with this brief.

[4] When citing the exhibits in support of South Madison's motion, this brief cites them by the ECF page number generated by the Court's filing system.

SMCSC SMF ¶ 38. South Madison points to no evidence proving McCord made all the statements in Kinnett's article. It is undisputed that the article relied on other sources, including Amanda Keegan, a South Madison teacher who "resigned in part to protest this policy," and "another counselor who wished to remain anonymous." (App. 781–82.) And South Madison's statement that "no other *Pendleton Heights* guidance counselor spoke to Kinnett" does not contradict Kinnett's article. (Doc. 59, SMCSC SMF ¶ 38 (emphasis added).) It is undisputed that counselors at schools other than Pendleton Heights also used Gender Support Plans. (Supp. App. 15–16.)

SMCSC SMF ¶ 41. South Madison cites no evidence of where Hall "made note of" the statements it identifies.

SMCSC SMF ¶¶ 43, 45–46. South Madison's own admissions don't support the assertions in these paragraphs, and South Madison can't create a fact question by citing conflicting testimony from its own witnesses. South Madison doesn't dispute that teachers were informed about the contents of Gender Support Plans and instructed to comply with them. (McCord SMF ¶¶ 49, 52–53.) And the email from McCord in Kinnett's article makes clear that counselors instructed teachers about information they should not divulge to parents. (*See* App. 777.) South Madison's cited testimony only shows that the plan document itself was not sent. (*See* Doc. 58-4 at 14; Doc. 58-8 at 6.)

SMCSC SMF ¶ 44. The undisputed facts show that South Madison has made conflicting representations about how many parents were unaware of their child's Gender Support Plan at different points in time. South Madison can't create a genuine fact dispute about the falsity of Kinnett's first statement by providing contradictory evidence to itself. Sometime after December 20, 2021, South Madison represented to the Office for Civil Rights ("OCR") with the U.S. Department of Education that 30% of requests for name and pronoun changes were granted

without parental notification. (*See* App. 786, 788–90.) The affidavit by Kruer that South Madison cites does not mention that representation—even though Kruer himself prepared the information sent to OCR. (App. 478.) In fact, none of the testimony South Madison cites addresses the contrary information it gave OCR. And multiple witnesses gave undisputed testimony that "not all parents" were notified of their child's Gender Support Plan, without limiting their testimony to a specific timeframe. (Doc. 58-7 at 5 (Superintendent Hall); *see* Supp. App. 5.)

SMCSC SMF ¶ 47. Here, South Madison selectively quotes from McCord's deposition but ignores her undisputed testimony to the School Board prior to her firing. She told the Board that she estimated how many Gender Support Plans existed based on her own experience with the students in her portion of the alphabet. (Doc. 58-8 at 41.) And she explained to the School Board that she tried to get Kinnett to clarify the wording of his first statement about the number of Gender Support Plans. (Doc. 58-14 at 4.) But it is undisputed that Kinnett did not change the wording of his first statement despite McCord's request. (*See* App. 781.)

SMCSC SMF ¶ 49. The undisputed evidence, including Hall's own testimony, shows that parents did not know Gender Support Plans existed prior to Kinnett's article and thus had no access to the plans. (McCord SMF ¶¶ 42–44.)

SMCSC SMF ¶¶ 51–53. South Madison has already admitted that "[a]t the assistant superintendent level, Kruer is in charge of the counseling department." (McCord SMF ¶ 32; *see id.* ¶¶ 29, 31–33.) And it can't retract that admission by citing a single line from McCord's complaint, which it misquotes. (*See* Verified Compl. ¶¶ 255–56.) Nor does South Madison dispute that Hall presented the Gender Support Plan to the School Board, which then allowed him to implement it. (McCord SMF ¶¶ 34–35.) That belies South Madison's assertion that there was no "Board-level policy in place" on gender-related accommodations. (SMCSC SMF ¶ 53.) And it is undisputed that McCord recalled times when Kruer and Taylor

"instructed her that South Madison required her to participate" in not notifying parents, which she "understood … to mean that the School Board had approved" that instruction. (Verified Compl. ¶¶ 258–59.)

SMCSC SMF ¶ 55. It is undisputed that South Madison required employees to change students' names and pronouns for gender-related reasons, which is a treatment for gender dysphoria. (McCord SMF ¶¶ 24, 47–53.)

SMCSC SMF ¶ 56. It is undisputed that McCord texted and emailed with Kinnett about places where she thought he could make the wording of his statements more precise. (McCord SMF ¶¶ 66–67; *see* Doc. 58-10 at 3; Doc. 58-14 at 3–5.) But it is also undisputed that Kinnett did not adopt all of McCord's proposed corrections. (McCord SMF ¶ 67.)

SMCSC SMF ¶ 59. This paragraph lacks proper evidentiary support. McCord objects to its use of Hall's testimony to establish the truth of what Kruer said to Taylor. That is hearsay within hearsay—to which no exception applies—and "cannot be presented in a form that would be admissible in evidence." Fed. R. Civ. P. 56(c)(2); *see* Fed. R. Evid. 801(c)(1), 805.

SMCSC SMF ¶ 65. This paragraph lacks evidentiary support. McCord did not testify that Kinnett's article had any "false statements."

SMCSC SMF ¶ 68. It is undisputed that counselors informed other South Madison employees of a student's name or pronoun change, and that the other employees "were expected to comply." (McCord SMF ¶¶ 49, 52.) Based on the undisputed facts, counselors compelled employees' speech.

SMCSC SMF ¶ 69. As discussed above and below, the undisputed facts show that these repeated statements are not "false." *See supra* pp. 4–5; *infra* pp. 11–15.

SMCSC SMF ¶ 76. The cited evidence doesn't support this statement. Neither cited deposition passage describes Kinnett's statements as "inaccurate," and neither supports the claim that McCord couldn't recall specifics during that meeting.

SMCSC SMF ¶ 80. This statement is not supported by the cited evidence. In the cited deposition passage, McCord doesn't mention the School Board at all. And she testified that she does not recall, among other things, whether Hall ever "ask[ed] if [she] had made any attempt to correct the inaccuracies in the article." (Supp. App. 44.) But that does not prove she never explained it.

SMCSC SMF ¶¶ 90, 96. The undisputed evidence, including the testimony cited by South Madison, does not support the characterization of McCord's testimony in these paragraphs. She in fact told the School Board that she "just d[idn't] feel that this was the right thing to be keeping this from parents." (Doc. 58-8 at 35.) And she continued to emphasize that "when parents don't know the plan exists, they don't know to ask about it." (*Id.*) The context shows McCord's concern was about hiding information from parents, regardless of whether, as a matter of "semantics," counselors were technically "lying." (*Id.*)

SMCSC SMF ¶ 91. This statement is not supported by the cited evidence. In the cited testimony, Hall asked McCord whether, "[a]fter the article came out," she "did … anything to refute those things," and McCord answered only that she "did not talk to him again." (Doc. 58-8 at 37.) All that shows is the limited nature of her communication with Kinnett after he published his article, not whether she ever "refuted" his statements.

ARGUMENT

I. The undisputed facts show South Madison retaliated against McCord because of her protected speech.

South Madison contests only one of the three elements of McCord's retaliation claim. As anticipated (*see* Doc. 50, McCord Br. 16), it doesn't contest that firing McCord was "a deprivation likely to deter" her speech. *Yahnke v. Kane Cnty.*, 823 F.3d 1066, 1070 (7th Cir. 2016). And it also doesn't dispute that it fired McCord "because of" her speech to Kinnett. *Kodish v. Oakbrook Terrace Fire Prot. Dist.*, 604

F.3d 490, 500 (7th Cir. 2010). Indeed, it disputes almost none of the facts material to causation. So McCord is entitled to summary judgment on these two elements.

South Madison argues only that McCord did not "engage[] in constitutionally protected speech." *Harnishfeger v. United States*, 943 F.3d 1105, 1112 (7th Cir. 2019). This is a legal question, not a factual one. And the undisputed facts show, as a matter of law, that McCord's speech to Kinnett was protected.

A. South Madison does not dispute causation—that but for McCord's speech to a journalist, Tony Kinnett, it would not have fired her.

South Madison forfeited its chance to dispute causation. McCord devoted much of her opening brief to applying the significant body of causation precedent to the undisputed facts in this case. (McCord Br. 27–35.) *See Ortiz v. Werner Enters., Inc.*, 834 F.3d 760, 763–66 (7th Cir. 2016) (summarizing and critiquing that precedent). Yet South Madison responds to none of that precedent, thus waiving any opportunity to respond. *Perry v. City of Indianapolis*, No. 1:11-CV-0172-RLY-TAB, 2013 WL 1750747, at *7 (S.D. Ind. Apr. 23, 2013). In fact, the only portion of South Madison's brief even arguably relevant to causation does not cite a *single* legal authority—no statutes, no cases, nothing. (*See* SMCSC Br. 33–36.) And on summary judgment no less than on appeal, "[t]he failure to cite cases in support of an argument waives the issue." *Powers v. USF Holland Inc.*, No. 3:12-CV-461 JD, 2015 WL 1455209, at *4 (N.D. Ind. Mar. 30, 2015) (quoting *Heft v. Moore*, 351 F.3d 278, 285 (7th Cir. 2003)).

Any attempt to do so would have failed, because South Madison does not dispute many of the facts that show McCord "would have kept [her] job if [s]he had" not spoken to Kinnett, "and everything else had remained the same." *Ortiz*, 834 F.3d at 764. (*See* McCord Br. 27–28 (detailing the undisputed facts that entitle McCord to summary judgment on causation).) It makes no difference that Hall briefly mentioned McCord's "First Amendment rights" in his opening statement at her

termination hearing. (Doc. 58-8 at 4; *see* SMCSC Br. 33 (citing this statement).) Indeed, "it would be rare … for a defendant to admit" a desire to violate the First Amendment. *Valentino v. Vill. of S. Chi. Heights*, 575 F.3d 664, 672 (7th Cir. 2009).

Nor does it matter that Sandefur's term as School Board president ended in the middle of South Madison's investigation of Kinnett's article. (*See* SMCSC Br. 33–34.) He was president when the article was published, and the investigation into the article began under his watch. (Doc. 58-18 at 7; Supp. App. 27–28.) Far from being "immaterial" (SMCSC Br. 34), Sandefur's concern about a "leak of information to the media" is evidence of what motivated the investigation that led to McCord's termination (App. 550–51.) It is "circumstantial evidence to show that [South Madison's] action was retaliatory." *Huff v. Buttigieg*, 42 F.4th 638, 646 (7th Cir. 2022). Combined with the other undisputed causation evidence, it entitles McCord to summary judgment.

B. Contrary to South Madison's arguments, the First Amendment protected McCord's speech to Kinnett.

As with retaliation, South Madison contests only one of the three prongs of the protected-speech standard. It does not dispute that McCord spoke to Kinnett (1) "as a private citizen," who (2) "addressed a matter of public concern." *Davis v. City of Chicago*, 889 F.3d 842, 845 (7th Cir. 2018) (quoting *Swetlik v. Crawford*, 738 F.3d 818, 825 (7th Cir. 2013)). (*See* McCord Br. 17–19 (arguing that she satisfied these two prongs with no response from South Madison).) So "the court needs to engage in *Pickering* balancing." *Harnishfeger*, 943 F.3d at 1113 (citing *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968)). Under *Pickering*, the undisputed facts also establish (3) that McCord's interest in speaking outweighed South Madison's interest in restricting her speech. *Davis*, 889 F.3d at 845. Based on those undisputed facts, the Court should grant McCord summary judgment. (*See* McCord Br. 19–26.)

1. Kinnett's statements cannot neutralize McCord's First Amendment protections.

For starters, South Madison still has not identified which statements *by McCord* it "reasonably believe[d] to be false." *Swetlik*, 738 F.3d at 825. As elsewhere, South Madison cites five statements by Kinnett, not McCord, without specifying precisely what false information it believes McCord gave him. (*See* SMCSC Br. 26–32, 36–38.)

South Madison itself acknowledges "it was Kinnett, rather than McCord, who made the statements at issue." (SMCSC Br. 32.) It nonetheless argues that McCord failed to fulfill something like a duty to "correct" or "publicly refute[]" Kinnett's article. (*Id.* 27–28.) But South Madison cites no authority that a public employee loses free-speech protections for failing to correct a journalist's allegedly false statements—ones based to an unknown extent upon information from multiple sources, no less. This is enough to grant summary judgment to McCord.

That failure to cite relevant legal authority masks a more fundamental problem. South Madison can't square its argument with the constitutional mens rea. It must show more than speech by McCord that "was factually inaccurate or that [s]he was somehow negligent in figuring out the accurate facts." *Sizelove v. Madison-Grant United Sch. Corp.*, 597 F. Supp. 3d 1246, 1272 (S.D. Ind. 2022). It must show that McCord herself made statements she knew at the time were "false," or that she made them in "reckless disregard of the truth." *Kodish*, 604 F.3d at 504. An alleged failure to correct Kinnett's statements, as a matter of law, can't meet that standard.

To argue that McCord "serv[ed] as Kinnett's source" or "provide[d] the information" (SMCSC Br. 32), South Madison ignores the undisputed evidence that Kinnett relied on multiple sources apart from McCord, including at least one other "counselor who wished to remain anonymous" (App. 782). And it also ignores McCord's testimony to the School Board that "there w[ere] a few things that weren't accurate" in Kinnett's representation of his conversation with her or that he "took

some liberty" with her statements. (Doc. 58-8 at 39.) In particular, she detailed to the School Board the factual basis for the estimated number of Gender Support Plans she told Kinnett. (*Id.* at 41.) South Madison never explains how these attempts to *improve* the accuracy of Kinnett's article prove any knowing or reckless falsehood by McCord. *See Trinidad v. Sch. City of E. Chi.*, No. 2:19-CV-90, 2021 WL 534802, at *7 (N.D. Ind. Feb. 12, 2021) (refusing to grant summary judgment under *Pickering* because plaintiff had a factual basis for allegedly false statement).

Finally, the transcript of the termination hearing shows that the School Board never bothered to ask McCord to "identify any specific statements for which she thought Kinnett inaccurately cited her." (SMCSC Br. 38.) Because of that, it would have been unreasonable for South Madison to determine based on Kinnett's article that McCord even said anything "factually inaccurate," not to mention anything she "in fact knew, or was recklessly indifferent to the fact, that" it was false. *Sizelove*, 597 F. Supp. 3d at 1272. Because South Madison failed to provide any facts at all to show that McCord made any specific statements, never mind false ones, there are no disputed facts here and summary judgment should be granted to McCord.

2. South Madison could not have reasonably found that McCord made any statements that were reckless or knowingly false.

Instead of providing evidence of McCord's *own* statements, South Madison relies on "an audio recording and several email and text exchanges." (SMCSC Br. 32.) But those items were not before the School Board, so they couldn't have formed the basis for McCord's termination. (SMCSC SMF ¶¶ 81, 86; *see generally* Doc. 58-8 (transcript of Board hearing).) And in any event, those items don't establish that McCord made any recklessly or knowingly false statements. To the contrary, McCord's deposition testimony and those documents identify places where she disagreed with Kinett's "wording" and asked him to revise it. (App. 654; *accord* App. 651; *see* Doc. 58-14 at 3–5 (email exchange with Kinnett).)

Because South Madison has no evidence of McCord's speech, the Court need not rule on whether Kinnett's statements were true or false. As a matter of law, his statements can't transform her protected speech into unprotected speech. But if the Court reaches the question whether Kinnett made a false statement, the undisputed evidence proves he did not. South Madison's contrary arguments largely echo points McCord has already refuted. (*See* McCord Br. 22–26.)

(i) First Statement.—The undisputed facts show that this statement is substantially true. South Madison persists in claiming Kinnett falsely said that Gender Support Plans "have been sent to teachers," because the plan document itself was not generally sent to teachers. (SMCSC Br. 27.) But it admits "counselors would inform relevant staff of the student's accommodations and whether the student's parents were aware or supportive." (SMCSC SMF ¶ 13.) It also doesn't dispute that the information given to teachers included the contents of Gender Support Plans, nor that teachers were instructed to comply—including instructions not to notify parents. (McCord SMF ¶¶ 49, 52–53.) Given those admissions, South Madison could not have reasonably found a material falsehood here.

Attempting to contradict Kinnett's reference to the number of plans, South Madison points to Taylor's testimony at the Board's March 2023 termination hearing and a January 2025 affidavit by Kruer. (*See* SMCSC Br. 27 (citing Doc. 58-8 at 23, and Doc. 58-15 ¶¶ 8–9); *id.* at 37 (citing Doc. 58-8 at 21).) But Taylor did not testify about all the Gender Support Plans in South Madison schools. He expressly limited his testimony to students in his "third of the alphabet." (Doc. 58-8 at 26; *see id.* at 23 (testifying only about his students—not all students with Gender Support Plans); App. 314 (disclaiming knowledge of "all the gender support plans").)

Additionally, neither Taylor nor Kruer addressed the undisputed evidence that, at some point after December 20, 2021, South Madison told the Department of Education's OCR that it did not contact parents about name or pronoun changes

30% of the time. (McCord SMF ¶ 54; *see* App. 786, 788–90.) Kruer himself submitted that information to the OCR. (App. 478.) Yet South Madison "fails to explain [the] conflict" between Kruer's representations to the federal government and the information in his "subsequent affidavit." *State Farm Fire & Cas. Co. v. Nokes*, 776 F. Supp. 2d 845, 855 (N.D. Ind. 2011). Just like a deponent trying to change his testimony by affidavit, Kruer's "contradictory affidavit may not create a genuine issue of material fact" about his prior representations to the federal government. *Id.*

Finally, South Madison also cites testimony by McCord that it claims proves "she knew the statement was false." (SMCSC Br. 37.) But in the very same transcript passage, McCord explains to the School Board why she believed the factual basis for the information she gave to Kinnett was true and that Kinnett had misconstrued the information she gave him. (Doc. 58-8 at 41.) Because the undisputed evidence shows she estimated the number of Gender Support Plans in "'good-faith,'" whether she "lacked all of the pertinent information" to make that estimate is beside the point. *Sizelove*, 597 F. Supp. 3d at 1272–73 (quoting *Pickering*, 391 U.S. at 582 (appendix to Court's opinion analyzing school board's rationale for firing the plaintiff)); *see Trinidad*, 2021 WL 534802, at *7 (refusing to grant summary judgment where allegedly false statement had factual basis).

(b) Second Statement.—The undisputed facts show that parents generally did not "ha[ve] access to their students' Gender Support Plans" (SMCSC Br. 28), because they didn't know the plans existed. South Madison doesn't dispute that, prior to the events resulting in this lawsuit, it never provided any public notice about its use of Gender Support Plans nor its directive not to notify parents. (McCord SMF ¶¶ 42–44.) Sure, a "parent *could* request information and documentation about their student's gender-related request." (SMCSC Br. 28 (emphasis added).) But as Hall testified, parents wouldn't "know whether or not to contact the school" to make that request, because there wasn't "anything that would notify

them to do that." (McCord SMF ¶ 44.) The testimony by Kruer and McCord that South Madison cites doesn't contradict Hall's testimony. (*See* SMCSC Br. 28.)

(c) Third Statement.—South Madison's admissions contradict its attempt to show falsity here. Kinnett described Kruer as "the assistant superintendent in charge of the counseling department." (App. 782.) And South Madison doesn't dispute this fact: "At the assistant superintendent level, Kruer is in charge of the counseling department at Pendleton Heights." (McCord SMF ¶ 32; *see id.* ¶¶ 28–29, 31–33 (describing Kruer's oversight).)

Similarly, South Madison quibbles with Kinnett's description of the Gender Support Plan and related practices as "board-approved" while not raising any factual dispute on the point. (*See* SMCSC Br. 28–29.) It doesn't dispute that Hall presented the plan to the Board, which permitted him to implement it. (McCord SMF ¶¶ 34–35.) Those undisputed facts prove the Gender Support Plan was "board-approved." And South Madison cites nothing to the contrary.

Finally, South Madison doesn't dispute that "McCord understood that the School Board was 'supportive of the development of' the Gender Support Plan and was 'behind it.'" (*Id.* ¶ 36.) That leaves no room for a reasonable finding that she knowingly or reckless made false statements about the Board's involvement.

(d) Fourth Statement.—Again, South Madison's admissions leave no room to dispute Kinnett's fourth statement. It does not dispute this key statement: "By changing students' names and pronouns for gender-related reasons, South Madison engages in a practice called 'social transition,' which 'is a powerful intervention' that 'strongly predisposes the child and family to desire and receive puberty blockers, cross-sex hormones and surgical interventions.'" (*Id.* ¶ 24.) It also failed to dispute that it required employees to change students' names and pronouns for gender-related reasons. (*Id.* ¶¶ 47–54.) Those facts show South Madison required employees to engage in "social transition," a gender-dysphoria treatment.

South Madison offers no evidence to support its implication that Kinnett intended the word "policy" to specifically mean a "written" document that appears in South Madison's Policy Manual. (*See* SMCSC Br. 30–31.) Kinnett never claimed that it was. And it cites no precedent for withdrawing First Amendment protection, because McCord "knowingly allow[ed] Kinnett to attribute" a statement to her. (*Id.* at 31.) That is not the standard. *See Kodish*, 604 F.3d at 504.

(e) Fifth Statement.—South Madison argues with Kinnett's word choice here, but the undisputed facts don't support its argument for the falsity of Kinnett's statement. As an initial matter, it is undisputed that McCord did not make any statements to Kinnett for his second article, which contains this fifth statement. (McCord SMF ¶ 75.) And though South Madison claims (with no citation to the record) that McCord "did not deny making Statement (5) during her hearing with the Board" (SMCSC Br. 31), that glosses over her hearing testimony that she "did not talk to [Kinnett] again" after his first article came out (Doc. 58-8 at 37).

More to the point, South Madison doesn't dispute the evidence establishing that counselors instructed teachers about changing a student's name or pronouns, and that teachers were then expected to comply. (McCord SMF ¶¶ 47–53.) Perhaps South Madison thinks a term other than "compel" is more precise. But it is undisputed that South Madison required teachers to comply with counselors' instructions on gender-related accommodations.

* * *

Based on the undisputed facts, as a matter of law, South Madison cannot carry its "burden to establish that [McCord] knew or was recklessly indifferent to the fact that [her] speech was false." *Sizelove*, 597 F. Supp. 3d at 1270.

3. McCord's interest in speaking outweighed South Madison's interest in restricting her speech.

To withdraw First Amendment protection from McCord's speech to Kinnett, South Madison "has the burden of showing" that its interest "'in promoting the efficiency of the public services it performs through its employees'" outweighs McCord's interest, "'as a citizen, in commenting upon matters of public concern.'" *Harnishfeger*, 943 F.3d at 1115 (quoting *Pickering*, 391 U.S. at 568). South Madison suggests that it faces a lighter burden because McCord spoke about "sensitive political topics." (SMCSC Br. 40.) But that gets the law backwards. Because McCord's speech "more substantially involved matters of public concern," South Madison must make an even "stronger showing." *Connick v. Myers*, 461 U.S. 138, 152 (1983). The undisputed facts show South Madison cannot carry that burden.

South Madison divides its argument to the contrary into five sections that purport to walk through the seven "*Pickering* factors." (SMCSC Br. 38–41.) But the Court "need not address each factor." *Harnishfeger*, 943 F.3d at 1115. South Madison makes really just two *Pickering* arguments: first, that "Kinnett's article caused disharmony and disruption within the School" (SMCSC Br. 39); and second, that McCord's role as a school counselor somehow reduced the constitutional protection of her speech (*id.* at 32–33, 40–41).

First, South Madison repeats its error of focusing on the effects of *Kinnett's* statements—not McCord's. As South Madison has failed to prove the speech was McCord's, or rebut that it was not, that should result in summary judgment being granted to McCord. Bracketing that repeated error, South Madison's summary-judgment brief is the first time it has ever claimed that Kinnett's article caused any disruption of its "educational atmosphere." *Dishnow v. Sch. Dist. of Rib Lake*, 77 F.3d 194, 197 (7th Cir. 1996). In its Findings of Fact, the School Board did not mention any disruption. (*See* App. 878–84.) And that "absence of any evidence that

[the School Board] considered [McCord's] speech potentially disruptive is particularly telling." *Gustafson v. Jones*, 290 F.3d 895, 911 (7th Cir. 2002). This purported "justification for interfering with First Amendment rights" has all the hallmarks of one "invented *post hoc* in response to litigation." *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 543 n.8 (2022) (cleaned up).

In addition, it is undisputed that even Kinnett's article caused nothing more than a "negative reaction." (*See* McCord SMF ¶¶ 68–74.) And none of the cited deposition testimony (SMCSC Br. 39) proves anything more than "a general claim of disharmony." *Gazarkiewicz v. Town of Kingsford Heights*, 359 F.3d 933, 945 (7th Cir. 2004). These "vague references," which "refer only generally to [an] ongoing concern about a detrimental effect on culture and morale … have been explicitly rejected as insufficient" under *Pickering*. *Sizelove*, 597 F. Supp. 3d at 1275. They can't carry South Madison's burden to show that the speech was "inimical to the maintenance of a proper educational atmosphere." *Dishnow*, 77 F.3d at 197.

Second, South Madison purports to make a series of arguments under the remaining six *Pickering* factors. But all six boil down to variations of a single claim: that McCord's job as a high school counselor reduces the level of protection her speech receives. It claims her status as an "insider" in a position of "trust" means the factor weighs against her. (SMCSC Br. 40–41.) It makes this same argument elsewhere in its brief without mentioning the *Pickering* factors. (*Id.* at 32–33.)

In most places, South Madison argues this point without citing any cases. (*See id.* at 40–41.) Where it does, it cites only *Pickering* and *Garcetti v. Ceballos*, 547 U.S. 410 (2006). But neither supports the proposition that school counselors' speech receives uniquely limited First Amendment protection. (SMCSC Br. 32–33.) And it isn't disputed that McCord had no "official dut[y]" to speak to Kinnett. *Garcetti*, 547 U.S. at 421; *see supra* p. 9. (*See also* McCord SMF ¶¶ 3, 62–74.)

Underneath the shallow legal analysis, South Madison's *Pickering* arguments lack any evidentiary basis. For the fourth, fifth, sixth, and seventh factors, South Madison's brief does not cite a single piece of evidence—only a handful of unsupported factual assertions. (SMCSC Br. 40–41.) But even those assertions establish merely that McCord was "a school employee." (*Id.* at 40.) If that's all it took for a school to satisfy *Pickering*, then it would no longer be true "that the First Amendment's protections extend to 'teachers.'" *Kennedy*, 597 U.S. at 527 (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969)).

As for the second and third *Pickering* factors, South Madison cites exactly one piece of deposition testimony that comes nowhere close to proving that McCord breached "her ethical duty of confidentiality" to South Madison students. (SMCSC Br. 40.) After describing students' concerns, Taylor summed them up as "tension amongst students towards the counseling office." (Doc. 58-17 at 10.) "Such vague references" to a "negative impact or damage to the workplace" can't carry South Madison's *Pickering* burden. *Sizelove*, 597 F. Supp. 3d at 1275.

4. Nothing about South Madison's investigation insulates its decision to fire McCord from First Amendment scrutiny.

The undisputed facts already discussed suffice to show that McCord's speech was protected and that South Madison fired her because of that speech—particularly because it identifies no statement made by her, only statements by Kinnett. Yet it argues that, because of its "nearly three-hour private conference" prior to firing her, McCord's otherwise protected speech somehow transforms into unprotected speech. (SMCSC Br. 36.) It cites very little of what was said during that hearing. (*See id.* at 37.) And McCord has already explained why, based on that, the School Board could *not* have "reasonably determined that McCord's statements to Kinnett were false." (*Id.*) *See supra* pp. 11–15.

South Madison has failed, as a matter of law, to establish a reasonable basis for its findings. Absent that, neither case cited by South Madison prevents the Court from considering "[w]hether [McCord's] speech is constitutionally protected," which "is a question of law." *Harnishfeger*, 943 F.3d at 1113. Take *Waters v. Churchill*, 511 U.S. 661, 677–680 (1994) (plurality op.). It expressly limited courts' "deference" to employers' decisionmaking, saying: "we do not believe that the court must apply the *Connick* test only to the facts as the employer thought them to be." *Id.* at 677. Nothing in *Waters* suggests that South Madison's brief, internal investigation can turn a legal question (Was McCord's speech protected?) into a factual one.

Regarding *Swetlik*, the investigation there bears no resemblance to South Madison's investigation here. In that case, a city "hired an *outside* investigator"—a private law firm—to investigate the plaintiff's statements accusing the police chief of misconduct. 738 F.3d at 822 (emphasis added). "Over the next year, the law firm conducted more than 80 interviews," including three interviews with the plaintiff. *Id.* at 823. It then recommended that the city council bring termination charges against both the plaintiff and the police chief, although the charges against the plaintiff were ultimately dismissed. *Id.* Rejecting the plaintiff's retaliation claim based on those dismissed charges, the court contrasted the long-running outside investigation performed with the plaintiff's evidence, which focused on the fact that two aldermen disagreed with the decision to bring charges against him. *Id.* at 829.

The same problems McCord already identified with South Madison's investigation also distinguish it from *Swetlik*. (McCord Br. 33–35.) The in-depth, independent investigation in *Swetlik* demonstrated that the city council did not take action against that plaintiff because of his speech. The investigators there were not motivated by the plaintiff's speech. *Swetlik*, 738 F.3d at 828–29.

Unlike *Swetlik*, it is undisputed that the investigation into McCord's statements was internal and led by Hall. (McCord SMF ¶ 78.) More important, the evidence

shows that Hall's investigation, his recommendation to fire McCord, and the School Board's ultimate decision occurred precisely *because of* McCord's speech to Kinnett. (App. 255 (Hall's testimony about start of investigation); McCord SMF ¶ 110; App. 878–85 (Board decision citing McCord's speech).) In fact, South Madison concedes that it fired McCord because of her speech. An investigation—particularly one like the investigation by South Madison—can't undo that concession.

Because of this internally inconsistent and incomplete evidence, South Madison's investigation into McCord's statements was not "adequate." *Swetlik*, 738 F.3d at 825. It can't turn McCord's protected speech into unprotected speech.

II. South Madison told the Department of Education that its directive was a policy, leaving no room for it to escape liability under *Monell*.

South Madison argues that, under *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658 (1978), McCord should have sued someone else in her three "remaining section 1983 claims." (SMCSC Br. 42.) It does not make this argument regarding McCord's claims for retaliation and violations of Indiana's Religious Freedom Restoration Act. And this argument fails regarding those other claims. South Madison's directive not to notify parents arose from South Madison's official policy, its widespread practice, or policy made by Superintendent Hall based on the School Board's authority.

First, the undisputed evidence shows the directive was an official policy. As part of a Title IX investigation, South Madison represented to the federal government that it had a policy of directing employees to change students' names and pronouns for gender-related reasons without parental notification or consent. (*See* App. 788–90 (OCR request for information about policies); App. 806–08 (excerpt of South Madison's response).) In December 2021, OCR wrote to announce that it had opened a Title IX investigation of South Madison. (*See* McCord SMF ¶ 54 (discussing App. 788–90, a Dec. 2021 letter from OCR, and App. 786, South Madison's response).) OCR requested, among other information, South Madison's "policies and procedures

related to using students' chosen names rather than the name on their official School record," expressly including "policies and procedures related to contacting parents." (App. 789.) And South Madison responded by detailing its districtwide implementation and enforcement of the directive not to notify parents about name and pronoun changes. (*See* McCord SMF ¶ 38; App. 806–08.)

The same directive that South Madison described as its policy to OCR "caused the constitutional deprivation[s]" claimed by McCord. *Glisson v. Ind. Dep't of Corrs.*, 849 F.3d 372, 379 (7th Cir. 2017) (en banc). For *Monell* purposes, "[i]t does not matter if the policy was duly enacted or written down." *Id.* And it "need not have received formal approval through official decisionmaking channels." *Bridges v. Dart*, 950 F.3d 476, 479 (7th Cir. 2020). In light of that evidence—none of which South Madison disputes—it can't now claim that "South Madison did not have a Board-level policy for gender-related accommodations." (SMCSC Br. 42.)

Second, as described to OCR, South Madison's directive was "a widespread practice constituting custom or usage that caused" McCord's constitutional injuries. *Kujawski v. Bd. of Comm'rs of Bartholomew Cnty.*, 183 F.3d 734, 737 (7th Cir. 1999). It told OCR that it trained employees at all levels on the directive and that it required those employees to comply. (*See* McCord SMF ¶¶ 47–53 (describing South Madison's trainings and requirements); App. 806–07 (reproducing portion of South Madison's communications with OCR).) Those facts provide at least "some evidence demonstrating that there is a policy at issue rather than a random event or even a short series of random events." *Estate of Warner ex rel. Norton v. Wellpath*, No. 1:19-CV-00774-RLY-MJD, 2021 WL 12310133, at *14 (S.D. Ind. Sept. 30, 2021) (quoting *Bridges*, 950 F.3d at 479), *ruling on unrelated claim modified on motion to reconsider*, 2022 WL 22881760 (May 4, 2022). And that suffices to show that South Madison's directive "constituted a widespread practice" and defeats its *Monell* arguments. *Id.*

Third, South Madison is also liable for an administrator's decisions if it "delegated" policymaking authority to him, "either expressly or in practice," *Wiseman v. City of Mich. City*, 966 F. Supp. 2d 790, 798 (N.D. Ind. 2012), or if it "adopt[ed] [his] action as its own (what is called 'ratification')," *Gernetzke v. Kenosha Unified Sch. Dist. No. 1*, 274 F.3d 464, 469 (7th Cir. 2001).

The undisputed facts prove delegation and ratification. Hall issued a district-wide directive to stop informing parents of name or pronoun changes. (McCord SMF ¶¶ 7–24.) Then, South Madison designed new processes and paperwork to implement that directive. (*Id.* ¶¶ 25–29.) After Hall explained his directive and its implementation to the School Board, it approved his actions. (*Id.* ¶¶ 34–35.) Then South Madison trained employees to comply. (*Id.* ¶¶ 47–53.) And Taylor, Kruer, and Rickert all treated Hall's directive as South Madison policy. (*See* Doc. 58-17 at 6 (Taylor calling it a "direction we were given"); App. 335–38 (Taylor giving additional detail on directive); App. 407–08, 462 (Kruer describing how directive was mandatory); Supp. App. 105 (Kruer describing directive as a decision that was made "as a school"); Supp. App. 57–60 (Rickert describing how "guidance increased" from the central office about gender accommodations).)

South Madison's only response is that, in general, Indiana law vests the Board with final policymaking authority. (*See* SMCSC Br. 42–43.) But in *Harless ex rel. Harless v. Darr*, the court relied on a repealed statute that limited principals' ability to adopt disciplinary rules. 937 F. Supp. 1339, 1349 (S.D. Ind. 1996). And *Herndon v. South Bend School Corp.* relied on *Harless* with no discussion of how that statute's repeal would change the analysis. No. 3:15-CV-587, 2016 WL 3654501, at *1 (N.D. Ind. July 8, 2016). More fundamentally, neither decision supports the proposition that Indiana school superintendents are *never* final policymakers. The Seventh Circuit has already treated an Indiana superintendent (and in other States) as "an authorized policymaker" in some cases. *Mazanec v. N. Judson-San*

Pierre Sch. Corp., 798 F.2d 230, 235 (7th Cir. 1986); *see, e.g.*, *Gschwind v. Heiden*, 692 F.3d 844, 847–48 (7th Cir. 2012) (same, Illinois).

There is no blanket rule that superintendents can't make policy. And the facts show South Madison treated Hall's directive as one. Its *Monell* arguments thus fail.

III. The undisputed facts show that South Madison compelled McCord's speech and discriminated against her viewpoint.

A. McCord's official duties did not include failing to notify parents.

Even as a public employee, McCord retained "the right to refrain from speaking," including not "to proselytize religious, political, and ideological causes." *Wooley v. Maynard*, 430 U.S. 705, 714 (1977). South Madison violated that right here.

As an initial matter, it cites no evidence to support its arguments in this section of its brief. (*See* SMCSC Br. 44–46 (citing complaint paragraphs supporting McCord's free-speech claims but nothing else).) Because South Madison doesn't "cit[e] to particular parts of the evidentiary record," the Court can deny this portion of South Madison's motion for summary judgment without considering it further. *Cherry v. Travelers Prop. Cas. Co.*, No. 1:12-CV-982-RLY-TAB, 2014 WL 11515870, at *1 (S.D. Ind. Feb. 18, 2014).

If South Madison had cited evidence, it still could not prevail. The undisputed facts show it compelled McCord "to mouth support for views [she] find[s] objectionable." *Janus v. Am. Fed'n of State, Cnty., & Mun. Emps.*, 585 U.S. 878, 892 (2018). South Madison directed McCord not to notify parents or seek their consent before using different names or pronouns to refer to students. (McCord SMF ¶¶ 12–24.) And it expected McCord and the other counselors to inform employees not to notify parents of South Madison's use of different names or pronouns for a student. (McCord SMF ¶¶ 49–54.) That expectation required McCord to communicate to other employees this message: "Parents aren't supportive of this so be careful when you call home … ." (Supp. App. 49.) She "didn't want to have to send another letter

that said" that, "because [she] felt like that was lying." (*Id.*; *see* Supp. App. 47–48.) Thus it is undisputed that McCord objected to speaking in support of South Madison's message. (*See* Verified Compl. ¶¶ 315, 318, 324–25.) South Madison compelled her to speak, her objections notwithstanding.

South Madison responds only by arguing that the Constitution *allowed* it to compel McCord's speech here, because "all of this occurred within the course and scope of her employment." (SMCSC Br. 44.) *See generally Garcetti*, 547 U.S. 410.

The undisputed facts show, as a matter of law, that *Garcetti* doesn't apply. South Madison "may not compel its employees to [speak] in a way that intentionally abridges parental constitutional rights or in a manner that is unlawful." *Mirabelli v. Olson*, No. 3:23-CV-0768, 2025 WL 42507, at *9 (S.D. Cal. Jan. 7, 2025); *see Janus*, 585 U.S. at 908 ("[I]f the speech in question is part of an employee's official duties, the employer may insist that the employee deliver any *lawful* message." (emphasis added)). Yet South Madison did exactly that by compelling McCord not to notify parents of important information about their own children. (*See* McCord SMF ¶¶ 12–24, 49–54.) Like school employees in other cases, McCord "felt like that was lying." (Supp. App. 49.) Such speech interferes with parents' "constitutional right to be accurately informed by public school teachers about their student's gender incongruity" and other "matter[s] of health." *Mirabelli*, 2025 WL 42507, at *10. *Garcetti* does not permit South Madison to order McCord to speak "in a manner that is intentionally deceptive and unlawful." *Id.* at *9.

Along these lines, "it is clear that the First Amendment protects the right[] of a citizen … to refuse to make a statement that he believes is false." *Jackler v. Byrne*, 658 F.3d 225, 241 (2d Cir. 2011). There, a police officer claimed he was punished "for refusing to retract" a report about an excessive-force complaint "and refusing to substitute statements that were false." *Id.* at 239. Because the officer "had a strong First Amendment interest in refusing to make a report that was dishonest," the

court vacated the judgment against his retaliation claim. *Id.* at 240, 244–45. Like the officer in *Jackler*, McCord maintains "the right to reject governmental efforts to require [her] to make statements [s]he believes are false." *Id.* at 241.

Overall, South Madison interprets *Garcetti* too broadly. Other courts have concluded that *Garcetti* should not apply to compelled-speech claims. *See Geraghty v. Jackson Loc. Sch. Dist. Bd. of Educ.*, No. 5:22-CV-02237, 2024 WL 3758499, at *11 (N.D. Ohio Aug. 12, 2024); *Vlaming v. W. Point Sch. Bd.*, 895 S.E.2d 705, 741 (Va. 2023) (explaining why *Garcetti* should not apply to compelled-speech claims). And none of the cases cited by South Madison applied *Garcetti* to a compelled-speech claim like McCord's. (SMCSC Br. 44–45.) *See Graber v. Clarke*, 763 F.3d 888, 896–97 (7th Cir. 2014) (sheriff's deputy who alleged retaliation for speaking about "potential violation of the collective bargaining agreement"); *Houskins v. Sheahan*, 549 F.3d 480, 491 (7th Cir. 2008) (same, plaintiff who "attempted to speak out on matters of public concern"); *Mayer v. Monroe Cnty. Cmty. Sch. Corp.*, 474 F.3d 477, 478 (7th Cir. 2007) (same, teacher fired "because she took a political stance" during a classroom lecture). Because South Madison compelled McCord to speak over her objection, *Garcetti* does not bar her claims.

Garcetti is no barrier to McCord's claims for one more reason. The undisputed facts show it was not "part of her ordinary job duties to convey (or refuse to convey) the message" that South Madison sought to compel, a message in support of hiding information from parents. *Geraghty*, 2024 WL 3758499, at *13. It is undisputed that *informing* parents about their children, including their educational progress and mental health, was an "important part" of her job. (McCord SMF ¶¶ 1–2; *see* App. 308–09, 775.) Yet South Madison directed McCord and other counselors to instruct employees *not* to notify parents about gender-related name and pronoun changes. (McCord SMF ¶¶ 7–10, 12–24, 47–54.) South Madison does not explain how speech like that furthers—or even relates to—any of McCord's official duties.

This last point—that South Madison sought to compel McCord to speak in support of its message about not notifying parents—also shows why it is wrong to argue that "McCord was not speaking on any matter of public concern." (SMCSC Br. 46.) For one thing, when the government "demand[s] that its employees recite words with which they disagree," the Supreme Court has said it has "never applied *Pickering* in such a case." *Janus*, 585 U.S. at 908. For another, it is undisputed that South Madison sought to compel McCord's speech "about a question of political and religious significance." *303 Creative LLC v. Elenis*, 600 U.S. 570, 596 (2023). Practices like South Madison's are subject to public debate, in Indiana and elsewhere. (*See* McCord SMF ¶¶ 72–74; McCord Br. 17–19.) Because she spoke for more than "*purely* personal" reasons, McCord spoke on a matter of public concern. *Swetlik*, 738 F.3d at 827 (emphasis added).

B. South Madison threatened to discipline McCord—and followed through on that threat—because of her viewpoint.

South Madison's final argument misunderstands McCord's viewpoint-discrimination claim. (SMCSC Br. 46.) She claims both that South Madison credibly *threatened* to punish her based on her viewpoint—itself a violation—and that it in fact did punish her based on her viewpoint—an independent violation. (*See, e.g.*, Verified Compl. ¶¶ 406, 411.) *See Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 159 (2014) ("credible threat of enforcement" creates standing); *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828 (1995) (viewpoint discrimination "is presumed" unconstitutional).

South Madison knew about McCord's viewpoint, threatened to punish her because of it, and then in fact punished her after hearing testimony that detailed her viewpoint. Rose told McCord's union representative that it would be insubordination if McCord did not speak in support of South Madison's message. (Supp. App. 48; Verified Compl. ¶ 79.) Hall specifically discussed McCord's viewpoint with

her during the December 15 meeting and the February 3 private conference that led to her termination. (Doc. 58-4 at 4–5; Supp. App. 49–50.) And at the School Board's termination hearing, multiple witnesses discussed her objections to supporting South Madison's viewpoint. (*See* Doc. 58-8 at 15–16, 24, 26 (Kruer and Taylor testifying about McCord's concerns).) South Madison cites nothing to dispute this evidence. (SMCSC Br. 46.) And this undisputed evidence entitles McCord to judgment as a matter of law on her viewpoint-discrimination claim.

IV. The undisputed facts show South Madison violated McCord's constitutional and statutory free-exercise rights.

McCord objected to speaking in support of South Madison's viewpoint because of her religious beliefs. (App. 614; Supp. App. 41–43, 45–47; Verified Compl. ¶¶ 312–15, 324–25.) Given the overlapping protections of the Free Speech and Free Exercise Clauses, "the First Amendment doubly protects religious speech." *Kennedy*, 597 U.S. at 523. And Indiana's Religious Freedom Restoration Act ("RFRA") provides McCord's religious beliefs another layer of protection. Ind. Code § 34-13-9-8.

Because South Madison's directive "substantially burden[s]" McCord's religious exercise, it must satisfy RFRA's compelling-interest test. Ind. Code § 34-13-9-8. And because South Madison's directive is neither "neutral" nor "generally applicable," it must satisfy strict scrutiny. *Fulton v. City of Phila.*, 593 U.S. 522, 533 (2021). But the undisputed facts leave South Madison no hope of satisfying either test.

A. South Madison's directive not to notify parents receives heightened scrutiny under both Indiana's RFRA and the U.S. Constitution.

To trigger the compelling-interest test under Indiana's RFRA, McCord need only show that South Madison's directive "substantially burden[ed]" her "exercise of religion." Ind. Code § 34-13-9-8(a). Likewise, if that directive was *either* non-neutral *or* not generally applicable, it triggers strict constitutional scrutiny. *Fulton*, 593 U.S. at 533. The directive triggers (and fails) both tests.

1. Because the directive substantially burdens McCord's religious exercise, it triggers Indiana RFRA's "compelling interest" test.

In South Madison's discussion of RFRA, it briefly argues that it never substantially burdened McCord's religious exercise, because she objected too late, or to the wrong administrators, or used the wrong words. (SMCSC Br. 49.) This is just another way of arguing that McCord should have drawn a different line between conduct that violated and didn't violate her religion. But "it is not for [a court] to say that the line [s]he drew was an unreasonable one." *Thomas v. Rev. Bd. of Ind. Emp. Sec. Div.*, 450 U.S. 707, 715 (1981); *Blattert v. State*, 190 N.E.3d 417, 421 n.1 (Ind. Ct. App. 2022) (using federal precedent to interpret Indiana's RFRA).

In any event, South Madison admits that it required McCord to participate in changing students' names and pronouns for gender-related reasons without notifying parents. (Answer ¶¶ 77, 296; *see* McCord SMF ¶¶ 47–54; App. 614; Supp. App. 41–43.) And it is undisputed that McCord believed such participation amounted to "lying" in violation of her religious beliefs as a Christian. (Supp. App. 49; *accord* App. 614; Supp. App. 41–43, 45–49; Verified Compl. ¶¶ 324–25, 332, 420; *see* Doc. 58-17 at 6, 8 (testifying that McCord felt like South Madison's directive was "lying").) That undisputed evidence suffices to prove that South Madison substantially burdened McCord's religious exercise.

2. The directive was neither neutral nor generally applicable, which subjects it to strict scrutiny under the Constitution.

South Madison does not dispute that, under the constitutional test, it "has burdened [McCord's] sincere religious practice." *Kennedy*, 597 U.S. at 525. If it did, the same evidence just discussed would similarly prevent summary judgment for it on this ground. South Madison also repeats its *Monell* argument (SMCSC Br. 46–47), which this brief has already explained is unavailing. *See supra* pp. 20–23.

That tees up the next question: whether South Madison's directive was either not neutral or generally applicable. In recent years, the Supreme Court has issued significant guidance about this question. *See, e.g.*, *Fulton*, 593 U.S. at 533–38; *Tandon v. Newsom*, 593 U.S. 61, 62 (2021) (per curiam); *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n*, 584 U.S. 617, 638–40 (2018). But South Madison cites none of those decisions nor any lower-court decisions applying them. It focuses instead on decisions predating them by a decade or more. (SMCSC Br. 47.) Contemporary free-exercise jurisprudence leaves no doubt that the directive receives strict scrutiny.

i. South Madison was not neutral to McCord's religious beliefs.

The Free Exercise Clause "bars even 'subtle departures from neutrality' on matters of religion." *Masterpiece Cakeshop*, 584 U.S. at 638 (quoting *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534 (1993)) (cleaned up). And the undisputed evidence here proves that South Madison departed from neutrality towards McCord's religion.

To begin with, the record does not support South Madison's claim that "McCord never requested any religious accommodation." (SMCSC Br. 48.) It is undisputed that, on multiple occasions, McCord expressed her objections to South Madison's directive to Taylor, her direct supervisor. (App. 613–14; Supp. App. 41–43, 45–49.) Indeed, South Madison itself admitted that McCord expressed her objections to Taylor "approximately five times." (Answer ¶ 75.) Taylor testified that, in those conversations, McCord didn't mention religion. (*See* Doc. 58-17 at 8, 12.) But he did not disclaim awareness of McCord's beliefs. Nor could he claim that, since he and McCord attend the same church. (*See* Supp. App. 14, 38.) And South Madison itself can't disclaim knowledge of McCord's objections, because she described them during the termination hearing. (Doc. 58-8 at 40.)

The testimony South Madison cites doesn't contradict those statements. All it shows is that McCord didn't recall whether she used counsel's precise terminology. And it can't object that she failed to follow a particular accommodation procedure, because Hall admitted that it had no formal procedure for obtaining religious accommodations. (App. 213 (individual capacity); Supp. App. 32 (Fed. R. Civ. P. 30(b)(6) witness).) But South Madison cites no authority for the proposition that McCord's free-exercise claim must fail because she never uttered the particular words "religious accommodation" or another similar phrase.

McCord's direct supervisor knew about her objections, knew about her faith, and did not disclaim knowing about a connection between the two. That is all the evidence she needs. *Cf. EEOC v. Abercrombie & Fitch Stores, Inc.*, 575 U.S. 768, 772 (2015) (rejecting statutory interpretation that would require "that an employer has 'actual knowledge' of the applicant's need for an accommodation").

Employees' reactions to McCord's religious objections show that South Madison was not neutral towards her religion. Zukowski testified that she shared McCord's religious objections. (App. 174; Supp. App. 3–4, 6–7.) But she "knew that [she] had to put those aside so [she] could … put on the counselor role." (Supp. App. 4; *accord* Supp. App. 6–7.) And during a meeting with McCord, Moore, and Rose (who would soon become principal), Taylor told McCord that she needed to "set [her] values aside" or she "can't be a good counselor." (App. 652; Supp. App. 47.)

Zukowski's and Taylor's comments show that South Madison views McCord's religious beliefs as incompatible with her job as a school counselor. *See Spivack v. City of Phila.*, 109 F.4th 158, 170 (3d Cir. 2024) (discussing employer's view that it "needed to curtail religious exemptions to prevent religious objectors from 'endangering others'"). South Madison "restrict[ed]" McCord's religious "practices *because of* their religious nature," so its actions receive strict scrutiny. *Fulton*, 593 U.S. at 533 (emphasis added).

ii. South Madison's directive was not generally applicable.

The Free Exercise Clause applies strict scrutiny to South Madison's directive for another, independently sufficient reason. It was not generally applicable.

First off, evidence shows that the directive "'invite[d]' the government to consider the particular reasons for a person's conduct by providing 'a mechanism for individualized exemptions.'" *Fulton*, 593 U.S. at 533 (quoting *Emp. Div. v. Smith*, 494 U.S. 872, 884 (1990)) (cleaned up). In his individual capacity, Hall testified that there "[c]ould be" some "discretion built into" South Madison's consideration of whether to exempt an employee from using preferred names and pronouns without notifying parents. (Supp. App. 10.) Testifying as South Madison's corporate representative, he said South Madison's consideration of accommodations was "situational." (App. 582.) "It would depend on what the accommodation was" and on "the reason for the request." (App. 582–83.) Similarly, Rose testified that South Madison "would need to know exactly … why they were refusing," referring to an employee seeking an accommodation. (Supp. App. 23.)

As this undisputed testimony shows, South Madison's determination of whether to grant exemptions "require[d] a case-by-case decision." *Mirabelli v. Olson*, 691 F. Supp. 3d 1197, 1217 (S.D. Cal. 2023). This sort of "undefined *ad hoc* determination" is not generally applicable. *Id.* at 1216–17; *see Ricard v. USD 475 Geary Cnty. Sch. Bd.*, No. 5:22-CV-04015, 2022 WL 1471372, at *5 (D. Kan. May 9, 2022) (concluding policy not generally applicable because it depended on "the putative violator's intent").

South Madison's directive is not generally applicable for another reason. While South Madison "prohibit[ed]" McCord's "religious conduct" by coercing her to comply with its directive not to notify parents despite her religious objections, it was simultaneously "permitting secular conduct that undermine[d] [its] asserted interests in a similar way." *Fulton*, 593 U.S. at 534. Because it "treat[ed] … comparable secular

activity more favorably than religious exercise," its directive "trigger[s] strict scrutiny." *Tandon*, 593 U.S. at 62.

Around the same time that McCord was expressing her religious objections to complying with South Madison's directive, it is undisputed that it granted an exemption on nonreligious grounds to another employee. (*See* Verified Compl. ¶¶ 73–83, 425–27.) Connie Rickert, the former principal at Pendleton Heights High School, testified about that nonreligious exemption. (*See* Doc. 58-22 at 4; Supp. App. 61.) Curt Trout, an English teacher, told Rickert that "[h]e felt uncomfortable with" the directive "to us[e] one name in the classroom and then not us[e] that same name with the kid's parents." (Supp. App. 61.) Trout "felt like that was lying." (*Id.*) Rickert summarized her response to Trout: "I gave Curt an out that if that makes you uncomfortable, then you could find—I gave him a solution for that." (Doc. 58-22 at 4.) And Trout used Rickert's offered accommodation by finding another teacher to fill in for him at an upcoming parent meeting. (*Id.*) Rickert thought she "probably … had a conversation with [her] superiors about" granting Trout an exemption. (*Id.*)

Trout told Rickert that "[h]e felt like" complying with the directive "was lying." (Supp. App. 61.) McCord similarly told Hall that she "felt like that was lying." (Supp. App. 49.) Yet South Madison accommodated Trout's nonreligious objection, while denying a religious accommodation to McCord. (*See* Verified Compl. ¶¶ 80–83.) Based on those undisputed facts, South Madison's directive was not generally applicable. *Tandon*, 593 U.S. at 62; *see Dahl v. Bd. of Trs. of W. Mich. Univ.*, 15 F.4th 728, 733 (6th Cir. 2021) ("[W]here a state extends discretionary exemptions to a policy, it must grant exemptions for cases of 'religious hardship' or present compelling reasons not to do so." (quoting *Fulton*, 593 U.S. at 534)).

It's no answer that "McCord did not have to send out any notices to teachers after [her] meeting" with Superintendent Hall on December 15, 2022. (SMCSC Br. 48–49.) Taylor had already known about McCord's objections for months. And after

the December 15 meeting, there was no time for McCord to have sent any additional notices. Christmas break began two days later, and within two or three days of the spring semester's beginning, Hall and Rose had already informed McCord that they intended to fire her. (Verified Compl. ¶¶ 183, 197–98.) Within weeks, they put her on administrative leave. (*Id.* ¶¶ 199, 205.)

Nor does it make any difference that South Madison's directive did not require "only Christian or Muslim faculty [to] comply." (SMCSC Br. 48.) Under *Fulton*, "the *mere existence* of a discretionary mechanism to grant exemptions can be sufficient to render a policy not generally applicable." *Fellowship of Christian Athletes v. San Jose Unified Sch. Dist. Bd. of Educ.*, 82 F.4th 664, 687–88 (9th Cir. 2023) (en banc) (emphasis added). Yet "this case steps beyond the mere existence of a mechanism." *Id.* at 688. By accommodating Trout, South Madison has "exercised its discretion to grant exemptions." *Id.* And it has "done so in a viewpoint-discriminatory manner," as shown by South Madison's failure to grant a similar exemption to McCord. *Id.* That's enough to show that its directive was not generally applicable.

B. South Madison's directive was not narrowly tailored to any compelling interest.

South Madison nowhere argues that the directive would satisfy strict scrutiny under the Free Exercise Clause. But it does argue (SMCSC Br. 49) that it satisfies the Indiana RFRA's compelling-interest test, which the Indiana Court of Appeals has treated as congruent with strict scrutiny. *See Blattert*, 190 N.E.3d at 422. South Madison bears the burden of satisfying either test. *Tandon*, 593 U.S. at 62; Ind. Code § 34-13-9-8(b). It must prove the directive "advances 'interests of the highest order.'" *Fulton*, 593 U.S. at 541 (quoting *Lukumi*, 508 U.S. at 546); *see Blattert*, 190 N.E.3d at 422. And it must prove that the directive "is narrowly tailored to achieve those interests," *Fulton*, 593 U.S. at 541, or that it "is the least restrictive means of furthering that compelling governmental interest," Ind. Code § 34-13-9-8(b)(2).

South Madison claims that Title IX compliance is a "compelling" interest. (SMCSC Br. 49; *see id.* at 48 (briefly referring to Title IX).) *See* 20 U.S.C. § 1681 *et seq.* But it cites no support for its view that burdening McCord's religious exercise was "necessary for the School to comply with Title IX." (SMCSC Br. 49.) It can't rely on the filing of an OCR complaint against it, because South Madison issued its directive *before* it knew that complaint existed. (*See* Doc. 58-4 at 4; Doc. 58-9 at 4.) More fundamentally, an OCR complaint—particularly an ongoing one in which the Department of Education has made no liability determination—cannot establish the scope of Title IX's requirements.

Another federal court recently denied a school district's motion for summary judgment making a similar argument. *See Geraghty*, 2024 WL 3758499, at *15–16. And as a matter of law federal courts have concluded that similar practices *do not* comply with Title IX or other federal laws. *See, e.g.*, *Tennessee v. Cardona*, 737 F. Supp. 3d 510, 547, 556 (E.D. Ky. 2024) (preliminarily enjoining new Title IX regulations on similar grounds and collecting citations to similar decisions), *denying stay*, 603 U.S. 866 (2024), *summary judgment rendered*, No. 2:24-072-DCR, 2025 WL 63795, at *7 (E.D. Ky. Jan. 9, 2025); *Mirabelli*, 691 F. Supp. 3d at 1212 (calling such practices "foreign to federal constitutional and statutory law"); *Ricard*, 2022 WL 1471372, at *8 n.12 (suggesting such practices fail rational basis); *see also Meriwether v. Hartop*, 992 F.3d 492, 511 (6th Cir. 2021) (rejecting argument that Title IX required professor to use "preferred pronouns"); *Willey v. Sweetwater Cnty. Sch. Dist. No. 1 Bd. of Trs.*, 680 F. Supp. 3d 1250, 1283 (D. Wyo. 2023) (granting preliminary injunction on parental-rights grounds to mother who also taught in school and not evaluating her free-exercise claim); *Vlaming*, 895 S.E.2d at 745 (noting that "[n]o appellate court, federal or state," has ever adopted South Madison's reading of Title IX regarding use of preferred names and pronouns). Far from requiring South Madison's directive, Title IX and other laws likely prohibit it.

Additionally, South Madison's directive was not "the least restrictive means of" serving the Title IX compliance interest it claims. Ind. Code § 34-13-9-8; *see Tandon*, 593 U.S. at 63. It could have chosen instead to notify *all* parents, which also would have ensured that it did not "discriminate against" transgender students. (Supp. App. 33–34; *see* Supp. App. 24.) And it would have totally removed the substantial burden on McCord's religious exercise—not to mention being more respectful of parents' fundamental rights. *See Mirabelli*, 2025 WL 42507, at *10 ("[P]arents do have a constitutional right to be accurately informed by public school teachers about their student's gender incongruity that could progress to gender dysphoria, depression, or suicidal ideation, because it is a matter of health.").

Not only that, the record shows that South Madison is now notifying all parents. (*See* App. 7.) *See also* Ind. Code § 20-33-7.5-2. It offers no explanation for not adopting its current practice sooner. Because South Madison could have achieved its putative interests without burdening McCord's religion, it needed to do so. *See Fulton*, 593 U.S. at 541 ("[S]o long as the government can achieve its interests in a manner that does not burden religion, it must do so."). As a result, South Madison's directive fails strict scrutiny as a matter of law.

CONCLUSION

Based on the concessions in South Madison's brief, there are no factual disputes material to McCord's claims. And far from entitling South Madison to summary judgment, the now-undisputed facts establish that McCord prevails as a matter of law. Therefore, she asks the Court to deny South Madison summary judgment and grant it to her on each of her claims. *See Leighton*, 403 F.3d at 885.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 5, 2025, I caused the foregoing to be electronically filed with the Clerk of Court using the CM/ECF system, which will send notification of such filing to the following counsel of record:

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