No. 23-1610

In the United States Court of Appeals
FOR THE SEVENTH CIRCUIT

MARISSA DARLINGH,
PLAINTIFF-APPELLANT,

v.

ADRIA MADDALENI, THERESE FREIBERG, OPHELIA KING, and
MILWAUKEE BOARD OF SCHOOL DIRECTORS,
DEFENDANTS-APPELLEES.

On Appeal from the United States District Court for the
Eastern District of Wisconsin, the Honorable
Stephen C. Dries, Magistrate Judge, Presiding,
Case No. 22-CV-1355

BRIEF AND REQUIRED SHORT APPENDIX
OF APPELLANT MARISSA DARLINGH

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Oral Argument Requested

RULE 26.1 DISCLOSURE STATEMENT

1. The full name of every party that the attorney represents in the case.

   Marissa Darlingh

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:

   Wisconsin Institute for Law & Liberty, Inc.

3. If the party or amicus is a corporation:

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

   N/A

   (ii) List any publicly held company that owns 10% or more of the party's or amicus' stock:

   N/A

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JURISDICTIONAL STATEMENT

1. Jurisdiction of the District Court: Plaintiff filed this case on November 16, 2022. SA 1–30. The case was randomly assigned to Magistrate Judge Stephen C. Dries. All parties consented to proceed before Magistrate Dries: Plaintiff consented on December 1, 2022, Dkt. 8, and Defendants on December 1, 2022, Dkt. 9.

This case raises claims under the First and Fourteenth Amendments to the United States Constitution and 42 U.S.C. § 1983. The District Court had jurisdiction over these claims under 28 U.S.C. §§ 1331 and 1343.

2. Jurisdiction of the Court of Appeals: Plaintiff filed a motion for a preliminary injunction (Dkt. 11), and Defendants filed a motion to dismiss Plaintiff's First Amendment claim (Claim One), Dkt. 25. On March 13, 2023, the District Court issued a decision and order denying Plaintiff's preliminary injunction motion and granting Defendants' motion to dismiss Claim One. RSA 1–25. The Court of Appeals has jurisdiction over an appeal of this order pursuant to 28 U.S.C. § 1292(a)(1). *Graff v. City of Chicago*, 9 F.3d 1309, 1313 (7th Cir. 1993). Plaintiff timely filed a notice of appeal on March 29, 2023.

3. Prior Related Appeals: There have been no prior or related appellate proceedings in this case.

4. Official Capacity Defendants: Defendants Adria Maddaleni, Therese Freiberg, and Ophelia King are each sued in both their individual and official capacities. Defendants Maddaleni and King continue to occupy their offices, as of

March 29, 2023, that Plaintiff is aware. Defendant Freiberg has retired, and her office of "Director of Employment Relations" is currently filled by Larry R. Cote, Jr.

STATEMENT OF ISSUES

1. Was Darlingh's speech at a Saturday rally, on her own time, 80 miles from where she works, on an important topic, protected by the First Amendment? If so, did the District Court err by dismissing her First Amendment retaliation claim and denying her motion for a preliminary injunction?

INTRODUCTION

The Supreme Court has long recognized "that citizens do not surrender their First Amendment rights by accepting public employment." *Lane v. Franks*, 573 U.S. 228, 231 (2014). Instead, "speech by public employees on subject matter related to their employment *holds special value* precisely because those employees gain knowledge of matters of public concern" and thus are "uniquely qualified to comment on [such] matters." *Id.* at 240 (emphasis added, citation omitted). Teachers, in particular, are "the members of a community most likely to have informed and definite opinions as to [school-related issues]," so "it is essential that they be able to speak out freely on such questions without fear of retaliatory dismissal." *Pickering v. Bd. of Ed. of Twp. High Sch. Dist. 205, Will Cnty., Illinois*, 391 U.S. 563, 572 (1968).

Defendants fired Plaintiff Marissa Darlingh, a public school counselor, for a short, unscripted speech she gave in April of 2022, where she expressed her views about how certain transgender-related policies and ideologies harm children.

Darlingh delivered that speech on a Saturday, on her own time, at a rally in Madison, 80 miles from where she worked, during a "speaker's corner" on the steps of the state capitol—the epitome of what the First Amendment protects.

The District Court recognized that "debate related to gender identity education is essential and that the opinions of school guidance counselors on questions involving children and gender identity are crucial to 'informed decision-making,'" RSA 18, and that these issues are "obviously matters of public concern," RSA 15. The Court also agreed that she spoke at "the quintessential forum for airing matters of public interest." RSA 16. Still, the Court rejected her First Amendment claim on the merits by misapplying multiple *Pickering* balancing factors. Most significantly, the Court adopted Defendants' characterization of her speech as communicating that she "*would not follow* MPS policy." RSA 19 (emphasis in original). She said no such thing. In fact, she told Defendants exactly the opposite, that she *would* follow all District policies. Defendants (and the District Court) simply disregarded that. This Court should reverse the dismissal and direct the entry of a preliminary injunction.

STATEMENT OF THE CASE[1]

A. Darlingh's Employment Contract and Status

From March 4, 2021, until September 30, 2022, Plaintiff Marissa Darlingh was a school counselor, under contract, at Allen-Field Elementary School in the

[1] This brief cites primarily to the affidavits submitted in support of a preliminary injunction, although these facts are also alleged in the Complaint. Likewise, the documents referenced were attached both as exhibits to the complaint and to affidavits. Defendants did not dispute any of these facts for purposes of the preliminary injunction motion. *See* Dkt. 21.

Milwaukee Public School District. SA 31 ¶ 2. In this position, Darlingh was a "certificated" employee. SA 31 ¶ 3; SA 53. Because she completed more than one year of work as a school counselor with the District, she was considered a non-probationary employee. SA 31 ¶ 3; SA 80. Pursuant to the District's Employee Handbook, non-probationary employees can "only be disciplined or discharged for just cause." SA 61, 80. The District renewed Darlingh's contract for the 2022–2023 school year on April 14, 2022. SA 31 ¶ 4. Outside of the circumstances at issue in this case, Darlingh has never been subject to disciplinary action, formal or informal. SA 32 ¶ 6. She loves and is devoted to the students she serves; she even has a tattoo on her right hand drawn by one of her fourth graders who cannot read. SA 31 ¶ 5; SA 253.

B. Darlingh's Short Speech at a Saturday Rally at the Capitol

On April 22–24, 2022, a group of women organized an event in Madison entitled "Sisters 4 Sisters," which they described as "[a] weekend of radical feminist action, discussion, community, and solidarity."[2] The weekend included a panel of speakers at the Madison library,[3] workshops,[4] and other events. SA 32 ¶¶ 7–8. The group also hosted a rally at the State Capitol in Madison on Saturday, April 23, 2022,

[2] Sisters 4 Sisters Event Page, Facebook, https://www.facebook.com/S4S2022.

[3] https://www.youtube.com/watch?v=CvE2Na8la9s

[4] https://www.youtube.com/watch?v=Nka-ViErhoI

which was recorded and posted on YouTube.[5] The rally included a "speaker's corner," where anyone attending was invited to speak. SA 32 ¶ 9–10. Many of the speeches were short and unscripted.

A group of people counter-protested the event. *Id.* ¶ 11. During the panel of speakers at the library, the counter-protestors stood outside the library chanting "no terfs on our turf"[6] and various other things.[7] During the "speaker's corner," they attempted to shout down the women speaking.[8] *Id.* ¶ 11. Some even yelled at them, calling them "lesbian Nazis" and other things.[9] Darlingh attended this event, and recalls activists calling her a "cunt" and "lesbian Nazi" at various points. *Id.* ¶ 12. She also saw multiple activists wearing shirts that said "protect trans kids" next to an image of a knife, which she took as a threat to harm her and the women at the event, based on a long history of threats against women who share her views.[10] *Id.* ¶ 13; SA 257. All that to say, tensions and emotions were high.

Darlingh spoke briefly during the "speaker's corner." SA 32 ¶ 14. She identified herself as an elementary school counselor in the Milwaukee Public Schools, and then stated that she "oppose[s] gender ideology" in elementary schools and that young children should not be "exposed to the harms of gender identity ideology." *Supra* n. 5

[5] https://www.youtube.com/watch?v=4jB70PNoJeI

[6] The acronym "TERF" stands for "Trans-Exclusionary Radical Feminist."

[7] *See* https://www.youtube.com/watch?v=g-tHgmf_-II at 0:00–0:35.

[8] *Supra* n. 5 at 14:11–14:45.

[9] https://www.youtube.com/shorts/zAYgkmVBxbY

[10] For hundreds of examples, *see* https://terfisaslur.com/

at 12:35–14:12. She said that she does not support and would not encourage the social or medical gender transition of children because she "exist[s] in this world to serve children" and "to protect children." *Id.* She also criticized those "who want children to have unfettered access to hormones—wrong-sex hormones—and surgery." *Id.* In the passion of the moment, Darlingh used the word "fuck" multiple times during her short, unscripted speech, and at one point said, "fuck transgenderism," referring to the "gender identity ideology" that she believes is harmful to children.[11] *Id.*

As Darlingh later learned, the group counter-protesting at this event immediately organized a campaign to get her fired from her job at the Milwaukee Public Schools, which ultimately succeeded.

C. DPI Investigation

Less than a week later, on April 29, 2022, Darlingh received a letter from the Wisconsin Department of Public Instruction (DPI) indicating it had "opened an investigation to determine whether to initiate educator license revocation

[11] Her full speech can be viewed at the video linked in footnote 5, from 12:35–14:12. A transcript of the most relevant portion is as follows:

> I didn't plan on speaking and I've been screaming a lot but my name is Marissa Darlingh, I am an elementary school counselor in Milwaukee Public Schools. And I oppose gender ideology ever entering the walls of my school building. On my dead fucking body will my students be exposed to the harms of gender identity ideology. Not a single one of my students under my fucking watch will ever ever transition socially and sure as hell not medically. Absolutely not. I exist in this world to serve children. I exist to protect children. I feel like I'm disassociating right now because this is very intense very intense. I think someone else is speaking through me right now, but fuck transgenderism. Fuck it. Fuck transgenderism. Fuck these people behind us who want children to have unfettered access to hormones, wrong-sex hormones, and surgery. [Interruption by protestors].

proceedings against [her]" for "immoral conduct." SA 32–33 ¶ 15; SA 104. The only "immoral conduct" DPI identified was Darlingh's short speech at the Capitol on April 23. SA 104–107. Darlingh was given 30 days to respond. DPI attempted to use the threat of an investigation to scare Darlingh into surrendering her educator license, and, in turn, her livelihood. The letter offered the "option to voluntarily surrender [her] license and bring the DPI's investigation of this matter to a close," and DPI attached an "Agreement to Surrender License" for her to sign and return. *Id*. When DPI initiates such an investigation, it notes on the "License Lookup" feature of its public website that the teacher is "Under Investigation."[12] Darlingh's license is listed with that status to this day.

On May 25, 2022, Darlingh sent DPI a response letter, declining the "offer" to surrender her license, and explaining that DPI's investigation and threat to suspend her license based on her public speech violated her First Amendment rights. SA 33 ¶ 17. In light of the harm to her reputation and serious risk to her livelihood, Darlingh chose to defend herself publicly and publicized her response to DPI. SA 33 ¶ 18. DPI's investigation of Darlingh generated interest from the media, including Fox News and the Milwaukee Journal Sentinel. *Id*. ¶ 19. Since her response on May 25, 2022, and as far as she is aware, DPI has taken no further action to revoke her license. *Id*. ¶ 20.

[12] Wisconsin Department of Public Instruction, Educator License Lookup, https://elo.wieducatorlicensing.org/datamart/licenseDetails.do?xentId=870025.

D. Defendants Terminate Darlingh for Her Speech

1. April 26 – June 2

Defendant Ophelia King, Darlingh's supervisor, also began investigating Darlingh on April 26, right after the event at the capitol, in response to a campaign by a few counter-protesters at the event to get Darlingh fired from her job. SA 120.

Shortly after the event, approximately nine individuals sent emails to various District staff calling for Darlingh to be fired for her speech. SA 126–50. Three of the emails are identical to one another, word-for-word, and the rest all follow the same basic structure. SA 130–31, 133–34, 138–39. One of the emails even describes who coordinated this campaign and how:

> "This was sent to me by a friend in Madison. She is part of a group who was counter protesting [at the April 23 event]. … She and some other folks in Madison are attempting to shed light on this situation and those involved. One happens to be an elementary guidance counselor at MPS. She asked that people … call, write, etc. to people at the school."

SA 146. None of the people who sent these emails are students in the District, parents of students, staff in the District, or have any interaction with Darlingh at her job or knowledge of how she performs her job. SA 126–50.

As a part of her investigation in response to these emails, Defendant King interviewed four students at the school where Darlingh worked. SA 124. One of the four described Darlingh as one of her "favorite staff." The student stated that Darlingh "helps them with their problems whenever they want to hurt somebody, and listen[s] to how my recess went." *Id*. Another of the four students also said Darlingh was one of "their favorite teachers." This student "explained that when they are mad,

frustrated, or sad Ms. Marissa would pick them up. 'I talk to Ms. Marissa about how I feel, she is my check-in and check-out person and I am working on being respectful to other students.'" *Id*. The only "criticism" of Darlingh from these student interviews was that she enforces the rules during "circle time." *Id*.

Between April and early June, Darlingh continued to do her job without incident. SA 33 ¶ 21. In mid-May, during a counseling lesson called "Emotional Bank Accounts," Darlingh's students wrote her a card with supportive notes, and at least seven different students described her as the best in the school: "You're the best teacher in the building"; "the best"; "the best counselor"; "best teacher"; "You are the best counselor and cool"; "best calming teacher"; "eres mi mejor amiga" (you are my best friend). SA 33 ¶ 22, SA 40. Other students described her as "so kind," "a great person," "a good mentor," "thoughtful," "sweet," "very nice," "fun and caring and chill," and that she "cares about people." *Id*. After Darlingh was suspended, as described below, one teacher in the school had multiple students asking "to see [Darlingh] to talk to her." SA 255.

2. Incident on June 3

On June 3, another teacher in Darlingh's school decided to show an article about Darlingh to her classroom of 5th grade students and told them "they have the right to not see her for counseling services"—a transparent attempt to rally opposition to Darlingh. SA 164. Darlingh saw the article on the screen as she was walking by and told the principal, who then intervened. SA 34 ¶ 24; SA 164. The principal then collected statements from Darlingh, the teachers involved, and the

students. SA 164. He told the teacher that she should not "be talking about this" in her classroom and made clear that he "never approved her decision to discuss news articles about Ms. Darlingh." *Id*. He directed that teacher to leave for the day. *Id*.

In her statement, Darlingh explained that she has "never brought [her] personal political beliefs into [her] work," but that it appeared that this teacher and one other teacher were attempting to mount "a campaign to turn students against [her]." SA 169–70. Nevertheless, Darlingh offered "to have a conversation with one or both [of these teachers] with mediation." SA 170; SA 34 ¶ 28–29. By contrast, the other teacher never spoke with Darlingh about her speech before bringing it into the school. *Id*. ¶ 25.

Most of the statements taken from the students in the classroom suggest the incident had little effect on them. SA179 ("I don't remember what Mx. Chappelle said."); SA 181 ("I don't know what is going on."); SA 182 ("Mx. Chappelle show[ed] the thing … she started reading a litt[le] then Ms. Marissa c[ame] and said [some]thing."); SA 184 ("I s[aw] somet[hing] but I forgot it."); SA 185 ("The background story of some person I forgot their name. I don't remember the other parts."); SA 186 ("I don't know"). That same day, another teacher cornered Darlingh twice (once in her office, and once as she was walking out to her car), in a way that Darlingh perceived as aggressive and hostile, both times related to her speech in April. SA 34 ¶ 27. Darlingh submitted a "Request for GPS: Guided Problem Solving," in an attempt to mediate with this coworker, but the other teacher "declined to participate." SA 34 ¶¶ 30–31; SA 41–43.

3. Disciplinary Letter #1

On June 9, 2022, Darlingh received a letter from her supervisor, Defendant King, stating that "certain facts have come to my attention which might lead to disciplinary action regarding your failure to follow District Rules and Policies," and listing various District policies Darlingh allegedly violated. SA 108. The letter, however, did not specify what conduct by Darlingh violated any of the District's policies. *Id*. Defendant King hand-delivered this letter to Darlingh, without any prior warning, and then pressured her to open it in her presence by asking, "don't you want to open it?" SA 35 ¶ 33.

Prior to this letter, and despite investigating Darlingh since April, Defendant King never had any conversation with Darlingh about her speech. *Id*. ¶ 34. Defendant King never communicated that Darlingh had violated any policies, nor did Defendant King ever give Darlingh any sort of warning or opportunity to correct any perceived violations of District policy. *Id*. And Defendant King had never observed Darlingh's work, either in an informal or formal capacity. *Id*. ¶ 35. The District's handbook provides that "generally, discipline is progressive in nature and requires communication with employees and/or their representatives." SA 61. And it further recommends that "[a]ny particular concern related to an employee's conduct may be settled by informal discussion with the immediate supervisor." *Id*. Yet Defendant King did not initiate any kind of "informal discussion" with Darlingh prior to delivering the misconduct letter. SA 35 ¶ 34.

Given that there had been no prior warning or discussion and that the letter itself did not explain how Darlingh had violated any policies, counsel for Darlingh sent an email to Ms. King and others on June 13, 2022, asking for more information, prior to the hearing, so that she could meaningfully respond. SA 109–12. An "employment relations specialist" in Defendant Freiberg's Department responded that Darlingh would *not* receive advanced notice, but instead would receive a "packet" minutes before the conference. *Id.*

4. Disciplinary Letter #2 and Public Property Ban

On the evening of June 13, 2022, two days before the scheduled hearing with respect to the first disciplinary letter, Darlingh received an email from Defendant Freiberg directing her "not [to] report to work tomorrow," because she would be receiving a second letter "placing you on paid investigatory suspension pending scheduling of a second conference." SA 113.

The following day, June 14, the School District sent Darlingh a second letter, entitled an "Emergency Scheduling Letter," notifying her that she was immediately suspended from her position as a school counselor. SA 114–15. Like the first letter, this second letter stated that Darlingh was alleged to have violated a similar list of policies as the first letter, but failed to describe any specific conduct by Darlingh that violated any of the policies. *Id.* The second letter further directed Darlingh "not [to] enter any MPS buildings or come onto any school grounds as of June 14, 2022," and "not to have any contact with school staff, students, or parents until further notice." *Id.* Unlike the first letter, however, and despite being labeled an "Emergency"

misconduct letter, the second letter stated that "an Emergency Conference will be scheduled [during] the Fall 2022–23 School year." *Id*.

The District sent this letter exactly three days before Darlingh's last scheduled day of work for the 2021–22 school year (June 16, 2022). *Id*.; SA 35 ¶ 38. The letter stated that "the first three days of your suspension will be paid, and the remaining days will be unpaid." SA 114–15. The timing of this letter strongly suggests that Defendants intended to put Darlingh into an unpaid suspension during the summer, making it difficult for her to know the status of her job in the months leading up to the next school year.

Later that day, Defendant Freiberg sent Darlingh a separate "notice of no trespass" (hereafter "public property ban") signed by Defendant Adria Maddaleni, prohibiting Darlingh from "enter[ing] upon the land and/or premises" of "ALL Milwaukee Public Schools School buildings and owned land," including even the "Central Administration Building." SA 116. The order stated that "it shall remain in effect until officially rescinded IN WRITING by the administrator in charge." *Id*. And it prohibited Darlingh from entering public property even when other members of the public were free to do so. *Id*.

5. The June 15 Hearing

The hearing related to the first discipline letter was held via Zoom on June 15. As promised, just minutes before the hearing, Darlingh received a 126-page "packet" containing 48 exhibits, all of which centered around Darlingh's speech at the Capitol on April 23. SA 117–242; SA 36 ¶ 46.

During the hearing, Defendant King "presented" the packet by showing each exhibit on her screen, allowing Darlingh to read each exhibit, and then moving to the next, without any comment. *Id.* ¶ 48. After the entire packet had been presented in this way, Defendant King finished her portion of the conference without any further statements or explanation. *Id.* ¶ 49. She did not connect anything in the packet to any alleged policy violations or explain how Darlingh had violated any District policy. *Id*. After Defendant King finished her "presentation," Defendant Freiberg communicated that Darlingh would have ten minutes to confer with counsel, after which she could respond orally to the information presented in the packet. *Id.* ¶ 50. Darlingh objected to this process because she had just seen these materials for the first time minutes before the "hearing" and asked for an opportunity to respond in writing. *Id.* ¶¶ 46, 50. Defendants Freiberg and King conferred, and then agreed to allow Darlingh to submit a written response two weeks later. *Id.* ¶ 50.

6. Darlingh's Response

Darlingh submitted her response to the District on June 27, 2022. SA 243–60. Although Defendants had not explained how she had violated any District policy, Darlingh addressed in detail how her speech did not violate any of the District policies that the District had identified. SA 245, 248–52.

Ms. Darlingh explained that she spoke primarily to "express her concern over some of the 'harms of gender identity ideology,' in particular the recent trend of providing children with 'unfettered access to hormones—wrong-sex hormones—and surgery.'" SA 243. She also addressed her "fuck transgenderism" comment up front,

emphasizing that she was "referring to policies and ideologies that she believes harm children, and not in any way referring to transgender students or individuals." SA 244. And she reiterated that she "has and always will equally love, respect, and serve all students under her care, including transgender-identifying students." *Id.*; SA 37 ¶¶ 53–56.

She also directly addressed names and pronouns in school. She stated, repeatedly, in at least five different places, that she "would follow the parents' lead as to a student's names and pronouns, even if the student transitioned." SA 248, *id.* ("following the parents' lead…"); SA 248–50, 252. And "if any of her students ever struggle with gender identity issues, she also will encourage them to talk to their families and provide community resources to all adult caregivers who reach out, some of which she learned about recently at a voluntary meeting on June 13, 2022, with members of the new Department of Inclusion and Gender Identity." SA 248–49.

She clarified that, in her comment about social and medical transition, she was attempting to communicate that "she will not be the cause of a student's transition—by promoting it, encouraging it, or initiating it," and, "as far [she] can tell, no District policy requires her to do so." SA 248. Her "understanding [was] that following the parents' lead as to names/pronouns is consistent with the District's policies. *E.g.* Employee Handbook, Core Belief #5 ('Families are valuable partners.')." *Id.* But just in case, she also noted that she "was never given, or trained on, the 'Gender Inclusion Guidance' document that was included in the packet," so she asked for "clarification about this" "[t]o the extent that the District disagrees" that "following the parents'

lead as to names/pronouns is consistent with the District's policies." *Id.*; SA 252 (reiterating that, "to the extent the District believes something Marissa has said or done is in conflict with this guidance, the first step should be to have a conversation with her about it and explain to her what she should do differently.").

Finally, although her speech was constitutionally protected and did not violate any policies, Darlingh "acknowledge[d] that her use of profanity went too far" and offered to "issue an apology to anyone who was offended by her use of profanity and to meet with any staff or students who were offended by what she said, to apologize directly and to listen to them and to how her words affected them." SA 243. She concluded that her "hope is to work with the District and any staff or students who were offended by her speech to resolve this so that she and her colleagues can get back to doing the jobs that they love." SA 252.[13]

7. Darlingh's Termination

Darlingh spent the summer repeatedly requesting the basis for the second misconduct letter, her suspension, and the public property ban, but Defendants refused to tell her the grounds for it or to schedule the "Emergency" misconduct

[13] Darlingh also directly addressed a Milwaukee Journal Sentinel article that the District included in its "packet," because that article had misquoted her. SA 248. She explained that the reporter had "inaccurately reported that [Darlingh] said she would not use students' preferred names or pronouns." *Id.*; SA 37 ¶¶ 57–58. Darlingh explained that she told the reporter she "would follow the parents' lead as to a student's names and pronouns, even if the student transitioned." She also noted that she had "asked the paper to issue a correction, which it ultimately did," "though it buried that clarification deep in the article." SA 248; SA 38 ¶¶ 59–60.

hearing, even after the school year began—and still have not, to this day. SA 19–22 ¶¶ 109–22; SA 35–36, 38–39 ¶¶ 37–44, 64–70.

On September 30, 2022, Defendant Freiberg sent Darlingh a letter notifying her that she had been terminated, effective immediately. SA 261–68. The letter is signed by Defendant Adria D. Maddaleni, the "Chief Human Resources Officer" for the District. SA 268. The letter makes clear that the entire basis for Darlingh's termination was "[t]he comments [she] made on April 23, 2022." SA 266. The termination letter relies heavily on the false assertion that Ms. Darlingh "made it clear [she] will not respect a transgender student's wishes and use their preferred name and pronouns," and that she "refuse[s] to provide transgender students the support they need," SA 266–68, completely disregarding her numerous statements to the contrary in her response, as outlined above.

E. Procedural History

Darlingh filed this lawsuit on November 16, 2022, raising both a First Amendment retaliation claim and a Due Process claim related to the second misconduct letter, suspension, and public property ban. SA 1–30. On December 13, Darlingh filed a preliminary injunction motion, seeking both reinstatement to her position with the Milwaukee Public Schools and removal of the public property ban, which remained in effect even after her termination. Dkts. 11, 12-1. On January 6, shortly before Defendants were required to respond to that motion, they sent Darlingh a letter rescinding the public property ban. Dkt. 23-6. On January 13, they

responded to the preliminary injunction motion and separately filed a motion to dismiss the First Amendment retaliation claim on the merits. Dkts. 21, 25–26.

On March 13, the District Court issued a decision and order denying Darlingh's preliminary injunction motion and granting Defendants' motion to dismiss the First Amendment claim. RSA 1–25. The Court held, on the merits, that Defendants did not violate Darlingh's First Amendment rights by firing her for her speech. The Court recognized that Darlingh spoke as a private citizen on a matter of public concern, RSA 12–17, but held that, under the *Pickering* balancing test, Defendants were nevertheless justified in firing her for her speech. RSA 17–23. The District Court relied heavily on characterizing Ms. Darlingh's speech as committing to "*not follow* MPS policy" and "openly refus[ing] to follow [her job] responsibilities"—like Defendants, disregarding her many statements to the contrary.[14]

Darlingh filed a notice of appeal on March 29.

SUMMARY OF ARGUMENT

I. Darlingh clearly spoke as a private citizen on a matter of immense public concern—she spoke on her own time about a critically important and hotly debated issue that significantly affects the welfare of children.

II. The factors this Court has identified for *Pickering* balancing support Darlingh's right to speak on this subject on her own time. The few counter-protestors

[14] The Court also held that the request for injunctive relief to remove the public property ban was moot after Defendants removed it. RSA 23–24. Darlingh does not appeal that issue.

and two teachers who attempted to rally opposition to Ms. Darlingh cannot veto her First Amendment rights.

III. The District Court erred in multiple ways: it erroneously held that she was not speaking as a member of the general public—even though it correctly held that she was speaking as a private citizen; it mischaracterized her speech as committing to disregard District policies—even though she did not say that and has repeatedly said the exact opposite; it allowed hecklers to override her right to speak; and it relied on a case that is not comparable.

IV. The remaining factors for preliminary injunctive relief support an injunction reinstating Darlingh to her position, as this Court, the Supreme Court, and many other circuits have recognized.

STANDARD OF REVIEW

Whether the speech of a public employee is protected by the First Amendment is a question of law that this Court reviews *de novo*. *Hagan v. Quinn,* 867 F.3d 816, 822 (7th Cir. 2017).

When evaluating a district court's preliminary injunction decision, this Court "review[s] the district court's findings of fact for clear error, its legal conclusions *de novo*, and its balancing of the factors for a preliminary injunction for an abuse of discretion." *Doe v. Univ. of S. Indiana*, 43 F.4th 784, 791 (7th Cir. 2022).

ARGUMENT

The Supreme Court has held, and repeatedly reaffirmed, that government employers may not fire or retaliate against their employees for First-Amendment-protected speech. *E.g.*, *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2423–25 (2022); *Lane*, 573 U.S. at 236; *Garcetti v. Ceballos*, 547 U.S. 410, 419 (2006); *Connick v. Myers*, 461 U.S. 138, 142 (1983); *Pickering*, 391 U.S. at 574. To establish a First Amendment retaliation claim, Darlingh must show that: "(1) she engaged in constitutionally protected speech; (2) she suffered a deprivation because of her employer's action; and (3) her protected speech was a but-for cause of the employer's action." *Milliman v. Cnty. of McHenry*, 893 F.3d 422, 430 (7th Cir. 2018). The second and third elements are undisputed here, *see* RSA 11: Darlingh was terminated by Defendants, a sufficient "deprivation," *see*, *e.g.*, *Lane*, 573 U.S. at 235, and she was fired solely for the "[t]he comments [she] made on April 23, 2022." SA 266.

Whether a public employee's speech is constitutionally protected depends on a two-step inquiry. *E.g.*, *Lane*, 573 U.S. at 237; *Kennedy*, 142 S. Ct. at 2423. First, the employee must establish that she "spoke as a citizen on a matter of public concern." *Lane*, 573 U.S. at 237 (quoting *Garcetti*, 547 U.S. at 418) (this Court sometimes splits this inquiry into two parts, *e.g.*, *Kristofek v. Vill. of Orland Hills*, 832 F.3d 785, 792 (7th Cir. 2016)). If so, the court then "balance[s] [ ] the interests of the employee, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Lane*, 573 U.S. at 231 (quoting *Pickering*, 391 U.S. at 568).

The Supreme Court has emphasized that "a stronger showing [of government interests] may be necessary if the employee's speech more substantially involve[s] matters of public concern." *Lane*, 573 U.S. at 242 (quoting *Connick*, 461 U.S. at 152). This Court has too: "when a public employee's speech has touched upon a matter of 'strong public concern,' the government employer typically must 'offer particularly convincing reasons to suppress it.'" *Kristofek*, 832 F.3d at 796 (citing *Gustafson v. Jones*, 117 F.3d 1015, 1019 (7th Cir. 1997)); *McGreal v. Ostrov*, 368 F.3d 657, 681–82 (7th Cir. 2004). An employer's "mere incantation of the phrase 'internal harmony in the workplace' is not enough to carry the day," *Harnishfeger v. United States*, 943 F.3d 1105, 1121 (7th Cir. 2019), because "First Amendment rights cannot be trampled based on hypothetical concerns." *Kristofek*, 832 F.3d at 796 (citations omitted).

I. The District Court Rightly Held That Darlingh Spoke as a Private Citizen on a Matter of Public Concern.

The District Court correctly concluded that Darlingh spoke as a private citizen and that her speech addressed a matter of public concern. RSA 12–17. Still, Defendants disputed this below and may raise this argument on appeal as an alternate grounds for affirming, so Darlingh briefly addresses the issue here.

With respect to whether an employee speaks as a "private citizen," the "critical question," the Supreme Court has held, is "whether the speech at issue is itself ordinarily within the scope of an employee's duties, not whether it merely concerns those duties." *Lane*, 573 U.S. at 240; *e.g.*, *Kristofek*, 832 F.3d at 793 (looking to the "applicable job description" and any other "responsibilities that the employee is

expected to perform”). Notably, speech “does not transform … into employee—rather than citizen—speech” merely because it “concerns” or is “acquired by virtue of [the citizen’s] public employment.” *Lane*, 573 U.S. at 240; *Kristofek*, 832 F.3d at 793.

Darlingh spoke on a Saturday, on her own time, at a public rally, 80 miles from the District and community in which she works. *Supra* Background Part B. This was not an internal memo she drafted as part of her job, *see Garcetti*, 547 U.S. at 421–22, a grievance about some decision circulated to her coworkers, *see Connick*, 461 U.S. at 141–42, 148–49, or a complaint raised internally up the chain of command, *see Bivens v. Trent*, 591 F.3d 555, 560 (7th Cir. 2010). She spoke on her own initiative, entirely apart from and outside her job duties. The District Court agreed that she spoke as a private citizen because “no one could reasonably believe that MPS ‘commissioned or created’ Darlingh’s speech.” RSA 13. Indeed, Defendants did not “point to any expectation that speaking at rallies (or anywhere) was part of the plaintiff ’s job duties as a school guidance counselor.” *Id.*; *compare Kennedy*, 142 S. Ct. at 2425.

As to whether speech involves a “matter of public concern,” the Supreme Court has held that such topics include “any matter of political, social, or other concern to the community” or “subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public.” *Lane*, 573 U.S. at 241 (quoting *Snyder v. Phelps*, 562 U.S. 443, 453 (2011)). This inquiry “turns on the content, form, and context of the speech.” *Id.* (cleaned up).

Darlingh’s speech clearly addressed a topic of immense “public concern.” She spoke to express her concerns about “expos[ing]” children to “the harms of gender

identity ideology" and giving children "unfettered access to hormones—wrong-sex hormones—and surgery" and "socially" and "medically" transitioning them to a different gender identity. She even emphasized that she was motivated to speak by her passion to "serve" and "protect" children. The District Court agreed that these are "obviously matters of public concern." RSA 15. Indeed, this subject is one of the most profound ontological, social, and moral topics of our time, and one need not search long to find experts raising similar concerns.[15]

In a few of her statements, Darlingh referenced her school and her students, but even those statements were not directed to any District policy, specific person in the District, or particular decision by the District. She was speaking generally about her view that students, including her own, should not be "exposed to the harms of gender identity ideology" and to state that, to the extent it was in her control, she would not be the initiator or cause of a student's social or medical transition. RSA 15. The District Court correctly held that these were not "personal grievances," but "sp[oke] to matters that would affect members of her school's community" and therefore were of "public concern." RSA 15–16.

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[15] *See, e.g.*, *Britain changes tack in its treatment of trans-identifying children*, The Economist (Nov. 17, 2022), https://www.economist.com/britain/2022/11/17/britain-changes-tack-in-its-treatment-of-trans-identifying-children; Megan Twohey & Christina Jewett, *They Paused Puberty, but Is There a Cost?*, N.Y. Times (Nov. 14, 2022), https://www.nytimes.com/2022/11/14/health/puberty-blockers-transgender.html (reporting that "concerns are growing among some medical professionals about the consequences of [puberty blockers]").

Lastly, the "form" and "context" for her speech also strongly support that it addressed a matter of public concern. It is difficult to conceive of any speech closer to "the heart of the First Amendment," *Lane*, 573 U.S. at 235, than one given during a "speakers' corner" at a rally on the steps of a state capitol. As the District Court put it, this was "the quintessential forum for airing matters of public interest." RSA 16.

II. *Pickering* Balancing Strongly Favors Darlingh's Right to Speak Freely on Such a Critical Subject.

Since Darlingh clearly spoke as a private citizen on a matter of public concern, this Court then considers whether her interest "as a citizen, in commenting upon matters of public concern" outweighs the District's interest, "as an employer, in promoting the efficiency of the public services it performs through its employees." *Kristofek*, 832 F.3d at 795 (quoting *Pickering*, 391 U.S. at 568). And, as noted above, because her speech addressed a matter of "strong public concern," Defendants must have "particularly convincing reasons to suppress it." *Id*. at 796. This Court has identified seven factors to consider when conducting *Pickering* balancing:

> "(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.

Here, the balance weighs in Darlingh's favor. The District Court correctly found it "clear that factors four through six favor Darlingh," RSA 18—the "time, place and manner" of her speech (factor 4), the "context in which the underlying dispute arose" (factor 5), and that "debate [is] vital" in the subject she addressed (factor 6). The speech "took place over a weekend at a political rally in a different city, and the dispute arose out of Darlingh's statements made on her own time." RSA 17–18. And it is "undeniable that debate related to gender identity education is essential and that the opinions of school guidance counselors on questions involving children and gender identity are crucial to 'informed decision-making.'" RSA 18.

For the same reasons that Darlingh spoke as a private citizen, she also spoke as a member of the "general public" (factor 7). Again, she spoke on a Saturday, "on her own time," RSA 17–18, and "no one could reasonably believe that MPS 'commissioned or created' [her] speech" or that it "was part of [her] job duties as a school guidance counselor." RSA 13; *supra* Part I; *Gazarkiewicz v. Town of Kingsford Heights, Indiana*, 359 F.3d 933, 944 (7th Cir. 2004) (holding that plaintiff was acting as "a member of the general public" because the speech "took place on his own time and away from work premises").

Darlingh's counseling position is not one in which "personal loyalty and confidence are necessary," and regardless her speech did *not* call into question her loyalty to the District (factor 2). As a preliminary matter, the "personal loyalty" factor typically applies to public-safety-related jobs. *See*, *e.g.*, *Lalowski v. City of Des Plaines*, 789 F.3d 784, 792 (7th Cir. 2015) (quoting *Breuer v. Hart*, 909 F.2d 1035,

1041 (7th Cir. 1990)) ("[T]here is a particularly urgent need for close teamwork among those involved in the 'high stakes' field of law enforcement."). The same concern is not present for public school employees. *See Pickering*, 391 U.S. at 570 (noting that a teacher's "employment relationships with the Board and, to a somewhat lesser extent, with the superintendent are not the kind of close working relationships for which it can persuasively be claimed that personal loyalty and confidence are necessary to their proper functioning"); *Knapp v. Whitaker*, 757 F.2d 827, 839, 842 (7th Cir. 1985) (reciting this part of *Pickering*, and finding no disruption to relationships between teachers and administrators).

In any event, Darlingh's speech did not in any way call into question her loyalty to the District. She was not criticizing her employer's decisions or policies, her speech was not "directed at" or "toward[s]" any District employees or any particular person, *see Knapp*, 757 F.2d at 838, 842; *Pickering*, 391 U.S. at 569–70, nor was she even commenting on any District policy or practice directly; she was merely expressing her views about the effect of certain ideologies and policies on children. The District may disagree with her opinions, but such disagreements are bound to exist—and must be allowed to exist—on such an immensely consequential topic.

Finally, Darlingh's speech did not "impede[ ] [her] ability to perform her responsibilities" or "create problems in maintaining discipline or harmony among co-workers" (factors 1 and 3) (*Kristofek*, 832 F.3d at 796). After her speech in April, Darlingh continued to do her job without incident until early June. SA 33 ¶ 21. In fact, the District's "misconduct packet," which contains information gathered by her

supervisor after her speech, does not indicate that any students or parents of students *were even aware of her speech at the rally*. SA 120–25. Defendant King asked four students whether "students are free and safe to be whom they want to be" and who their "favorite person" is at the school, and all four answered yes to the first question, and two said Darlingh was their favorite staff member. SA 124.

Similarly, on May 26, 2022—a month after her speech—Darlingh received notes from her students during a counseling lesson describing her as "car[ing] about people," the "best teacher in the building," "a great person," "so kind," "sweet," and "thoughtful," among other things, SA33 ¶ 22; SA 40; *supra* p. 9, further indicating that Darlingh's speech did not "imped[e] the [ ] proper performance of [her] daily duties" or "interfer[e] with the regular operation of the schools generally." *Lane*, 573 U.S. at 237 (quoting *Pickering*, 391 U.S. at 572–73). And following Darlingh's suspension, one teacher even reported multiple "children asking to see [Darlingh] to talk to her." SA 255.

Defendants have pointed to the nine-or-so emails sent to various District employees calling for the District to "fir[e]" or "severe[ly] reprimand and/or punish" Darlingh for her speech, SA 126–50, yet these do not constitute the kind of interference or disruption to the District capable of overriding Darlingh's First Amendment rights. In the first place, none of the individuals who sent these emails claim to be students in the District, parents of students in the District, or staff in the District, nor do they claim to have any interaction with Darlingh on the job or any knowledge of how she performs her job. *Id.* And none describe any interference or

disruption to the District whatsoever. *Id*. Instead, what these emails *do* show is a coordinated campaign by the protestors at the rally to have Darlingh fired for expressing her views, with one even describing this campaign. *Supra* p. 8.

This campaign is a classic "heckler's veto," in which individuals who object to some viewpoint attempt to *create* a disruption to silence speech they disagree with. *See Zamecnik v. Indian Prairie Sch. Dist. No. 204*, 636 F.3d 874, 879 (7th Cir. 2011) (discussing the heckler's veto doctrine). Fortunately, hecklers do not get the veto. *Feiner v. New York*, 340 U.S. 315, 320 (1951) ("We are well aware that the ordinary murmurings and objections of a hostile audience cannot be allowed to silence a speaker."); *Zamecnik*, 636 F.3d at 879 ("[T]he fact that homosexual students and their sympathizers harassed [plaintiff] because of their disapproval of her message is not a permissible ground for banning it"). These emails could not, and indeed did not, create any disruption or interference to the District or Darlingh's duties sufficient to rise to a "particularly convincing" justification to punish Darlingh for her speech.

The District will also point to the June 3 incident—in which another teacher showed her students an article about Darlingh to rally opposition to her, *see supra* Background Part D.2—but allowing this manufactured disruption to be used against Darlingh would also amount to a "heckler's veto." "[E]ven if [ ] speech is deeply offensive to members of the school community and may cause a disruption, the school cannot punish the [speaker]; 'that would be a heckler's veto.' The school may suppress the disruption, but it may not punish the off-campus speech that prompted [others]

to engage in misconduct." *Mahanoy Area Sch. Dist. v. B. L. by & through Levy*, 141 S. Ct. 2038, 2056 (2021) (Alito, J., concurring) (citations omitted).

In other words, the June 3 incident was not *caused* by Darlingh's speech in April, but by another teacher who attempted to bring the issue into the classroom and create controversy in the school. *See Zamecnik*, 636 F.3d at 880 (affirming summary judgment in favor of plaintiffs and finding that plaintiff's speech, which Defendant school district had banned, was not what had given rise to the disruption at the school). When an objector attempts to create a disruption, "schools should punish the rioters, not the speaker." *Mahanoy Area Sch. Dist.*, 141 S. Ct. at 2056 (Alito, J., concurring) (citations omitted); *see Nelson v. Streeter*, 16 F.3d 145, 150 (7th Cir. 1994) ("The rioters are the culpable parties, not the artist whose work unintentionally provoked them … ."). The school principal recognized this, promptly sending the other teacher home for the day and documenting that he had "never approved her decision to discuss news articles about Darlingh" and that "no one [was to] be talking about this topic … to children." SA 164. In any event, most of the statements taken from the students in the classroom suggest the incident had little or no effect on them. *Supra* p. 10.

For her part, Darlingh sought to reconcile with the teachers who were campaigning against her, offering "to have a conversation with one or both [of these teachers] with mediation." SA 170. And she also submitted a "Request for GPS: Guided Problem Solving" to mediate with another coworker who had cornered her multiple times on June 3. SA 41–42. By contrast, the main teacher involved in the

June 3 incident never spoke to Darlingh about her concerns before bringing the issue into the classroom, SA 34 ¶ 25, and the other teacher declined to participate in the GPS process, *Id.* ¶ 31. Throughout the misconduct proceedings, Darlingh has also repeatedly offered to meet with anyone who was offended by her speech to "listen to them and how her words affected them," to "apologize directly" for some of her words, and "to work towards a resolution." SA 243.

Finally, the fact that Darlingh used a vulgar word during her short, unscripted speech does not entitle the District to fire her. The Supreme Court has repeatedly stressed that "First Amendment freedoms need breathing space to survive," *see NAACP v. Button*, 371 U.S. 415, 433 (1963), since "[s]peech concerning public affairs is … the essence of self-government," *McGreal*, 368 F.3d at 681–82 (citations omitted). Thus, "in public debate [we] must tolerate insulting, and even outrageous, speech in order to provide adequate 'breathing space' to the freedoms protected by the First Amendment." *Snyder v. Phelps*, 562 U.S. 443, 458 (2011). "[D]ebate on public issues should be uninhibited, robust, and wide-open, and ... may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *Rankin v. McPherson*, 483 U.S. 378, 387 (1987) (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964) in the context of a public-employment case). And the "use of expletives [is] a defining feature of modern American culture." *Zamecnik*, 636 F.3d at 880.

Although her speech is constitutionally protected and unpunishable, Darlingh nevertheless has acknowledged that "her use of profanity went too far" and offered to

"apologize directly" to "anyone who was offended by her use of profanity." SA 243. And she has made it "absolutely clear" that her "fuck transgenderism" comment, "as the context shows, [ ] was referring to policies and ideologies that she believes harm children, and not in any way referring to transgender students or individuals." SA 244; SA 37 ¶ 54. She also emphasized that she "has and always will equally love, respect, and serve all students under her care, including transgender-identifying students." SA 244; SA 31, 37 ¶¶ 5, 53.

In sum, Darlingh's speech did not cause any disruption to her duties or the District's services to its students and there is no justification, much less a "particularly convincing" one, for her government employer to punish Darlingh for her speech on an important topic of the day. The *Connick-Pickering* balance tips in favor of Darlingh's First Amendment rights.

III. The District Court Erred in Multiple Ways.

A. Darlingh Spoke as a Member of the "General Public."

Although the District Court correctly held that Darlingh spoke as a private citizen for purposes of the threshold question required by *Garcetti*, RSA 12–13, it nevertheless held that the seventh *Pickering* balancing factor—whether she spoke "as a member of the general public"—cut in the *opposite* direction because she identified herself as a school counselor and spoke in part about her job. RSA 22.

As a preliminary matter, the Court was wrong, legally, to conclude that "[t]his factor differs from the earlier question of whether Darlingh was speaking as an employee or a citizen." RSA 22. This Court has never held that, but instead has

repeatedly analyzed this factor in the same terms as the threshold "private citizen" question under *Garcetti*. *McGreal*, 368 F.3d at 682 (equating the "speaking as a member of the general public" factor with whether the plaintiff "was speaking as a private citizen or as a police officer"); *Gazarkiewicz*, 359 F.3d at 944; *compare Gonzalez v. City of Chicago*, 239 F.3d 939, 941 (7th Cir. 2001) (finding that plaintiff "was not acting as a … 'member of the general public'" because the reports at issue "were created in the scope of [plaintiff's] ordinary job responsibilities."). *Marquez v. Turnock*, 967 F.2d 1175, 1178 (7th Cir. 1992) (same).

The only case the District Court cited for treating these two inquiries separately, *Lalowski*, 789 F.3d 784, is not to the contrary. Indeed, the Court in that case did not analyze the threshold *Garcetti* question at all (or even cite *Garcetti*), but instead applied this Court's pre-*Garcetti* framework where the only threshold question was whether the speech "addressed a matter of public concern." *Id*. at 790–91; *see*, *e.g.*, *Caruso v. De Luca*, 81 F.3d 666, 670 (7th Cir. 1996) (outlining this Court's pre-*Garcetti* framework); *Spiegla v. Hull*, 481 F.3d 961, 965 (7th Cir. 2007) (explaining how *Garcetti* changed this Court's analysis). Thus, *Lalowski* does not support the proposition that the two inquiries are different.

Even setting that legal point aside, the facts in *Lalowski* are not remotely comparable to this one. In that case a police officer had an "adversarial" confrontation with demonstrators outside an abortion facility, initially "while on duty." *Lalowski,* 789 F.3d at 793. He left and returned when he was off duty, but it was just "a half hour later," so the Court held that the second, off-duty encounter "was a mere

continuation and escalation of the earlier, on-duty confrontation." *Id*. And he "made sure demonstrators remembered him as a police officer … so they would show him respect." RSA 22 (quoting *Lalowski,* 789 F.3d at 792–93). It was this sequence of events that led the Court to conclude that the officer was not "speaking as a member of the general public." *Lalowski,* 789 F.3d at 793. There is nothing like that here.[16]

The fact that Darlingh identified herself as a school counselor and spoke in part about her job does not in any way establish that she was not "speaking as a member of the general public." RSA 22. Indeed, in *Pickering* itself, the seminal case on public-employee speech, a teacher wrote a letter to the editor commenting on the school district's budget, 391 U.S. at 564, and the Court not only did not find it problematic that the teacher had identified himself as a teacher, the Court emphasized that "teachers are, as a class, the members of a community most likely to have informed and definite opinions as to how funds allotted to the operations of the schools should be spent" and therefore must "be able to speak out freely on such questions," *id*. at 572. The Court has reiterated the point multiple times since: "It

[16] Nor is the speech at issue comparable. In *Lalowski*, the officer "aggressively lambasted, ridiculed, and touched the protestors" in a way that was "abusive and degrading." *Id.* at 792. Among other things, he called one protester a "fat fucking cow," a "sinner of gluttony," "sarcastically asked her whether she was hiding food somewhere," and at one point "got down on all fours to demonstrate aerobic exercises she could do to lose weight"; he also "'poked' her in both arms and rubbed her arms 'in a creepy, sexual way.'" *Id*. 788. He "accused the demonstrators of using intimidation tactics like the Taliban, compared their use of the aborted-fetus signs to using an image of a priest 'bending over' a small boy to protest sexual abuse within the Catholic church, called demonstrator Wanda Glitz a 'psycho' and a 'man hater,' called Paula Emmerth a 'fat cow' several times, [and] called Paula's sister Teresa Emmerth 'fatty.'" *Id*. He was there for an "hour and twenty minutes" "hurling profanity and insults at the demonstrators." *Id*. at 788; 791.

bears emphasis that our precedents dating back to *Pickering* have recognized that speech by public employees on subject matter related to their employment holds special value precisely because those employees gain knowledge of matters of public concern through their employment," *Lane*, 573 U.S. at 240; "[P]ublic employees are uniquely qualified to comment" on "government policies that are of interest to the public at large," *City of San Diego, Cal. v. Roe*, 543 U.S. 77, 80 (2004); "[T]he public has a right to hear the views of public employees," *Borough of Duryea, Pa. v. Guarnieri*, 564 U.S. 379, 397 (2011).

B. Darlingh Did Not Violate Any District Policy by Speaking, Much Less *Commit* to Violating District Policy—in Fact She Has Repeatedly Told Defendants She Will Follow Their Policies.

The District Court concluded that Darlingh's speech "fatally undermined her ability to do her job" (factor 3), because it viewed her speech as "openly refus[ing] to follow [her] responsibilities" and committing to "*not follow* MPS policy." RSA 19; *id.* (comparing her speech to "insubordination"). Darlingh of course does not dispute that speech that amounts to open insubordination is a legitimate grounds for termination, but treating her speech this way not only mischaracterizes what Darlingh actually said, it also completely disregards the fact that she has repeatedly told Defendants the exact opposite, that she *will* follow their policies.

As an initial matter, Defendants have never identified any policy that prohibits employees from speaking at a political rally on an important topic of the day. Rather, the District's policies state that "[e]mployees of the MPS are *encouraged* to participate in the political process." SA 270 (MPS Administrative Policy 6.04(7)). Nor have they

pointed to any District policy that requires Darlingh to teach "gender ideology" to her young students. *See* SA 261–68.[17] The termination letter states that Darlingh was not "authorized to comment on the topic of gender identity," SA 266, but the District does not identify any policy that requires employees to get pre-authorization from the District before speaking about this topic, or any other topic, and even if there were such a policy, that would be an unlawful "prior restraint," with a "heavy presumption against its constitutional validity," *see Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963).

Also important, the *first time* Darlingh received any explanation for how Defendants believed her speech violated District policies was in her termination letter. Defendant King did not give Darlingh any warning, have any discussion with her, or give her any opportunity to correct any perceived violations. The misconduct letter did not provide any explanation, SA 108, Defendants would not provide it when Darlingh asked for it, *supra* p. 12, and even during the misconduct hearing, neither Defendant King nor Defendant Freiberg explained how Darlingh's speech had violated any policies, *supra* p. 14. The District's handbook emphasizes that "generally, discipline is progressive in nature and requires communication with employees and/or their representatives" and recommends that "[a]ny particular concern related to an employee's conduct may be settled by informal discussion with

[17] Even if there were such a Policy, Darlingh is entitled to have and to express an opinion on the important public matter of what schools should be teaching young, impressionable children. *Lane*, 573 U.S. at 240 ("[I]t is essential that [public employees] be able to speak out freely on such questions without fear of retaliatory dismissal.").

the immediate supervisor." SA 61. Yet Defendants did not follow the usual "progressive" disciplinary process, but clearly had already decided to terminate Darlingh for her speech.

With that in mind, Defendants' theory of "insubordination," which the District Court accepted, is that Darlingh "made it clear that [she] will not respect a transgender student's wishes and use their preferred name and pronouns," and "refuses to provide transgender students the support they need." SA 266–68; RSA 18–19 (including similar quotes from the termination letter). Defendants and the District Court appear to rely most heavily on her statement that "[n]ot a single one of my students under my fucking watch will ever ever transition socially and sure as hell not medically." *Supra* p. 6 n. 11. Yet during the misconduct proceedings, Darlingh explained to Defendants that what she was attempting to communicate (in a speech that was unscripted, by the way) was that "she will not be the cause of a student's transition—by promoting it, encouraging it, or initiating it." SA 248; SA 37 ¶ 55. Defendants have not pointed to any District Policy that requires her to take the lead in a child's social or medical transition.

She also told Defendants directly that she "would follow the parents' lead as to a student's names and pronouns, even if the student transitioned." SA 248. She further explained that, "if any of her students ever struggle with gender identity issues," she would "encourage them to talk to their families and provide community resources to all adult caregivers who reach out." *Id.* The only "policy" cited in the misconduct letter that even addresses names and pronouns is the District's "Gender

Inclusion" guidance, but this not a policy adopted by the school board, and Darlingh had never received or been trained on it, SA 38 ¶¶ 61–62; *see* SA 237 (Receipt of Policies and Procedures). In light of that, Darlingh asked for clarification if Defendants believed that guidance requires something different, indicating her willingness to follow District policies. SA 248. Defendants have never told her their policies require something else. And neither the misconduct packet nor the termination letter describe any examples—nor are there any—of Darlingh ever *not* using a student's "preferred name and pronouns" or failing to provide support to a transgender-identifying student. SA 38 ¶ 63; SA 117–242, 267.

If there were any doubt that Darlingh has never communicated that she "will not provide students the support they need," RSA 19 (quoting SA 268), Darlingh has stated, repeatedly, both to the Defendants, SA 244, 250, and publicly,[18] that she "has and always will equally love, respect, and serve all students under her care, including transgender-identifying students." *E.g.*, SA 244. She also offered to "meet with any staff or students" to make that clear and to apologize for her use of profanity. *See* SA 243.

Thus, the idea that Darlingh "openly refuse[s]" to follow District policies, RSA 19, or has committed to "do everything within [her] power to prevent a student in [her] building from transitioning or even expressing who they truly are," RSA 18, is

[18] *See* May 25, 2022 Letter from Darlingh to DPI at 2 ("Darlingh always has and will love and professionally serve every child in her charge"), https://will-law.org/wp-content/uploads/2022/05/Darlingh-Letter-to-DPI-FINAL-1.pdf; SA 8 ¶ 40 and n.12.

not just demonstrably false, *she has said the exact opposite*. Had Defendants followed their usual disciplinary process, or simply had a conversation or informal meeting with Darlingh, she could and would have made that very clear. Instead, Defendants immediately initiated termination proceedings and ignored everything she said during those proceedings, because they were determined to fire her, in violation of the First Amendment.

The termination letter lists a few other policies that Defendants contend Darlingh violated, but none of these prohibit her speech on her own time outside of work. The letter cites Administrative Policy 6.07(2)(n), SA 218, but Darlingh did not "threaten or intimidate" anyone, much less students. There is no evidence that any students were at the rally, and her words were not directed to anyone in particular; she was expressing her views generally on an important subject.

The termination letter also claims that Darlingh "detract[ed] from the school district's image or reputation," citing Administrative Policy 6.07(2)(p), *id.*, but such a broad and generic policy cannot override the First Amendment or the analysis under *Pickering*. *See United States v. Nat'l Treasury Emps. Union*, 513 U.S. 454, 467 (1995) ("[T]he Government must be able to satisfy a balancing test of the *Pickering* form to maintain a statutory restriction on employee speech").

The termination letter also invokes the District's vague and aspirational "Equity" policy, SA 213, but the letter does not explain how Darlingh has violated it. Here the letter relies heavily on the assertion that Darlingh "made it known that [she] will do everything within [her] power when working at MPS to prevent a student

from transitioning medically or socially," which is false and contradicted by what she told Defendants, as explained above.

As for the District's bullying policy, SA 216–17, Darlingh's speech was not "deliberate or intentional[ly]" meant "to cause fear, humiliation, intimidation, harm or social exclusion"—she even explained during her short speech that her motivation was to "protect" and "serve children." Moreover, this policy, by its own terms, only applies to "off-duty speech" if it "results in a substantial disruption of the workplace," which it did not.

Finally, the ASCA standards which the Defendants refer to, *see* SA 206–10, are not adopted policies of the District, Darlingh is not a member of that association, and in any event, they simply require counselors to treat all students "equally and fairly with dignity and respect," which Darlingh has explained she will do and always has done, SA 243–60.

C. The District Court Improperly Allowed Hecklers to Override Darlingh's First Amendment Rights.

The District Court's third error was to hold that the June 3 incident, in which another teacher inappropriately attempted to rally opposition to Darlingh during the school day, cut against her in the *Pickering* balance, RSA 20–21, effectively giving two teachers who disagreed with her speech a "heckler's veto," *see supra* pp. 28–29. The Court disregarded the "heckler's veto" doctrine on the grounds that Darlingh did "not cite to any authority suggesting that the heckler's veto doctrine applies in an employment context." RSA 20 n.6. But neither did Defendants cite any case holding

that it *does not* apply, Dkt. 21:12 (nor did the District Court identify one). Darlingh did cite multiple cases/opinions invoking the doctrine in the public school context, Dkt. 12-1:21–22 (citing *Mahanoy*, 141 S. Ct. at 2056, and *Zamenick*, 636 F.3d at 879), and pointed out that the cases Defendants cited—which *were* employment cases—treated it as a "truism" that "community reaction cannot dictate whether an employee's constitutional rights are protected," *Melzer v. Bd. of Educ. of City Sch. Dist. of City of New York*, 336 F.3d 185, 199 (2d Cir. 2003); *Craig v. Rich Twp. High Sch. Dist. 227*, 736 F.3d 1110, 1121 (7th Cir. 2013) (citing *Feiner* favorably); Dkt. 29:9.[19]

In any event, the Supreme Court has indicated that the doctrine would apply in the employment context. *Kennedy*, 142 S. Ct. at 2432 n.8 (emphasizing, in an employment case, that: "Nor under our Constitution does protected speech or religious exercise readily give way to a 'heckler's veto.'"). And at least one other circuit has invoked it favorably in an employment case. *Flanagan v. Munger*, 890 F.2d 1557, 1566 (10th Cir. 1989).

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[19] As Darlingh explained below, both *Melzer* and *Craig* ultimately did not *apply* the heckler's veto doctrine because the disruptions came, not from someone who merely disagreed with the speech—a traditional "heckler"—but from parents and students who, rightfully, were unwilling to engage a male counselor who was a "self described pedophile" and publicly advocated for legalizing sex with minors, *Melzer*, 336 F.3d at 189, or one who published a "hypersexualized" book in which he "professed [an] inability to refrain from sexualizing females." *Craig*, 736 F.3d at 1120; *see infra* Part III.D. Here, by stark contrast, the "disruption" was caused, not by any parents or students, but by two teachers who disagreed with what Darlingh said—classic "hecklers."

Darlingh, for her part, did everything she could to ameliorate any disruption (even though she did not cause the disruption), by immediately offering to meet with these teachers to mediate and requesting a "guided problem solving" session, whereas the teachers who caused the disruption never spoke with Darlingh about their concerns and refused to participate in any mediating discussions. *Supra* p. 30. If two teachers who disagree with what a coworker said on her own time can manufacture a "disruption" sufficient to fire their coworker, then public employees have no meaningful First Amendment protection whatsoever. The whole point of the "heckler's veto" doctrine is to prevent dissenters from having the power to override someone else's First Amendment rights.

Defendants emphasized below that, shortly after this teacher used classroom time to persuade her minor students to oppose and fear Darlingh (which the principal recognized was entirely inappropriate), a few students in the room said that they did not want to attend counseling with Darlingh that day, and some were gossiping about the incident later that day. *See* SA 168, 171. That a few elementary-age students were persuaded by their adult teacher, that day, not to see Darlingh, is not particularly surprising. But Defendants have not offered any evidence, either before or after this one day, of any students *not* wanting to meet with Darlingh as a result of her speech. And the statements taken from the students later that day, after the immediate moment had passed, suggest that most had already forgotten about it. *Supra* p. 10. Even if there were any students who continued to have reservations about meeting with Darlingh—and again, Defendants have not offered any evidence that there are

or were—Darlingh has offered to meet with any to apologize for her use of profanity, to listen, and to make clear that she "has and always will equally love, respect, and serve all students under her care, including transgender-identifying students." SA 243–44.

In the same vein, the District Court concluded that more "disruption could be expected to follow" due to Darlingh's use of profanity at the rally. RSA 21. In support, the District Court quoted *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 683 (1986), but it takes this case out of context. The question addressed in *Fraser* was whether a public school board may decide "what manner of speech *in the classroom* or *in school assembly* is inappropriate," not whether a public school board may control the speech of a public employee who is speaking as a private citizen, on their own time, outside the school setting. *Id.* at 683. Notably, while the Court held that a public school board can prohibit students from using profanity within the classroom and at school events, it also emphasized that, "in matters of adult public discourse," the First Amendment "guarantees wide freedom" that may include "the use of an offensive form of expression." *Id.* at 682.

D. *Craig* Is Not Analogous.

Finally, the District Court relied heavily on *Craig*, 736 F.3d 1110, for multiple of the *Pickering* factors, RSA 20, 21, but that case is not comparable to this one, and instead serves only to highlight the First Amendment violation here. The "speech" at issue there involved a male, high school guidance counselor's self-published book that was filled with "hypersexualized content," including a "description of his own sexual

exploits," "[self-] confess[ions] [of] 'a weakness for cleavage' and other portions of a woman's anatomy," encouragements "[to] his female readers to engage in 'a certain level of promiscuity before marriage,'" and to be "submissive" to their male partners, and "a comparative analysis of the female genitalia of various races which goes into an excruciating degree of graphic detail." *Craig*, 736 F.3d at 1114–15, 1117, 1119. The Court held that parts of the book touched on matters of public concern, but barely so, such that the Court gave "minimal weight [to] Craig's speech interest," emphasizing that this "is not the sort of topic of expression that Defendants would require a compelling interest to restrict." *Id*. at 1120–1121. And, given that the counselor's job required him to work with high school girls (including his role as the girls basketball coach), the Court could "easily see how female students may feel uncomfortable seeking advice from Craig given his professed inability to refrain from sexualizing females." *Id*.

By stark contrast, Darlingh's speech not only addressed a matter of immense public concern, it also had nothing to do with obscene proclivities and was not directed at any other person, but instead to a *topic*. And again, other than a few statements by students on the very day that their teacher inappropriately tried to rally opposition to Darlingh during the school day, there is no evidence in this case that students were afraid or unwilling to see her due to her speech, and even if there are such students, she offered to meet with any to apologize, listen, and explain what she was trying to communicate. *Supra* pp. 42–43.

IV. This Court Should Direct the Entry of a Preliminary Injunction Reinstating Darlingh to Her Position.

Because the District Court dismissed the case on the merits, it did not address any of the other factors for preliminary injunctive relief. RSA 23. The District Court's analysis of the merits was wrong for the reasons explained above, *supra* Parts I–III, and the other preliminary injunction factors—irreparable harm, balance of equities, public interest, *Higher Soc'y of Indiana v. Tippecanoe Cnty., Indiana*, 858 F.3d 1113, 1116 (7th Cir. 2017) (citations omitted)—support an injunction, so this Court should not only reverse the dismissal, but direct the entry of an injunction reinstating Darlingh to her position.

The First Amendment violation alone constitutes irreparable harm that warrants preliminary injunctive relief reinstating Darlingh. In *Elrod v. Burns*, 427 U.S. 347 (1976), multiple deputy sheriffs who were fired or threatened with termination for their political affiliations filed a First Amendment retaliation claim and sought a preliminary injunction for, among other things, an "order[ ] reinstating [the] unlawfully dismissed employees." *Burns v. Elrod*, 509 F.2d 1133, 1135 (7th Cir. 1975). The trial court denied a preliminary injunction on the grounds that "loss of employment did not constitute a sufficient showing of irreparable injury" and then dismissed the case for failure to state a claim. *Id.* The Seventh Circuit reversed, and on "the question concerning the denial of plaintiffs' motion for a preliminary injunction," held that "injunctive relief is clearly appropriate" "[i]nasmuch as this case involves First Amendment rights of association which must be carefully guarded

against infringement by public office holders." *Id.* at 1136. The United States Supreme Court affirmed, agreeing that the "loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. at 373–74 (plurality op.).

Since *Elrod*, this Court has repeatedly reaffirmed that irreparable injury is presumed in First Amendment cases. *Higher Soc'y of Indiana*, 858 F.3d at 1116 ("[E]ven short deprivations of First Amendment rights constitute irreparable harm."); *Am. C.L. Union of Illinois v. Alvarez*, 679 F.3d 583, 589 (7th Cir. 2012) (quoting *Elrod* for the proposition that the "loss of First Amendment freedoms … unquestionably constitutes irreparable injury"); *Christian Legal Soc'y v. Walker*, 453 F.3d 853, 859 (7th Cir. 2006) ("The loss of First Amendment freedoms is presumed to constitute an irreparable injury for which money damages are not adequate.").

Thus, in First Amendment cases, "the likelihood of success on the merits will often be the determinative factor" such that "the analysis begins and ends with [that factor]." *E.g.*, *Korte v. Sebelius*, 735 F.3d 654, 666 (7th Cir. 2013); *Higher Soc'y of Indiana*, 858 F.3d at 1116; *Vitolo v. Guzman*, 999 F.3d 353, 360, 365 (6th Cir. 2021) ("When constitutional rights are threatened or impaired, irreparable injury is presumed. … [P]laintiffs will win on the merits of their constitutional claim. And like in most constitutional cases, that is dispositive here."); 11A Wright & Miller, *Fed. Prac. & Proc.* § 2948.1 (3d ed. 2022) ("When an alleged deprivation of a constitutional right is involved, such as the right to free speech … most courts hold that no further showing of irreparable injury is necessary.").

Multiple other federal circuits since *Elrod* have applied this principle in the employment context where the plaintiff(s) raised a First Amendment retaliation claim and sought a preliminary injunction for reinstatement. *E.g*, *Newsom v. Norris*, 888 F.2d 371, 378 (6th Cir. 1989) (affirming preliminary injunctive relief ordering reinstatement, and holding that "[a]n individual, who has been subjected to direct and intentional retaliation for having exercised the protected constitutional right of expression, continues to suffer irreparable injury even after termination of some tangible benefit such as employment."); *Romero Feliciano v. Torres Gaztambide*, 836 F.2d 1, 4 (1st Cir. 1987) (affirming preliminary injunctive relief for reinstatement, and holding that "[g]iven the finding that Romero was likely to succeed on the merits of his First Amendment claim there was no abuse of discretion in finding irreparable harm."); *Johnson v. Bergland*, 586 F.2d 993, 995 (4th Cir.1978) (reversing the denial of a preliminary injunction for reinstatement, and emphasizing that "[v]iolations of first amendment rights constitute per se irreparable injury").

The Sixth Circuit also emphasized in *Newsom* that "[t]he majority of federal circuit courts, however, have concluded that an individual, who has been subjected to direct and intentional retaliation for having exercised the protected constitutional right of expression, continues to suffer irreparable injury even after termination of some tangible benefit such as employment." *Newsom*, 888 F.2d at 378–79 (listing cases); *see also Cate v. Oldham*, 707 F.2d 1176, 1189 (11th Cir. 1983) ("This does not mean, however, that only if a plaintiff can prove actual, current chill can he prove irreparable injury. On the contrary, direct retaliation by the state for having

exercised First Amendment freedoms in the past is particularly proscribed by the First Amendment.").

In this same context, the Western District of Wisconsin District Court has recognized that "a broad view of *Elrod* is still the rule in the Seventh Circuit," such that "the Seventh Circuit continues to interpret *Elrod's* waiver of the requirement to make an explicit showing of irreparable harm as applicable in *all types of First Amendment discharge cases*." *Greer v. Amesqua*, 22 F. Supp. 2d 916, 924–25 (W.D. Wis. 1998) (emphasis added). Thus, the First Amendment violation alone constitutes irreparable injury that warrants a preliminary injunction.

For similar reasons, this Court has also held that "injunctions protecting First Amendment freedoms are always in the public interest." *Christian Legal Soc'y*, 453 F.3d at 859; *Preston v. Thompson*, 589 F.2d 300, 303, n. 3 (7th Cir. 1978) ("[the remedy of a constitutional violation] certainly would serve the public interest."); *Vitolo*, 999 F.3d at 360 ("[I]t is always in the public interest to prevent violation of a party's constitutional rights.").

CONCLUSION

For the foregoing reasons, Plaintiff respectfully asks this court to reverse the District Court's dismissal of Darlingh's First Amendment retaliation claim and direct the entry of a preliminary injunction reinstating her to her former position.

Dated: May 8, 2023.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g), I certify the following:

This brief complies with the type-volume limitation of Cir. R. 32(c) because it contains 12,973 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

This brief complies with the typeface requirements of Cir. R. 32(b) for a brief produced with a proportionally spaced font using the 2016 version of Microsoft Word in 12-point Century Schoolbook font.

Dated: May 8, 2023.

/s/ Luke N. Berg
LUKE N. BERG

CIRCUIT RULE 30(D) CERTIFICATE

Pursuant to Circuit Rule 30(d), I hereby certify that all materials required by Circuit Rules 30(a), (b) are included in the Required Short Appendix bound with the brief.

Dated: May 8, 2023

/s/ Luke N. Berg
LUKE N. BERG

INDEX OF REQUIRED SHORT APPENDIX

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District Court's Decision and Order
(March 13, 2023) (ECF No. 33) .... RSA 1–25

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

MARISSA DARLINGH,

Plaintiff,

v. **Case No. 22-CV-1355-SCD**

ADRIA MADDALENI, THERESE FREIBERG, OPHELIA KING, and MILWAUKEE BOARD OF SCHOOL DIRECTORS

Defendants.

DECISION AND ORDER DENYING PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION AND GRANTING DEFENDANTS' MOTION TO DISMISS

This case probes the tension between a public employee's right to speak her mind and an employer's right to terminate the employee when her speech runs afoul of its policies. Plaintiff Marissa Darlingh, a guidance counselor at Allen-Field Elementary School in Milwaukee, spoke at a rally in Madison, Wisconsin in April 2022. In her speech, Darlingh identified herself as a school counselor for Milwaukee Public Schools and then made a number of controversial comments about transgenderism in her school and classroom. When MPS learned about the speech, which it viewed as discriminatory and antagonistic towards transgender students, it initiated disciplinary proceedings and ultimately fired her. Darlingh now alleges that the school and its administrators violated her First Amendment right to free speech and Fourteenth Amendment right to due process under the law; she seeks a preliminary injunction to reinstate her to her position. The defendants have opposed the preliminary injunction and have also filed a motion to dismiss her First Amendment claim.

BACKGROUND[1]

I. The Rally

Plaintiff Marissa Darlingh worked as a guidance counselor at Allen-Field Elementary School, a Milwaukee-area public school. ECF No. 1 at ¶ 2. On April 23, 2022, Darlingh attended a rally called "Sisters 4 Sisters" at the Wisconsin Capitol building in Madison, Wisconsin. *Id.* ¶ 14. This event primarily served as a platform for speeches and discussions regarding gender identity and women's rights. *Id.* ¶ 16. One key focus of this event was a criticism of transgender identity ideology.[2] The highly controversial nature of this debate attracted protestors and counter-protestors, and emotions ran high. *Id.* ¶¶ 19-20. Some attendees who, like Darlingh, oppose transgender ideology in grade schools, received threats and were called names like "lesbian Nazis" and "TERFs" (a common acronym used by those supporting transgender identity normalization against those that oppose it, which stands for "trans-exclusionary radical feminists"). *Id.* ¶¶ 19-25.

The event also hosted a "speaker's corner" which allowed attendees to give unscheduled speeches. *Id.* ¶ 18. Darlingh gave one of these unscheduled speeches, the material portion of which is reproduced below:

> "I didn't plan on speaking and I've been screaming a lot but my name is Marissa Darlingh, I am an elementary school counselor in Milwaukee Public Schools. And I oppose gender ideology ever entering the walls of my school building. On my dead fucking body will my students be exposed to the harms of gender identity

[1] Facts in this section (unless otherwise noted) are drawn from the Complaint and accompanying exhibits. *See* ECF No. 1 – 1-17. Because I am addressing a motion to dismiss, I am required to take as true all allegations in the Complaint.

[2] The YouTube livestream recording of the rally cited in footnote 2 of the Complaint contains the following statements in the event-sponsored description: "The transgender movement would have us believe that sex does not exist as a material reality and should be replaced by the utterly incoherent concept of 'gender identity' . . . If you care about women, free speech, civil rights, or the state of our democracy, join these four brave women as they explain what gender ideology is doing to women—and what we might do to fight back." *See* https://www.youtube.com/watch?v=CvE2Na8la9s, *as cited in* ECF No. 1 ¶ 15, n. 2. As such, it is fair to conclude that criticism of gender identity ideology was at the heart of the event.

> ideology. Not a single one of my students under my fucking watch will ever ever transition socially and sure as hell not medically. Absolutely not. I exist in this world to serve children. I exist to protect children. I feel like I'm disassociating right now because this is very intense very intense. I think someone else is speaking through me right now, but fuck transgenderism. Fuck it. Fuck transgenderism. Fuck these people behind us who want children to have unfettered access to hormones, wrong-sex hormones, and surgery."

Id. ¶¶ 26-30. This speech was recorded and posted to YouTube. *Id*. ¶ 30, n. 10. In response to seeing this speech, several members of the public contacted various officials for Milwaukee Public Schools (MPS), demanding that MPS terminate Darlingh.

I. The DPI Investigation

Shortly after the rally, Darlingh received a letter from the Wisconsin Department of Public Instruction (DPI) informing Darlingh of its impending investigation into alleged immoral conduct (her speech at the rally) that could result in the revocation of her educator license. *Id*. ¶ 32. The letter instructed Darlingh to respond within thirty days, and it also gave Darlingh the option to voluntarily surrender her license and stop the investigation from proceeding. *Id*. ¶¶ 35, 37. Darlingh responded within the designated timeframe, declined to surrender her license, and asserted that the investigation violated her First Amendment right to free speech. *Id*. ¶¶ 39. Darlingh further took to several media outlets, including the Milwaukee Journal Sentinel and Fox News to publicly defend the rally speech. *Id*. ¶ 41. Because Milwaukee Public Schools began its own investigation that resulted in Darlingh's termination, DPI did not take further action against Darlingh, and her license is still listed as "Under Investigation." *Id*. ¶ 42.

II. The MPS Investigation and the Incidents on June 3rd

Within a week of Darlingh's speech at the Capitol, Darlingh's supervisor Ophelia King also began an investigation into Darlingh's conduct after receiving nine emails from members of the public regarding the speech. *Id.* ¶¶ 5, 43-44. The senders of these emails did not have any apparent ties to the school, and Darlingh contends that they were sent as part of a campaign organized by counter-protestors at the rally to get her fired. *Id.* ¶¶ 43-47.

As part of her investigation into Darlingh, King interviewed several students, none of whom reported problems with Darlingh, and several of whom spoke highly positively of Darlingh and her performance as an educator. *Id.* ¶¶ 49-51. There is no record of any employee misconduct or issues arising out of Darlingh's speech until June 3, 2022.

On June 3, 2022, following the release of a Milwaukee Journal Sentinel[3] article about Darlingh, an Allen-Field Elementary School teacher named Chappelle informed a fifth-grade classroom about Darlingh's speaker's corner speech and told the students "'they have a right not to see [Darlingh] for counseling services.'" *Id.* ¶¶ 56, 64. Darlingh, who had been walking by the classroom while Chapelle was speaking, saw her name and picture projected on the board and entered the classroom to confront Chapelle in front of the students. *Id.* ¶ 57. Darlingh informed the principal, who admonished Chapelle for discussing the subject of a pending investigation with her students and sent her home for the day. *Id.* ¶¶ 58-60. *See also* ECF No. 1-11 at 48 (the school principal's summary of events based on collected statements). Following this incident, Darlingh asked the students in Chapelle's class whether they wanted to proceed with regularly scheduled counseling that afternoon, and "several students shouted

[3] Rory Linnane, *MPS counselor under investigation after saying no transgender students will transition under her watch,* Milwaukee Journal Sentinel (June 1, 2022), https://www.jsonline.com/story/news/education/2022/06/01/mps-counselor-under-investigation-comments-transgender-students/9947268002/. *See also*, ECF No. 1-11 at 35-38.

'no.' One student said 'I don't even want to be in the same room as her.'" *Id.* at 53, (Darlingh's incident report to the principal). The principal collected statements from the teachers involved and the students who witnessed the interaction. ECF No. 1 at ¶ 61. Most students reported not remembering or understanding the altercation, but the incident did seem to make an impression on some students.[4] *Id.* ¶ 64.

Later that day, Darlingh had a dispute with a second teacher. *Id.* ¶ 65. The teacher took issue with the content of Darlingh's speaker's corner speech and "cornered Ms. Darlingh twice (once in her office, and once as she was walking out to her car), in a way that Ms. Darlingh perceived as aggressive and hostile, both times related to her speech in April." *Id.* Darlingh requested a mediation with this coworker through the District's Human Resources Department, but the other teacher declined to participate. *Id.* ¶¶ 66-67.

In a separate incident report from that day, Darlingh reported to the principal:

> "While checking in at my scheduled time with a student, he let me know that lots of kids were gossipping [sic] about me at 5th grade recess. He wasn't sure of what all was being said, because in his words it was 'a lot.' He expressed concern over the 5th grade monolingual classes being pitted against each other over their opinion of me. He was also worried that the students I work with closely, including himself, might be subject to retaliation from students who have been influenced to turn against me."[5]

ECF No. 1-11 at 55.

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[4] *See e.g.*, ECF No. 1-11 at 67, "Miss Marisa a meany;"*id.* at 71, "We seen that Ms. Marissa would not let trans studens transpher and the teacher said that we had a opinion to have consoling or not"; *id.* at 72, "We saw pictures about the protest a long time ago about LGBTQ . . . and Miss Marissa came and said 'Are you talking about me?!' and the teacher said 'yes' nicely and Ms Marrissa got mad and said the teacher 'can't teach us this!'"; *id.* at 74, "We were leaning about how Ms. Marrissa done't like transgender kids and then Ms. Marissa looked in the door." (all errors in originals).

[5] Darlingh does not mention this incident in the Complaint-in-chief, but it is included in the exhibits to her complaint and signed by her.

III. Disciplinary Letters

On June 9, 2022, King gave Darlingh a letter informing her of potential disciplinary action related to District rules and policies Darlingh allegedly violated. *Id.* ¶ 68. These policies included various non-discrimination and anti-bullying policies, as well as several employee code of conduct provisions. ECF No. 1-6. While the letter did not specify exactly what the problematic conduct was, one of the policies Darlingh allegedly violated is listed in the letter as "Violation of School Counselor & Transgender/Gender Non-Conforming Youth standards," suggesting that it pertained to her speaker's corner speech. *Id.* The letter further instructed Darlingh to confer with school officials over Zoom on June 15, 2022. *Id.* Darlingh's attorney reached out to the school administration on June 13th to ask what Darlingh had done to violate school policies, and the District's Department of Employment Relations responded that a packet of materials would be provided to Darlingh on the day of the conference to review prior to the meeting. ECF No. 1 ¶¶ 78-79.

Later that day, defendant Therese Freiberg, the head of the Department of Employment Relations, emailed Darlingh, instructing her not to report for work the following day and alerting her to her suspension pending the results of a second investigatory conference. *Id.* ¶ 80. A second letter arrived the next day and further outlined the details of Darlingh's suspension. *Id.* ¶ 81. The letter provided that Darlingh's suspension would be paid for the remainder of the school year—three days—but unpaid through the conclusion of the investigation. *Id.* ¶¶ 82-84. This letter also instructed Darlingh not to enter any MPS buildings or contact any school staff, students, or parents. *Id.* ¶ 86. Freiberg sent a separate no-trespass order, signed by Chief Human Resources Officer and defendant Adria Maddaleni, prohibiting

Darlingh from entering the land or premises of all MPS property until the District rescinded the order in writing. *Id.* ¶¶ 87-88.

IV. June 15th Hearing and Aftermath

The day of the hearing, Darlingh and her attorney received a 126-page packet containing the text of the policies Darlingh allegedly violated, the communications between her and the school, emails from the public regarding Darlingh's speaker's corner speech, media coverage of the speech and DPI investigation, and student and teacher statements about Darlingh generally and about the June 3rd incident between Darlingh and Chappelle. *Id.* ¶¶ 90-91, ECF No. 1-11. During the Zoom hearing, King displayed the packet on the screen page by page and did not elaborate on the exhibits displayed. *Id.* ¶ 93. Freiburg, presiding over the hearing, then allowed Darlingh and counsel ten minutes to confer off camera before responding to the packet orally. Counsel for Darlingh requested to instead respond in writing, and Freiberg granted Darlingh two weeks to submit a written response. *Id.* ¶¶ 96-98.

Darlingh submitted her written response on June 27, 2023. *Id.* ¶ 99. The response primarily argued that Darlingh's speaker's corner speech was protected by the First Amendment because it was on her own time in a different city and did not violate any policies. *Id.* ¶ 100. Darlingh conceded that her use of profanity went too far and offered to apologize to anyone who was offended by it. *Id.* ¶ 101. Darlingh also claimed that her speech only "referr[ed] to policies and ideologies that she believes harm children and not [did]not in any way refer[] to transgender students or individuals." *Id.* ¶ 102. She also stated that she "has and always will equally love, respect, and serve all students under her care, including transgender-identifying students." *Id.* ¶ 103. Further, she protested that the news coverage of the speech misstated her position; Darlingh claimed that she never stated that she would not use students'

preferred pronouns. *Id.* ¶¶ 104-105. Darlingh clarified that she "would follow the parents' lead as to a student's names and pronouns." *Id.* ¶ 106.

MPS did not schedule the second misconduct hearing at the time. *Id.* ¶ 109. Freiberg and King informed Darlingh that they would not schedule a hearing until the Fall because it was not District practice to schedule a disciplinary hearing over the summer. This was despite the fact that both defendants worked over the summer and Darlingh expressed her desire to meet as soon as possible to allow her time to search for a different job if the District did terminate her employment. *Id.* ¶¶110-112. Darlingh's attorney protested the delay and followed up several times over the summer to inquire about the timing of the hearing, and MPS reiterated that it did not hold disciplinary hearings over the summer. *Id.* ¶¶ 112-122. Darlingh submitted a grievance through the District's grievance procedure in an attempt to speed up the process, and MPS denied the grievance. Id. ¶ 119.

On September 30, 2022, approximately one month after the school year began, Freiberg sent Darlingh a letter notifying her of the termination of her employment as a result of the first disciplinary hearing. *Id.* ¶ 123. The letter informed Darlingh that based on her speaker's corner speech and the disrespect for transgender students that it evinced, Darlingh had violated various student policies related to anti-discrimination measures and bullying. *Id.* ¶¶ 124-125. This letter also notified Darlingh that the second disciplinary hearing was canceled.

V. Posture of the Case

Darlingh filed this lawsuit November 16, 2022, alleging that MPS violated Darlingh's First Amendment right to free speech and Fourteenth Amendment right to due process. *See id.*, *generally*. Darlingh argues that MPS violated her right to free speech by terminating her in

retaliation for speaking at the rally and further discussing the issue with various media outlets. *Id*. ¶¶ 128-155. She further alleges that the MPS no-trespass order against her violated her First Amendment rights for the same reason. *Id*. Next, she alleges that MPS's conduct in suspending and terminating her employment without just cause violated the Fourteenth Amendment because it deprived her of a property right to employment without due process of law. Darlingh also alleges that the no-trespass order violated her right to due process because it gave her no opportunity to respond. *Id*. ¶¶ 156-168.

On December 13, 2022, Darlingh moved for a preliminary injunction reinstating her employment and lifting the no-trespass order. *See* ECF No. 11. Darlingh filed a brief in support of this motion, ECF No. 12, and defendants filed a brief in opposition to an injunction reinstating Darlingh's employment on the merits and in opposition to the no-trespass order as moot because the order had already been lifted. *See* ECF No. 21. Shortly thereafter, defendants filed a motion to dismiss count one of Darlingh's Complaint for failure to state a claim and filed a brief in support. *See* ECF Nos. 25, 26.

APPLICABLE LEGAL STANDARD

To obtain a motion for preliminary injunction, a plaintiff must demonstrate that (1) she is likely to succeed on the merits of her claim, (2) she is likely to suffer irreparable harm in the absence of an injunction, (3) that the balance of equities favors the plaintiff, and (4) the injunction is in the public interest. *Winter v. Natural Res. Defense Council, Inc.*, 555 U.S. 7, 20 (2008) (citation omitted). The first step requires a plaintiff demonstrate that the "'claim has some likelihood of success of the merits' . . . not merely a 'better than negligible' chance." *Mays v. Dart*, 974 F.3d 810, 822 (7th Cir. 2020) (quoting *Eli Lilly and Co. v. Arla Foods, Inc.*, 893 F.3d 375, 381 (7th Cir. 2018)). "If plaintiffs fail to establish their likelihood of success on the

merits, [the court] need not address the remaining preliminary injunction elements." *Lukaszczyk v. Cook Cnty.*, 47 F.4th 587, 598 (7th Cir. 2022).

The defendant's motion to dismiss under Rule 12(b)(6) on the other hand requires a showing not just that the plaintiff is unlikely to succeed on her claim, but that she *cannot plausibly* succeed on her claim. *See Zemeckis v. Global Credit & Collect. Corp.*, 679 F.3d 632, 634–35 (7th Cir. 2012) ("To survive a motion to dismiss, a complaint must 'state a claim to relief that is plausible on its face.'" (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). A complaint satisfies this pleading standard when its "'factual allegations . . . raise a right to relief above the speculative level.'" *Kaminski v. Elite Staffing, Inc.*, 23 F.4th 774, 776 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). A plaintiff "need not plead detailed factual allegations to survive a motion to dismiss," but "she still must provide more than mere labels and conclusions or a formulaic recitation of the elements of a cause of action for her complaint to be considered adequate." *Bell v. City of Chicago*, 835 F.3d 736, 738 (7th Cir. 2016)). "To analyze the sufficiency of a complaint [courts] must construe it in the light most favorable to the plaintiff, accept well-pleaded facts as true, and draw all inferences in the plaintiff's favor." *Carlson v. CSX Transp., Inc.*, 758 F.3d 819, 826 (7th Cir. 2014) (citing *Tamayo v. Blagojevich*, 526 F.3d 1074, 1081 (7th Cir. 2008)). "In addition to the allegations set forth in the Complaint itself, [I] may consider 'documents that are attached to the complaint, documents that are central to the complaint and are referred to in it, and information that is properly subject to judicial notice.'" *O'Brien v. Vill. of Lincolnshire*, 955 F.3d 616, 621 (7th Cir. 2020).

DISCUSSION

I. First Amendment Retaliation

Darlingh seeks a preliminary injunction reinstating her to her former position as guidance counselor at Allen-Field Elementary. As justification, she argues that she is likely to succeed on the merits of her First Amendment retaliation claim, that the deprivation of her First Amendment rights constitutes an irreparable injury warranting an injunction, that the balance of harms favors her reinstatement, and that her reinstatement is in the public interest. Defendants argue that Darlingh's First Amendment claim should be dismissed. Because both the motion for preliminary injunction and the motion to dismiss depend on whether Darlingh has stated a prima facie claim for First Amendment retaliation, I will address these issues together.

To state a claim under the First Amendment, the plaintiff must demonstrate that "(1) she engaged in constitutionally protected speech; (2) she suffered a deprivation because of her employer's action; and (3) her protected speech was a but-for cause of her employer's action." *Milliman v. Cnty. of McHenry*, 893 F.3d 422, 430 (7th Cir. 2018) (internal citations omitted). The only element at issue here is whether Darlingh's speech at the speaker's corner was protected by the First Amendment. Whether the First Amendment protects particular speech is a question of law and not fact. As such, and because the parties do not dispute what Darlingh said and the context in which she said it, I can determine at this early stage of the case whether or not Darlingh's speech was constitutionally protected.

"For a public employee's speech to be protected under the First Amendment, the employee must show that (1) he made the speech as a private citizen, (2) the speech addressed a matter of public concern, and (3) his interest in expressing that speech was not outweighed by the state's interests as an employer in promoting effective and efficient public service."

Swetlik v. Crawford, 738 F.3d 818, 825 (7th Cir. 2013) (citation and internal quotation marks omitted).

A. Whether Darlingh spoke as a private citizen

The first question is whether Darlingh was speaking as an employee or as a private citizen. The Supreme Court has held that "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline." *Garcetti v. Ceballos,* 547 U.S. 410, 421 (2006). The *Garcetti* case involved a deputy district attorney who entertained serious concerns about the accuracy of a warrant application he encountered in the course of his daily duties. *Id.* at 414. When he raised the matter with higher-ups in his office, they proved unreceptive and hostile to his concerns, and eventually they transferred him and denied him a promotion. After he alleged retaliation against his First Amendment rights, the Supreme Court rejected his claim, finding that "his expressions were made pursuant to his duties as a calendar deputy" and not as a private citizen. *Id.* at 421. "Restricting speech that owes its existence to a public employee's professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen. It simply reflects the exercise of employer control over what the employer itself has commissioned or created." *Id.* at 421-22.

Darlingh argues that she clearly spoke as a private citizen because although her speech was *related* to her employment, it was not part of her official duties. She emphasizes that she spoke on a weekend, in a different city, on her own time. Darlingh further argues that the fact that she identified herself as a school counselor doesn't mean she was speaking as an employee; instead, it actually affords her opinion special value because, as the *Pickering* court

stated, "teachers are, as a class, the members of a community most likely to have informed and definite opinions about school policies." 391 U.S. at 572.

The defendants suggest Darlingh was speaking as an employee because she identified herself as an MPS counselor, and her speech touched on what she would do (or not do) at her *job*. For example, she said things like "I oppose gender ideology ever entering the walls of my school building" and "my students [will not] be exposed to the harm of gender identity ideology." But it's not enough that the speech merely concerned Darlingh's job. *Garcetti,* 547 U.S. at 421 ("The memo concerned the subject matter of Ceballos' employment, but this, too, is nondispositive. The First Amendment protects some expressions related to the speaker's job.") As the *Garcetti* court emphasized, the reason employee speech is not protected is that such speech "owes its existence to" the employee's official duties and has essentially been "commissioned or created" by the employer itself. *Id.* at 421-22. Here, by contrast, no one could reasonably believe that MPS "commissioned or created" Darlingh's speech. Nowhere do the defendants point to any expectation that speaking at rallies (or anywhere) was part of the plaintiff's job duties as a school guidance counselor. The mere fact that her speech touched on her job, and was even *about* her job, does not render it *part of* her job, and that's what *Garcetti* insulates from protection.

B. Whether the speech touched on a matter of public concern

Even if the employee is speaking as a private citizen, the speech must touch on a matter of concern before it receives constitutional protection. Courts have explained that matters of public concern are those relating to "legitimate news interest," or "a subject of general interest and of value and concern to the public at the time of publication." *Kubiak v. City of Chicago*, 810 F.3d 476, 482 (7th Cir. 2016) (internal citations omitted). "Whether an employee's speech

addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole of the record." *Connick v. Myers*, 461 U.S. 138, 147 (1983). Of the three *Connick* factors, "content is the most important, but the subject matter of the speech is not determinative." *Kubiak*, 810 F. 3d at 481. Instead, I "must focus on the '*particular content* (as opposed to the subject matter of the speech. . .)'" *Id*. (quoting *Bivens*, 591 F.3d at 561) (emphasis added). For example, an employee's speech could generically touch on the subject matter of a major political question like war. But if the employee limits his topic to his personal desire to avoid being drafted, any semblance of "public concern" dissipates. Put another way, "[i]f the speech concerns a subject of public interest but the *expression* addresses only the personal effect upon the employee, then as a matter of law the speech is not of public concern." *Marshall v. Porter Cnty. Plan Comm'n*, 32 F.3d 1215, 1219 (7th Cir. 1994) (emphasis in original).

Several patterns have emerged through the application of this standard. Courts have deemed some grievances mostly personal. For example, a public employee's report of internal workplace conflicts or a personal grievance against a coworker is not "of public concern." *See, e.g.*, *Connick*, 461 U.S. 138 (finding that an employee's unauthorized survey into general employee satisfaction was not of public concern); *Kubiak*, 810 F.3d at 483 (finding that an employee's report of being threatened by a coworker was not of public concern). Similarly, although a complaint regarding second-hand smoke may theoretically involve a matter of "widespread public interest," the Seventh Circuit viewed an employee's grievance as "entirely personal" because "he spoke solely in terms of his own sensitivity to smoke" and "did not purport to speak on behalf of anyone but himself." *Smith v. Fruin,* 28 F.3d 646, 651 (7th Cir. 1994).

In contrast with these more picayune internal grievances, an employee's criticism of public officials or government policies *is* "of public concern." *See, e.g.*, *Swetlik*, 738 F.3d at 827 (finding that police officer's report that police chief had asked him to disobey procedure was of public interest because it "implicated the effectiveness and integrity of the chief,"); *Lane*, 573 U.S. at 241 (finding that an employee's testimony in the criminal prosecution of a former employee for theft was of public concern because "corruption in a public program and misuse of state funds [] obviously involves a matter of significant public concern."); *Wainscott v. Henry*, 315 F.3d 844, 849 (7th Cir. 2003) (a city employee's complaint to a coworker that "'the city administration did not know what is was doing from one day to the next,'" was of public concern); *Pickering*, 391 U.S. 563 (a teacher's letter to the editor in a local newspaper criticizing the allocation of school funding was of public concern).

Here, the content of Darlingh's speech contains elements of both personal and public concern. On the one hand, she was expressing a generalized political message opposed to "gender ideology" and "people who want children to have unfettered access to hormones . . . and surgery." These are obviously matters of public concern. On the other hand, however, the defendants point out that her exhortation was largely cabined to her own specific role as a guidance counselor. For example, Darlingh said (1) "**I** am an elementary school counselor;" (2) "**I** oppose gender ideology ever entering the walls of **my school** building;" (3) "**On my dead [] body** will **my students** be exposed to the harms of gender identity ideology;" (4) "Not a single one of **my students** under **my [] watch** will ever ever transition;" (5) "**I** exist in this world to serve children. **I** exist to protect children." ECF No. 1 at ¶ 31, n. 10 (emphasis added). Although it's true that the bulk of Darlingh's speech addressed what she would do in her own work environment, it must be remembered that her work environment was a *public* school

funded by taxpayers. The school presumably employed dozens of other employees and educated hundreds of local children. More importantly, Darlingh's concerns were not *personal* grievances about her work environment—for example, her desire to avoid inhaling second-hand smoke, *Fruin,* 28 F.3d at 651, or to avoid harassment by a co-worker, *Kubiak*, 810 F.3d at 483. Instead, she spoke about what she would do to serve *other people* (public-school children) by protecting them from gender ideology. As such, although the content of her speech has some elements of private speech, it speaks to matters that would affect members of her school's community—parents, students and co-workers.

The public *context* and *form* of Darlingh's speech are also highly suggestive of public concern. By contrast, in *Fruin,* for example, the employee relied upon private grievances to supervisors to complain about inhaling second-hand smoke. *Id.* Similarly, in *Kubiak,* the plaintiff reported alleged misconduct to her supervisors. The courts in both cases found that the private nature in which the plaintiffs aired their grievances was indicative of unprotected speech. "Kubiak reported the incident to her superiors . . . and to the IAD. The fact that Kubiak's complaints about Zala were directed up the chain of command suggests that Kubiak's speech did not address a matter of public concern." 810 F.3d at 483. Here, by contrast, Darlingh spoke at a "speaker's corner" at a rally, the quintessential forum for airing matters of public interest. The rally occurred at the state capitol, a common locus for the voicing of public grievances. *Id.* (noting that the speaker's motive matters). *See also Davis v. City of E. Orange,* No. CIV A 05-3720(JLL), 2008 WL 4328218, at *6 (D.N.J. Sept. 17, 2008) ("the form of Plaintiff's [speech]—speech a public rally—also supports Plaintiff's position that his expression went beyond the scope of a personal gripe.") In short, Darlingh's entire effort

was directed at speaking about a matter she believed would interest those who were gathered at the rally. I conclude, therefore, that her speech did address matters of public concern.

C. *Pickering* Balance

Finally, once an employee demonstrates that she was speaking as a private citizen on a matter of public concern, she must establish that her "interest in expressing that speech was not outweighed by the state's interests as an employer in promoting effective and efficient public service." *Swetlik,* 738 F.3d at 825; *Pickering*, 391 U.S. at 568. This balancing test recognizes that the government is both a government and an employer, and as an employer "the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general." *Pickering,* 391 U.S. at 568. What might be protected speech for a member of the public could be *un*protected if uttered by a school employee. "The problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Id*. In balancing the two parties' interests, I must consider the following factors:

> "(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 decision-making; and (7) whether the speaker should be regarded as a member of the general public."

Kristofek v. Vill. of Orland Hills, 832 F.3d 785, 796 (7th Cir. 2016).

At the outset, it's clear that factors four through six favor Darlingh. The speech took place over a weekend at a political rally in a different city, and the dispute arose out of Darlingh's statements made on her own time. It's also undeniable that debate related to gender identity education is essential and that the opinions of school guidance counselors on questions involving children and gender identity are crucial to "informed decision-making." *Id.* Those three factors all attenuate the employer's interest in regulating her speech.

However, these factors are strongly outweighed by the fact that Darlingh's speech fatally undermined her ability to do her job as it was defined by her employer (factor three). In her eight-page termination letter, Chief Human Resources Officer Adria Maddaleni cited these several school policies and explained the district's termination decision. For example, Maddaleni stated that Darlingh's speech involved vulgarity and words that could be construed as threatening and intimidating to students. "You make it very clear," she explained, "that you will do everything within your power to prevent a student in your building from transitioning or even expressing who they truly are." ECF No. 1-15 at 6. This violated the district's policy against threatening or harassing language. Maddaleni also cited the American School Counselor Association's standards, which state that "school counselors recognize all students have the right to be treated equally and fairly with dignity and respect as unique individuals free from discrimination, harassment, and bullying based on their real or perceived gender identity and gender expression." *Id.* Darlingh's statement that she would "actively prevent a transgender student from transitioning are harmful to transgender students and are in direct violation of the school counselor standards." *Id.* at 8. In sum, Maddaleni stated that "[c]onsidering your threats to actively prevent transgender MPS students from transitioning medically or socially and your subsequent comments standing by those threats, you have

made clear you will not adhere to the district's policies. You will not provide students the support they need, which is required of you as a school counselor and an MPS employee." *Id.*

It was hardly unreasonable for an employer like MPS to interpret Darlingh's speech to mean not merely that Darlingh thought MPS policy was wrong, but that Darlingh *would not follow* MPS policy. In many cases employees have some leeway in criticizing their employers, especially when they shed light on misconduct. However, if they cross the line and suggest that they will not follow their employers' policies, a court is bound to conclude that "the speech impeded the employee's ability to perform her responsibilities." *Kristofek*, 832 F.3d at 796. Just as a citizen is entitled to think what she wants, an employer is entitled to create a job, define that job's responsibilities, and set policies. To allow an employee to openly refuse to follow those responsibilities, or to redefine the job altogether, would create chaos by requiring employers to tolerate insubordination. "Although such a refusal is 'speech,' which implicates First Amendment interests, it is also insubordination, and as such it may serve as the basis for a lawful dismissal." *Connick,* 461 U.S. at 163 n. 3 (Brennan, J., dissenting).

Domiano v. Vill. of River Grove provides a sound example. 904 F.2d 1142, 1146 (7th Cir. 1990). There, a village discharged its fire chief after he criticized a recently enacted ordinance. The Seventh Circuit rejected the chief's First Amendment claim largely because he didn't limit his comments to criticism. Instead, he told the chairman of the fire and police commission and the village president that he would not enforce the ordinance. He also encouraged other members of the department to ignore the ordinance because it was "ridiculous." *Id.* at 1145. This went well beyond public discourse and strayed into the field of insubordination. "[B]y elevating his individual philosophy regarding patient transportation, however well-founded,

above the policy reflected by the repealing ordinance enacted by the elected representatives of the citizens of River Grove, Domiano undermined department discipline and harmony and ignored the directive of River Grove's policy makers." *Id.* at 1146. The chief's speech, in short, constituted insubordination: "Domiano's concern for the safe transport of patients was commendable and his disagreement with the ordinance was certainly protected speech; his adamant refusal to follow the ordinance, however, was insubordination justifying dismissal." *Id.* The same holds true here. The words Darlingh chose suggested not just that she disagreed with transgender ideology permeating the schools but that she would "elevat[e] [her] individual philosophy" above the policies imposed by her employer. *Id.*

A second factor favoring the defendants is that Darlingh's speech would (and did) create problems in maintaining discipline or harmony among co-workers (factor one). *Kristofek*, 832 F.3d at 796. "Interference with work, personnel relationships, or the speaker's job performance can detract from the public employer's function." *Craig v. Rich Twp. High Sch. Dist. 227*, 736 F.3d 1110, 1119 (7th Cir. 2013). Crucially, the disruption in question is not merely conjectural—her speech led to actual disruption in the workplace on June 3, 2022 when Darlingh confronted another teacher who was discussing her speech with students.[6] Darlingh also informed the principal that one of her students reported that his class was gossiping about the incident between Darlingh and Chappelle and that he feared social

[6] Darlingh also tries to characterize Chappelle's mention of her speaker's corner speech to the class (as well as the concerned emails from members of the public) as a classic "heckler's veto," in which individuals objecting to a viewpoint attempt to create a disruption to silence speech with which they disagree. However, Darlingh does not cite to any authority suggesting that the heckler's veto doctrine applies in an employment context or that it could invalidate the *Pickering* balance's tendency to favor an employer just because a disruption involved some "hecklers." Further, regardless of the way in which Darlingh's speech came to the school's, students', or parents' attention, once the content of the speech became widely known, it caused substantial disruption to the educational environment, and the school was properly entitled to consider the incident with Chappelle in its decision to terminate Darlingh's employment. Finally, there is no indication that Chappelle knew Darlingh was outside of her classroom at the time. Given that, it's hard to see how she might have been creating a disruption.

retribution for continued counseling with her. These incidents suggest that Darlingh's speech fomented discord in the workplace among both coworkers and students.

Moreover, disruption could be expected to follow not just from the content of Darlingh's speech but by her liberal use of profanity as well. Grade school students are impressionable, and school districts play a role in setting a positive example. As the termination letter indicates, "Not only are the vulgar words you used inappropriate (which you admit to), the statements are threatening and intimidating." ECF 1-15 at 6. The Supreme Court has recognized, "[s]urely it is a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse." *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 683 (1986). As such, "it was perfectly appropriate for the school to disassociate itself to make the point to the pupils that vulgar speech and lewd conduct is wholly inconsistent with the 'fundamental values' of public school education." *Id.* at 685-86.

Another key factor favoring the defendants is that Darlingh's position as a guidance counselor relies on trust and close personal relationships (factor two). The Seventh Circuit has found that the role of educators, and especially guidance counselors, involves a great deal of personal loyalty and confidence. *See Craig*, 736 F.3d 1110 ("[t]he fact that [the plaintiff] works closely with students at a public school as a counselor confers upon him an inordinate amount of trust and authority."). In *Craig*, the Seventh Circuit found that the *Pickering* balance heavily favored the school when it terminated a guidance counselor after he published a book of questionable relationship advice. *Id*. The book included descriptions of his "weakness" for particular parts of female anatomy as well as sexist asides, including a suggestion that women tend to "act based on emotion alone." *Id*. at 1120. The court found it likely that once the gist of the book became common knowledge at the school, female students would be highly

uncomfortable going to Craig for counseling. The court determined that where a guidance counselor fails to foster a safe and accepting learning environment, students "will not approach him and he cannot do his job." *Id*. at 1120. This case implicates similar issues of lost trust and confidence between a school counselor and at least some segment of the student body. Just as the Seventh Circuit found female students would likely have been uncomfortable approaching Craig after he published degrading and hypersexualized language about women, students who are transgender or gender-questioning at Allen-Field would likely be uncomfortable approaching Darlingh after her highly publicized statements hostile towards transgenderism.[7]

Finally, the seventh Pickering factor—whether Darlingh was speaking as a member of the "general public"—also favors the defendants. This factor differs from the earlier question of whether Darlingh was speaking as an employee or a citizen. *See Lalowski v. City of Des Plaines*, 789 F.3d 784, 792-793 (7th Cir. 2015) (finding that even though some of an off-duty police officer's statements at a protest were made as a private citizen on a matter of public concern, in the *Pickering* balance, "he [could] not be regarded as a member of the general public" in part because "he made sure demonstrators remembered him as a police officer . . . so they would show him respect."). Similarly, even though Darlingh might have been speaking as a private citizen for the purposes of the first prong of the test, she spoke as a school counselor for the purposes of the *Pickering* balance. During her speech, Darlingh focused entirely on her job as a school counselor and relied on her position to lend her platform an air of credibility.

[7] Darlingh objects to defendants' comparison of this case to *Craig* because she believes that her speech was on a matter of greater public importance and was addressed at a topic rather than a person. This distinction does not affect the degree of trust and loyalty in the position of a guidance counselor because the content of the speech and importance of the subject go towards different *Pickering* balancing factors.

None of the above discussion is intended to suggest that it was unreasonable for a guidance counselor to question the district's policies. Ultimately, however, because the speech opposing those policies was laced with profanity and suggestive of insubordination, the *Pickering* balance strongly favors the school district's interest in maintaining efficiency and effectiveness in its operation. I find, therefore, that Darlingh's speaker's corner speech was not constitutionally protected. Because Darlingh is not likely to succeed on the merits, the motion for a preliminary injunction will therefore be denied. And because I was able to resolve the question of the plaintiff's speech by referring only to uncontested documents attached to the complaint, the defendants' motion to dismiss will be granted. *Jefferson v. Ambroz,* 90 F.3d 1291, 1296 (7th Cir. 1996) (dismissal based on *Pickering* balance appropriate at pleadings stage).

II. Injunction Lifting No-trespass Order

Despite the fact that defendants have lifted the no-trespass order and stated that they have "no intention of reenact [sic] the Notice of No Trespassing" "unless there are new disturbances caused by Darlingh's presence at MPS own [sic] facilities or property in the future" (ECF No. 21 at 26), Darlingh nonetheless requests that I grant an injunction to preempt any effort by defendants to reinstate the order. Darlingh argues that I should grant an injunction "(1) prohibiting Defendants from reimposing a no-trespassing order against Ms. Darlingh for her speech; and (2) prohibiting Defendants from re-imposing a no-trespassing order without telling her what it is based upon." ECF No. 17. As previously explained, Darlingh's speaker's corner speech was not protected First Amendment speech, so the motion for a preliminary injunction fails on First Amendment grounds. I do not need to assess whether she is likely to succeed on her Fourteenth Amendment claim because I can (and do) deny the injunction on other grounds.

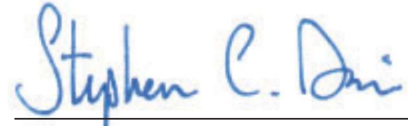
As previously discussed, to obtain a preliminary injunction, in addition to demonstrating the likelihood of success on the merits of a claim, a plaintiff must also demonstrate a likelihood of irreparable harm in the absence of an injunction. Defendants have lifted the no-trespass order, and any hypothetical order issued in the future would be a different legal order than the one issued in the past. Darlingh cannot obtain a preliminary injunction based on the specter of potential harm raised by a hypothetical order that defendants *have not issued*. Nor can I rule on the permissibility of state action that *has not occurred* such as to find Darlingh likely to succeed on a claim against such hypothetical state action.[8] Should the defendants issue a no-trespass order during the pendency of this case, Darlingh can move for an injunction then. However, without knowing the reason why the defendants might issue such an order or the breadth of that order, I cannot categorically prohibit them from doing so.

CONCLUSION

For the foregoing reasons, I **DENY** the plaintiff's motion for preliminary injunction reinstating her to her former position, ECF No. 11. I also **DENY AS MOOT** the plaintiff's motion seeking an injunction lifting the no-trespass order, ECF No. 11. Finally, I **GRANT** the defendant's motion to dismiss the plaintiff's First Amendment claim, ECF No. 25. The plaintiff's Fourteenth Amendment claim still stands.

[8] Darlingh's string citation of cases does not aid her case. For one, she does not actually explain these cases. More importantly, none of the cited cases directly addresses a *preliminary injunction*'s mootness, just the concept of mootness generally. The one case cited that even mentions a preliminary injunction does so in the court's mention of its previous decision to uphold a district court's denial of a preliminary injunction. *See Elim Romanian Pentecostal Church v. Pritzker*, 962 F.3d 341, 343-344 (7th Cir. 2020). Darlingh urges that "[t]he Supreme Court has long held that 'voluntary cessation of an unlawful practice does not moot a case unless it is absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.'" ECF No. 29 at 16-17 (quoting *W. Virginia v. Env't Prot. Agency*, 142 S. Ct. 2587, 2607 (2022) (internal citations omitted)). And I agree; the case is not moot. But the motion for preliminary injunction is. Darlingh will have her opportunity to argue that issuing the no-trespass order violated her right to due process, but she cannot reasonably argue that she is likely to suffer irreparable harm from an order that is not currently in place.

SO ORDERED this 13th day of March, 2023.



STEPHEN C. DRIES
United States Magistrate Judge