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RAY SHELTON

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

RAY SHELTON,

Plaintiff(s),

vs.

GLENDALE UNIFIED SCHOOL DISTRICT; BOARD OF EDUCATION OF THE GLENDALE UNIFIED SCHOOL DISTRICT; VIVIAN EKCHIAN; DARNEIKA WATSON, individually, and in her official capacity as Chief Human Resources and Operations Officer and Superintendent; KATHLEEN CROSS, individually, and in her official capacity as a Board of Education member; INGRID GUNNELL, individually, and in her official capacity as a Board of Education member; SHANT SAHAKIAN, individually, and in his official capacity as a Board of Education member;

CASE NO. 2:23-cv-10427-CBM-SSC

PLAINTIFF'S MEMORANDUM IN OPPOSITION TO MOTION TO DISMISS AND/OR STRIKE SECOND AMENDED COMPLAINT

Date: October 8, 2024
Time: 10:00 a.m.
Room: 8D

JENNIFER FREEMON, individually, and in her official capacity as a Board of Education member; NAYIRI NAHABEDIAN, individually, and in her official capacity as a Board of Education member; KRISTINE TONOLI,

Defendants.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes

Other Authorities

I. INTRODUCTION

The question to be answered on this motion to dismiss is whether the facts in the Second Amended Complaint ("SAC") allege a plausible First Amendment claim against Defendants. In the SAC, Plaintiff, a celebrated public-school teacher, alleges that the day after he spoke as a public citizen at a school board meeting the district initiated a disciplinary investigation against him, placed him on leave, and publicly smeared him as a threat to the safety of the community—never allowing him to return to his classroom.

Defendants' motion seems to confuse the burden of proof at trial with what is required under Rule 12(b)(6). Defendants demand not only factual allegations suggesting a plausible avenue of relief but the *evidence* supporting it as well (without the benefit of discovery). Additionally, Defendants impermissibly attempt to present their own version of the facts at the pleading stage by trying to smuggle them in through documents that are neither admissible nor subject to judicial notice. The arguments, and the inadmissible evidence on which they rely, should be disregarded.

Taking the well-pleaded allegations of the SAC as true, as the law requires, Plaintiff adequately states a First Amendment retaliation claim because all of Defendants' actions in response to Plaintiff's speech would deter any reasonable person from speaking out in the future. Defendants are not entitled to qualified immunity here either because a schoolteacher's right to speak out against district policies has been well established for over 50 years. The SAC's specific, factual allegations are also sufficient to establish municipal liability and a conspiracy by the defendants to retaliate against Plaintiff. The district is also not entitled to Eleventh Amendment Immunity as it is not an arm of the state under the new test established by the Ninth Circuit. Finally, Plaintiff has a claim under the free speech provision of the California Constitution. Thus, the Court must deny Defendants' motion.

II. FACTS

A. The Parties

Plaintiff Ray Shelton ("Plaintiff" or "Shelton") was a venerated fifth-grade teacher at the at the Mark Keppel Visual and Performing Arts Elementary School ("Mark Keppel"), a public school under the authority and control of the Glendale Unified School District ("GUSD"). ECF 26 ("Second Amended Complaint" or "SAC") at ¶ 13. At the time of the SAC's allegations, Mr. Shelton had been employed by GUSD as a teacher for 25 years. *Id.* at ¶ 37. Mr. Shelton was universally beloved by his students and their parents, well-respected by his colleagues, and—over the course of his career—earned many professional awards and accolades. *Id.* at ¶¶ 38-39.

Defendants Kathleen Cross ("Cross"), Ingrid Gunnell ("Gunnell"), Shant Sahakian ("Sahakian"), Jennifer Freemon ("Freemon"), and Nayiri Nahabedian ("Nahabedian") (collectively, the "Board Members") were members of the GUSD Board of Education during the time period relevant to the SAC. *Id.* at ¶¶ 17-21. The GUSD Board of Education is a public body that governs public schools in Glendale, California and has final policymaking and decision-making authority for rules, regulations, and decisions that govern school personnel. *Id.* at ¶ 23.

Defendant Vivian Ekchian ("Ekchian") was the superintendent of GUSD. *Id.* at ¶ 26. As alleged in the SAC, she was GUSD's chief executive officer whose powers included oversight and control of the district, including oversight of personnel and the application of GUSD policies. *Id.* at ¶¶ 27-29. Defendant Darneika Watson ("Watson") was the Chief Human Resources and Operations Officer of GUSD who possessed the authority and responsibility for governing and regulating employees. She currently serves as superintendent of GUSD. *Id.* at ¶ 30. Defendant Kristine Tonoli ("Tonoli") was the principal of Mark Keppel during the time relevant to the SAC. *Id.* at ¶ 33. Tonoli possessed the authority and responsibility for governing Mark Keppel teachers, including Mr. Shelton. *Id.* at ¶ 34-35.

B. Defendants Implement Sex-Change Policies for Children

During recent years GUSD, under the influence of political activists, has started implementing policies that deny the biological reality that the human species has two sexes: male and female. SAC ¶¶ 41-42. Mr. Shelton has taught this basic biological fact for years to his students and deeply believes it himself. *Id.* at ¶¶ 42. The activist-driven policies seek to assert the unscientific belief that biological sex itself is a social construct. *Id.* at ¶ 43.

The specific policies that GUSD has implemented, "include, but are not limited to, keeping a secret file on students who have decided to use pronouns that do not correspond to their natal sex and a 'preferred' cross-sex name which is different from their given one; permitting natal males, who 'identify' as the opposite sex, to use girls' locker rooms and bathrooms at school; mandating that teachers and students use 'preferred pronouns' regardless of natal sex, even if this violates the users' deeply held religious or personal beliefs; and teaching elementary school children about various sexual positions" (the "Sex-Change Policies."). *Id.* at ¶ 45. It is also GUSD's policy to conceal all of this information from parents. *Id.*

Mr. Shelton opposes these policies and believes that children do not have a fully developed capacity to understand the long-term consequences of their decisions, especially when it comes to sex and identity. *Id.* at ¶ 46. He also believes that parents must be intimately involved in any serious decisions involving their children and that these policies threaten their fundamental right to control the upbringing and education of their children. *Id.* at ¶¶ 47-48.

As a gay man, Mr. Shelton also believes that GUSD's Sex-Change Policies cause harm to gay people because they are a form of gay conversion therapy that attempt to convince individuals they are "born in the wrong body" rather than simply attracted to the same sex. *Id.* at ¶ 52.

C. Mr. Shelton Speaks Out Against the Policies at a School Board Meeting

Because of his strong, scientifically grounded ideas and his desire to protect children at GUSD from harm, Mr. Shelton attended a GUSD Board of Education meeting to speak out against GUSD's policies. SAC ¶¶ 51-52. He attended as a private citizen and not in any representative capacity. *Id.* at ¶ 51.

During the public comment portion of the meeting, Mr. Shelton gave a short speech in front of the school board, opposing the Sex-Change Policies and advocating for science and biological facts. *Id.* at ¶ 54. Mr. Shelton expressed his sincere personal belief that the Sex-Change Policies were causing mental, physical, and emotional harm to the children who were being experimented on by adults pursuing a political agenda. *Id.* at ¶ 55.

D. Defendants Retaliate Against Mr. Shelton

When Mr. Shelton arrived to teach his class the morning after the meeting, Defendant Tonoli pulled Mr. Shelton out of his class and directed him to Tonoli's office, where a School Board administrator sat waiting. *Id.* ¶ 60. Mr. Shelton was read a letter from Defendant Watson telling him he was being placed on administrative leave while the District conducted a disciplinary investigation. *Id.* at ¶¶ 61-62. The letter informed Mr. Shelton that he was to have a further meeting with human resources regarding the disciplinary investigation against him and that he had a right to have a union representative present at the meeting. *Id.* at ¶ 63. Watson's letter stressed confidentiality since this was a personnel matter. *Id.* at ¶ 64.

Later that day, Defendant Tonoli published an email to the entire Mark Keppel community publicly disparaging Mr. Shelton, accusing him of "hate speech" at the school board meeting. Tonoli also stated that the district was investigating Mr. Shelton and that he is no longer on campus. *Id.* at ¶ 66. Tonoli also insinuated that Mr. Shelton put the safety of students and employees in jeopardy. *Id.* at ¶ 67.

The School board, including Individual Board members, as well as Defendants Watson and Ekchian, conspired with Tonoli regarding the content and publishing of

the email as retaliation for Mr. Shelton exercising his rights. Public statements and emails of a sensitive and controversial nature require approval by the District before they are disseminated to the community. SAC ¶ 70; Plaintiff's Request for Judicial Notice ("Ptf. RJN") ¶¶ 1-2, Ex. A, B.). Shortly after Tonoli published her email, Ekchian followed up with an email to the entire school district mirroring Tonoli's language about "hate speech" nearly word for word. *Id.* at ¶ 4, Ex. D.

As a result of these false and inflammatory emails, what would normally be a private personnel matter became a flashpoint in the community. *Id.* at ¶ 71. GUSD's general counsel informed plaintiff's counsel that, due to the highly publicized nature of Mr. Shelton's punishment, the decision to reinstate him—while normally in the hands of Human Resources—had to be made by the School Board. *Id.* at ¶ 72. In early June 2023, the School Board reviewed the disciplinary decisions regarding Mr. Shelton and, after review and discussion, sanctioned the continuing actions against Mr. Shelton and refused to reinstate him. *Id.* at ¶ 73.

This decision, as outlined in Watson's letter from "the District," barred Mr. Shelton from school-related activities and events and kept Mr. Shelton from returning to his classroom for the rest of the school year. It also barred Mr. Shelton from attending his students' fifth-grade graduation ceremony—something that he deeply cherished every year to commemorate the achievement of his students and to be able to celebrate with them and their families before they moved on to middle school. *Id.* at ¶75.

The retaliatory actions against Mr. Shelton furthered Defendants' policy of chilling speech by punishing those who spoke out against District heterodoxy. *Id.* at ¶¶ 82-83. Notably, GUSD employees who spoke in favor of these Sex-Change Policies have never been punished or disciplined in any way. *Id.* at ¶¶ 84-85. As a result of Defendants' actions, other GUSD teachers, who supported the Sex-Change Policies, engaged in a public campaign of harassment and personal attacks directed against Mr. Shelton because of his stated opposition. *Id.* at ¶ 86. This virulent

harassment campaign, in addition to Defendants public emails, caused Mr. Shelton to be bombarded with homophobic slurs and to receive death threats. SAC ¶ 87.

However, despite the personal nature of the attacks by these teachers, which were reported to GUSD by Mr. Shelton, Defendants took no action against them. *Id.* at ¶ 88. Conversely, Defendants specifically retaliated against Mr. Shelton for his speech that occurred outside school hours. This shows that GUSD selectively punished Mr. Shelton, who opposed its Sex-Change Policies, for "misconduct" while defending or ignoring the actual misconduct of teachers who supported its policies. *Id.* at ¶¶ 90-91.

The School Board also retaliated against non-employee individuals and families who opposed the Sex-Change Policies by explicitly changing the rules of its meetings to prevent individuals from being able to voice their opposition to its policies. This was done in direct retaliation for these individuals' previous efforts to convince the Board to change the Sex-Change Policies. *Id.* at ¶¶ 92-93. Pursuant to this official policy, supervisory officials, including the School Board, Ekchian, and Watson took no action against a teacher or principal who retaliated against a special needs student who spoke out against these policies because they were simply following District orders and mandates. *Id.* at ¶ 94. Following these retaliatory actions by Defendants, Mr. Shelton retired at the end of the school year. *Id.* at ¶ 96.

E. Defendants' Improperly Introduce Evidence on a Rule 12(b)(6) Motion

As part of their motion, Defendants filed a Request for Judicial Notice ("Def. RJN") that attempts to impermissibly introduce several documents which are not subject to judicial notice and are otherwise inadmissible. Defendants also improperly ask the Court to accept the truth of the factual assertions contained in these inadmissible documents.[1]

[1] Plaintiff has filed objections to Defendants' RJN concurrently with this Opposition.

While Defendants concede that Mr. Shelton spoke at the board meeting, stating his opposition to their Sex-Change Policies, they try—through their improper RJN—to falsely accuse him of waving a "swastika" to harass other people at the board meeting. Mr. Shelton emphatically denies these claims. And, as will be discussed in more detail below, these false accusations only bolster the SAC's allegations regarding the smear campaign at the heart of Defendants' retaliatory actions that served as a warning to others who opposed Defendants' policies.

The only noticeable "fact" in Defendants' submission is that a Board Member, Defendant Gunnell, stated that there was a "swastika" in the room during the meeting. But even accepting Defendants' inadmissible evidence at the motion to dismiss stage, the facts show that this is a misrepresentation. First, what Defendants falsely call a "swastika" is actually a popular internet meme that *satirizes* swastikas and everything they represent. This meme depicts four unaltered rainbow "Progress Pride Flags" arranged in a pinwheel shape. Ptf. RJN ¶ 5, Ex. E.[2] This flag is the official symbol of the divisive political ideology driving the Pride celebrations at GUSD. It is also the symbolic representation of the Sex-Change policies in the District. Ptf. RJN ¶¶ 7-11, Ex. G-J. On its face, this meme represents a criticism of the totalitarian way in which GUSD's political ideology, and the policies that flow from it—like the Sex-Change Policies—is enforced. Specifically, a hectoring authoritarianism that silences dissent and uses the power of the state to punish opposition. Ptf. RJN ¶ 11, Ex. J. An irony that is obviously lost on the defendants.

III. ARGUMENT

A. Defendants' Retaliation Against Mr. Shelton Constitutes an Adverse Employment Action

The cumulative actions that Defendants took against Mr. Shelton in retaliation for opposing GUSD's Sex-Change Policies constitute an adverse employment action

[2] The meme Plaintiff is alleged to have had at the board meeting only contains the flags without any verbal caption attached.

under the Ninth Circuit's "reasonably likely to deter" test for First Amendment retaliation. See *Greisen v. Hanken*, 925 F.3d 1097, 1113 (9th Cir. 2019). "Under this test, the plaintiff must prove that the employer's action was reasonably likely to deter [him] from engaging in constitutionally protected speech. The plaintiff need not have suffered a tangible loss." *Dodge v. Evergreen School District #114*, 56 F.4th 767, 778 (9th Cir. 2022) (cleaned up). If the government's retaliatory action "would chill or silence a person of ordinary firmness from continuing to speak out" then it has committed a constitutional violation. *Id.* at 779 (cleaned up).

The Ninth Circuit has recognized that, under this test,

> some, perhaps all, of the following acts, *considered individually*, were adverse employment actions for purposes of plaintiffs' First Amendment retaliation suit: …an unwarranted disciplinary investigation…an unwarranted assignment of blame…a reprimand containing a false accusation…repeated and ongoing verbal harassment and humiliation…a threat of disciplinary action…[and] a withholding of customary public recognition.

Coszalter v. City of Salem, 320 F.3d 968, 976–977 (9th Cir. 2003) (emphasis added).

The *Dodge* case is instructive. There, the Ninth Circuit held that a teacher who was called a bigot by his principal for having a MAGA hat at a training session and told that he would need his union rep next time he wore it had suffered an adverse action under First Amendment retaliation standards. *Dodge*, 56 F.4th at 787. Here, the procedural conduct that was only threatened against the *Dodge* plaintiff was actually carried out against Mr. Shelton by Defendants.

Additionally, several of the acts that the Ninth Circuit has held, *individually*, to constitute adverse actions, were collectively taken against Mr. Shelton by Defendants. Specifically, Defendants placed Mr. Shelton on administrative leave while they subjected him to an unwarranted disciplinary investigation for alleged "misconduct." SAC ¶ 62. As part of this investigation, Mr. Shelton was required to attend an HR meeting where he was told he had a right to have a union representative present—

further highlighting the seriousness of the matter. SAC ¶ 63. Then, Mr. Shelton's principal publicly (not privately, like in *Dodge*) accused him of engaging in "hate speech" and of jeopardizing the safety of students and employees. Not to be outdone, the superintendent of the entire district also chimed in to publicly humiliate, defame, and threaten Mr. Shelton by also accusing him of "hate speech" and of jeopardizing people's safety, while warning about the District's efforts to "respond swiftly and appropriately" to "hate speech." Ptf. RJN ¶ 4, Ex. D.

Despite Defendants' feigned perplexion, the implication of these district-wide communications from supervisors is unambiguous. The communications send a chilling message to any other teacher who wants to publicly oppose the District's controversial policies. Defendants also unnecessarily left Mr. Shelton on leave for almost two months until the end of the school year, never allowing him to return to his classroom or to attend his students' graduation like he had done every year.[3] Instead of letting Mr. Shelton clear his name, Defendants let these false accusations against him fester without quickly resolving them in his favor, when he had done nothing wrong. And, as a result, he was forced to retire in shame and ignominy, rather than attending graduation and being honored for his notable career accomplishments.

The misleading conclusions that Defendants want the Court to assume the truth of, in their improper RJN, perfectly exemplify the harm that Mr. Shelton suffered, and continues to suffer, as a result of Defendants' constitutional violations. The false accusation that Mr. Shelton was waving a "swastika" at individuals at the school board meeting has not only caused him reputational harm but the Defendants' malicious inclusion of this bald-faced lie in his personnel file is something that will harm his future employment prospects. See *Perea v. Fales* 39 Cal.App.3d 939, 941 (1974) ("the contents of an individual's personnel file may be the basis of the current employer's

[3] Defendants again feign confusion when they question how a letter from Mr. Shelton's employer prohibiting him from reporting to school, *"or any GUSD site,"* would give him the impression that he could not attend the school's official graduation site. ECF 29 at 24-25. This line of argument also strains credulity.

response to inquiries about that individual from prospective employers."). "When taken together, it is clear that these acts amounted to a severe and sustained campaign of employer retaliation that was 'reasonably likely to deter' plaintiff [] from engaging in speech protected under the First Amendment." *Coszalter*, 320 F.3d at 977.

1. The SAC states a claim against Superintendent Ekchian

Defendants' entire motion relies on the erroneous belief that Mr. Shelton must prove his entire case before discovery has even commenced. But that is not the law. Mr. Shelton "is not required to 'demonstrate' anything in order to survive a Rule 12(b)(6) motion to dismiss." *Pinnacle Armor, Inc. v. U.S.*, 648 F.3d 708, 721 (9th Cir. 2011). "At the motion to dismiss phase, the trial court must accept as true all facts alleged in the complaint and *draw all reasonable inferences in favor of the plaintiff*." *In re Tracht Gut, LLC*, 836 F.3d 1146, 1150 (9th Cir. 2016) (emphasis added). And where the complaint in question puts forward a claim that is "plausible—meaning something more than 'a sheer possibility,' but less than a probability—the plaintiff's failure to prove the case on the pleadings does not warrant dismissal." *OSU Student Alliance v. Ray* 699 F.3d 1053, 1078 (9th Cir. 2012). Thus, the question to be decided as to Defendants is a simple one: Looking at the allegations of the SAC as a whole, is it *plausible* that Mr. Shelton will be able to prove that Defendants retaliated against him for engaging in protected speech?

The Ninth Circuit has established that "free speech claims do not require specific intent…[A]llegations of facts that demonstrate an immediate supervisor knew about the subordinate violating another's federal constitutional right to free speech, and acquiescence in that violation, suffice to state free speech violations under the First Amendment." *OSU*, 699 F.3d at 1074-1075 (cleaned up). Furthermore, "[w]hen a supervisory official advances or manages a policy that instructs its adherents to violate constitutional rights, then the official specifically intends for such violations to occur." *Id.* at 1076.

Here, the well-pleaded allegations establish that Defendant Ekchian was the superintendent of GUSD. As the district's CEO, Ekchian had oversight responsibilities to the district and its employees, like Mr. Shelton. SAC ¶ 27. The SAC alleges that Ekchian participated in the dissemination of Tonoli's false and accusatory email about Mr. Shelton to the entire Mark Keppel community because such sensitive statements require district approval. Ptf. RJN ¶¶ 1-2, Ex. A, B. There is also conclusive evidence that Ekchian participated in the drafting of the email and was responsible for the decisions regarding Mr. Shelton because of her own email that she sent shortly after Tonli's. The email, which Ekchian sent to the entire school district (not just the Mark Keppel community) mirrors Tonoli's language about "hate speech" nearly word for word. Ptf. RJN ¶ 4, Ex. D.

Thus, Ekchian, who was the supervisor to both Tonoli and Watson, did not only fully acquiesce to the retaliatory action taken against Mr. Shelton after his speech at the board meeting but then herself participated in it by publicly condoning their actions and making vile accusations against him to the whole district. See *OSU,* 699 F.3d at 1075. This advancement and management of GUSD's policy of retaliating against those who spoke out against the Sex-Change Policies is additional evidence of her liability. *Id.* at 1076. Finally, as supervisor of all personnel, Ekchian failed to take steps to remove the derogatory information from Mr. Shelton's personnel file that was only there due to Defendants' unconstitutional retaliation.

Despite Defendants' attempt to conceal Echian's knowledge of and involvement in Mr. Shelton's punishment, her email conclusively shows that she is liable for the conduct alleged in the SAC. Moreover, Defendants' fallacious arguments illustrate the need for discovery in this matter to establish what other evidence is in their exclusive possession that would establish liability in this case.

2. The SAC states a claim against the Board Members

The SAC alleges in detail how the Board, the policy-making body for GUSD, had a policy of acting in retaliation whenever people spoke out against its Sex-Change

Policies. SAC ¶¶ 91-95. This entailed treating people who agreed with the Sex-Change Policies (SAC ¶¶ 84-89) differently from those who opposed them (SAC ¶¶ 92-94). Mr. Shelton alleges that the Board also set in motion the retaliatory chain of events after his speech as part of this policy. SAC ¶ 74. The video of the board meeting submitted as part of Defendants' RJN dispenses with their facially absurd argument that Board didn't witness speech (an argument which they now seemingly abandon).

"Advancing a policy that requires subordinates to commit constitutional violations is always enough for § 1983 liability…so long as the policy proximately causes the harm—that is, so long as the plaintiff's constitutional injury in fact occurs pursuant to the policy." *OSU*, 699 F.3d at 1076. Additionally, under California law, although a school board may delegate certain powers to subordinates, the board remains liable for the performance of this conduct. See Cal. Educ. Code § 35161 (a school board may delegate certain powers to an officer or employee but retains ultimate responsibility over the performance of those powers or duties).

The Supreme Court has also held that members of a school board, which acts by majority vote, may be held individually liable for § 1983 violations. *See Wood v. Strickland,* 420 U.S. 308, 319-22 (1975) (holding that individual members of a school board who voted to expel a student could not receive absolute immunity from the student's claim that the expulsion decision violated her rights to procedural due process). The "Ninth Circuit [also] implicitly recognizes that members of a council or board, which acts by majority vote, may be held individually liable for their conduct." *Minster v. Gates*, No. 01-01867-CBM, 2001 WL 1112684, at *3 (C.D. Cal. 2001).

Here, the Board did not just set the retaliatory policy in question, it also directly participated in the constitutional violations against Mr. Shelton. The SAC plausibly alleges that the Board participated in Tonoli's email because the Board's own policies support the inference that they had to approve it. See Ptf. RJN ¶¶ 1-2, Ex. A, B; *see also, Pinnacle Armor,* 648 F.3d at 721. Further, the SAC alleges the Board's participation not only in the disciplinary investigation against Mr. Shelton but in the

refusal to reinstate him after reviewing the decision. SAC ¶ 73. This makes the allegation that the Board "bore responsibility for the operation of the [retaliation] policy [] plausible—not conclusory—in light of other allegations in the complaint." *OSU,* 699 F.3d at 1076–1077.

Defendants claim that the Board's "early June 2023" review somehow means the review came after Mr. Shelton's retirement on June 9, 2023. But, given the chronological order of SAC (which states that Mr. Shelton retired "[f]ollowing these retaliatory actions") and the fact that "early June" in plain English suggests a date before June 9 (as opposed to *mid* or *late* June), basic reasoning skills lead to the obvious conclusion that the Board deliberated on Shelton's reinstatement before his retirement at the end of the school year.[4]

Defendants' reliance on *Weisbuch v. County of L.A.* with respect to this point is unavailing. 119 F.3d 778 (9th Cir. 1997). That holding simply states that a supervisor's failure to proactively and unilaterally overrule a subordinate's decision does not lead to liability. But here, the Board Members took deliberate action to review Mr. Shelton's leave, measured it against their own policies, and failed to act. *Pembaur v. City of Cincinnati*, 475 U.S. 469, 483 (1986) (liability attaches where "a deliberate choice to follow a course of action is made from among various alternatives by the…officials responsible for establishing final policy with respect to the subject matter in question."). Thus Mr. Shelton has *plausibly* alleged the Board's direct involvement in a constitutional violation.

3. The SAC states a claim against Principal Tonoli

The SAC also *plausibly* alleges that Defendant Tonoli committed a First Amendment violation. Tonoli was Mr. Shelton's direct supervisor and one of the people responsible for placing him on leave. SAC ¶¶ 33-34. She also published the email to the entire Mark Keppel community falsely accusing him of "hate speech" and

[4] Plaintiff is also happy to further amend the complaint to spell this out more clearly to Defendants' satisfaction.

implicating him in being a threat to the safety of students and fellow employees.[5] Such false accusations—especially in today's cultural climate, coupled with a disciplinary investigation for "misconduct"—would chill the speech of any reasonable employee. See *Coszalter*, 320 F.3d at 976–977.

In her email, Tonoli also disclosed a personnel matter in which Mr. Shelton has a privacy interest in. See *Versaci v. Superior Court*, 127 Cal.App.4th 805, 819-820 (2005) (public school employees have a privacy interest in their personnel matters). Defendants' reliance on the argument that the email does not reference Mr. Shelton by name is strikingly disingenuous. The SAC alleges that Mr. Shelton was marched out of his classroom, never to return. The email also specifically refers to a Mark Keppel teacher and Defendants do not, and cannot, suggest that this could have described any individual other than Mr. Shelton in light of the SAC's other allegations. Specifically, Mr. Shelton's nearly two-month leave and the SAC's allegations that his punishment became a flashpoint in the community. SAC ¶ 71. Finally, Defendants' motion concedes the email was obviously about Mr. Shelton so any argument to the contrary is a red herring.

Tonoli's false, public email humiliated Mr. Shelton and predictably caused him to be the target of virulent harassment campaign where he was bombarded with homophobic slurs and received death threats. SAC ¶ 87. He also suffered the loss of finishing the school year with his students and the professional opportunities that came with that. Mr. Shelton was additionally deprived of the ability to see his students graduate and now has derogatory information in his personnel file. All of these were the foreseeable consequences of Tonoli's retaliatory actions. See *Tatum v. Moody*, 768 F.3d 806, 817 (9th Cir. 2014) ("a § 1983 defendant is liable for 'setting in motion a series of acts by others which the actor knows or reasonably should know would cause

[5] Defendants craftily avoid drawing attention to Tonoli's references to "speech" while emphasizing the "symbols" part of her email.

others to inflict the constitutional injury.'"). Thus, Mr. Shelton has sufficiently pled a retaliation claim against Defendant Tonoli.

4. The SAC states a claim against HR head Watson

As the Ninth Circuit has emphasized, "§ 1983 makes a man responsible for the natural consequences of his actions." *OSU*, 699 F.3d at 1072. As GUSD's head of HR, Defendant Watson was personally, not *indirectly*, involved in the unconstitutional retaliation against Mr. Shelton. As evidenced by her letter to Mr. Shelton, she was directly responsible for the unwarranted disciplinary investigation against him. Def. RJN ¶ 4, Ex. B. The fact that the letter was prepared and given to him first thing in the morning after his speech shows Watson's complicity with the other defendants in the retaliation. The Board's own policy with regard to investigations against employees plausibly shows that Watson, Tonoli, Ekchian, and the Board were responsible for the unwarranted investigation against Plaintiff. SAC ¶ 74; Ptf. RJN ¶ 3, Ex. C. Watson was also responsible for barring Mr. Shelton from all GUSD sites during his leave which was never revoked. Def. RJN ¶ 4, Ex. B.

Even if Watson was not personally responsible for establishing GUSD's retaliatory policies, her role as the head of HR put her in a supervisory role to enforce it in an unconstitutional manner. See *OSU*, 699 F.3d at 1076. The SAC alleges how Watson used her position to selectively impose discipline that discriminated based on viewpoint, in violation of the First Amendment. For instance, she acted with deliberate indifference when a teacher and principal under her control abused a special needs student who spoke out against GUSD's Sex-Change Policies. See *Hoye v. City of Oakland*, 653 F.3d 835, 855 (9th Cir. 2011) (plaintiff can demonstrate discriminatory government action by contrast in enforcement of speech policies). Watson also selectively punished Mr. Shelton for expressing his views while ignoring Mr. Shelton's complaints against teachers who engaged in a personal, virulent harassment campaign against him. The only reason for this differential treatment was the teachers' support for Sex-Change Policies and Mr. Shelton's opposition to them. SAC ¶¶ 86-91. These

allegations against Watson nudge the inference of her liability "across the line from conceivable to plausible…That is enough to get discovery." *OSU*, 699 F.3d at 1078.

B. Mr. Shelton's Protected Speech Was a Substantial Motivating Factor in the Adverse Actions Against Him

In the Ninth Circuit, "to establish that retaliation was a substantial or motivating factor behind an adverse employment action, a plaintiff may introduce evidence that (1) the speech and adverse action were proximate in time…; (2) the employer expressed opposition to the speech…; or (3) the proffered explanations for the adverse action were false and pretextual." *Ellins v. City of Sierra Madre*, 710 F.3d 1049, 1062 (9th Cir. 2013). These factors may be established by circumstantial evidence. *Howard v. City of Coos Bay*, 871 F.3d 1032, 1045 (9th Cir. 2017). A complaint that alleges even one of these factors is sufficient to get the case to a jury. See *Marable v. Nitchman,* 511 F.3d 924, 930 (9th Cir. 2007) (allowing a close temporal connection to establish substantial motive even though defendants claimed no knowledge of the employee's protected speech and asserted independent reasons for disciplining the employee).

Here, the evidence of retaliation is overwhelming. Defendants' adverse actions against Mr. Shelton started first thing in the morning the very next day after his speech at the school board meeting. They then continued into the afternoon and evening with the false and malicious emails from Tonoli and Ekchian. These adverse actions almost immediately following Mr. Shelton's speech establish beyond the shadow of a doubt that his exercise of constitutional rights was a substantial factor in the retaliation.

To get around this, Defendants attempt to mislead the Court by conflating the analysis for Title VII retaliation with that under the First Amendment. Defendants claim that the Ninth Circuit held that "if 'an adverse action follows on the heels of *both* a protected activity *and* an independent reason for adverse action,' temporal proximity may not establish **retaliation** under Title VII." ECF 29 at 26 (emphasis added). However—the full quote, with the crucial section severed by Defendants—states that if, "an adverse action follows on the heels of *both* a protected activity *and* an independent

reason for adverse action—it might not be enough standing alone to establish ***pretext***." *Kama v. Mayorkas,* 107 F.4th 1054, 1060 (9th Cir. 2024) (emphasis added). The distinction is crucial because the *Kama* holding has no bearing on a motion to dismiss in a First Amendment retaliation action. This is because Title VII "allocates burdens of proof more favorably to defendants." *Allen v. Iranon*, 283 F.3d 1070, 1074 (9th Cir. 2002) (plaintiff has the burden of proving pretext) (emphasis added).[6]

Conversely, in a First Amendment retaliation case, the question is "whether the 'adverse employment action was based on protected *and* unprotected activities,' and if the state 'would have taken the adverse action if the proper reason alone had existed.'" *Eng v. Cooley* 552 F.3d 1062, 1072 (9th Cir. 2009) (the state must affirmatively prove "that the employee's protected speech was not a but-for cause of the adverse employment action."). Most importantly, this "causation inquiry is purely a question of fact." *Id.; see also, Mabey v. Reagan,* 537 F.2d 1036, 1045 (9th Cir.1976) ("[T]he only way to erect adequate barriers around First Amendment freedoms is for the trier of fact to delve into the motives of the decisionmaker.").

Here, Defendants are not only asking the Court to apply the wrong legal standard but to also accept their "facts" over the well-pleaded allegations of the SAC. This, the Court cannot do. See *Khoja v. Orexigen Therapeutics, Inc.* 899 F.3d 988, 999 (9th Cir. 2018) ("If defendants are permitted to present their own version of the facts at the pleading stage—and district courts accept those facts as uncontroverted and true—it becomes near impossible for even the most aggrieved plaintiff to demonstrate a sufficiently 'plausible' claim for relief.").

1. Facetious speech is constitutionally protected

In any case, Defendants' erroneous argument is moot because even if the Court were to apply their incorrect legal standard and accept their inadmissible evidence, the

[6] It is also worth noting that in *Kama*, the Ninth Circuit held that temporal proximity may not be enough to establish *pretext*, an element that is irrelevant at this stage of a First Amendment retaliation claim. See *Ellins*, 710 F.3d at 1063 ("That Ellins has not demonstrated pretext or falsity at this stage, where the district court ruled that Ellins has not made out a prima facie case, is not fatal to his claim.").

facts establish that Defendants' adverse actions were still based on *protected* activity. Defendants claim, based on inadmissible evidence, that they took adverse action against Mr. Shelton because he allegedly "waved" a "swastika" at the school board meeting. Even crediting their false and conclusory "evidence," all they can show is that Mr. Shelton had a sign with a facetious meme with him at the meeting that satirized the same Sex-Change Policies that he spoke out against during his speech.

Notably, Defendants do not claim that Mr. Shelton uttered a single word with respect to this meme. In all their submissions, they do not attempt to claim that Mr. Shelton ever said anything to suggest he would ever endorse what an actual swastika represents. In fact, everything presented by Defendants shows the exact opposite to be true: There were no words attached to the meme. It was merely four Progress Pride flags—the same flags that Defendants have repeatedly displayed as a symbol of conquest and a representation of transgender ideology and their Sex-Change Policies. See Ptf. RJN ¶¶ 6-10, Ex. F-I. And the only reasonable interpretation of the meme is that it is a criticism of the hectoring authoritarianism that silences dissent and uses the power of the state to punish opposition. Essentially, a visual meme that verbally would translate to "Fascism = Bad."

Defendants want the Court to engage in mind-reading and credit their conclusory interpretation that Mr. Shelton was engaging in harassment at the meeting. But this is simply not permitted on a motion to dismiss. See *Mabey,* 537 F.2d at 1045. Further, as the as the Supreme Court has noted "[f]acetious speech…remains protected even if it is offensive." *See Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 54 (1988). "Parody serves its goals whether labeled or not, and there is no reason to require parody to state the obvious (or even the reasonably perceived)." *Campbell v. Acuff-Rose Music, Inc.* 510 U.S. 569, 583 n.17 (1994). "The political cartoon is a weapon of attack, of scorn and ridicule and satire; it is least effective when it tries to pat some politician on the back. It is usually as welcome as a bee sting and is always controversial in some quarters." *Hustler*, 485 U.S. at 54.

At most, the Court can conclude that the meme was in the room during the board meeting. But Mr. Shelton simply having possession of a meme while at the meeting is not only protected facetious speech but nothing remotely resembling "hate speech" or any of the other false things Defendants accused him of. In fact, Defendants' claim that they punished Mr. Shelton for having a visual meme that verbally would translate to "Fascism = Bad" shows that he was retaliated against for opposing GUSD's Sex-Change Policies—an adverse action for engaging in *private speech* on a matter of *public concern*.

C. Mr. Shelton Engaged in Petitioning Activity

Mr. Shelton's speech at the school board meeting constitutes petitioning activity because it sought to influence GUSD to abandon its harmful Sex-Change Policies. In determining what constitutes petitioning activity courts often look to the *Noerr–Pennington* doctrine, which immunizes "conduct encompassed by the Petition Clause [of the First Amendment]—i.e., legitimate efforts to influence a branch of government." *Tichinin v. City of Morgan Hill* 177 Cal.App.4th 1049, 1064–1065 (2009). This "right to petition extends to all departments of the government, including the executive department, the legislature, agencies, and the courts." *White v. Lee*, 227 F.3d 1214, 1232 (9th Cir. 2000). This necessarily includes government entities such as local school boards and districts. Therefore, Mr. Shelton's attempt to influence the Board to stop harming children in service of transgender ideology was protected petitioning activity under the First Amendment. See SAC ¶¶ 41-49.

D. Defendants Do Not Present a Coherent Qualified Immunity Argument

Because the qualified immunity defense requires courts to delve into the factual record, most have recognized that it is unusual and inappropriate to dismiss a complaint on immunity grounds under Rule 12(b)(6). See *Alvarado v. Litscher*, 267 F.3d 648, 651 (7th Cir. 2001) ("[A] complaint is generally not dismissed under Rule 12(b)(6) on qualified immunity grounds."); *Kwai Fun Wong v. United States*, 373 F.3d 952, 957 (9th Cir. 2004) (a motion to dismiss on qualified immunity grounds puts the

court in the difficult position of trying "to decide far-reaching constitutional questions on a nonexistent factual record[.]"); *see also Alvarado*, 267 F.3d at 651 ("Because an immunity defense usually depends on the facts of the case, dismissal at the pleading stage is inappropriate: [T]he plaintiff is not required initially to plead factual allegations that anticipate and overcome a defense of qualified immunity.") (cleaned up).

Here, Defendants' stated reasons for urging this Court to contravene this long-accepted practice are unavailing. They are simply a re-hashing of their previous arguments on the liability issue, the first step in the qualified immunity analysis. But Defendants do not even attempt to address the "clearly established *right*" portion of the analysis.[7] As such, it is waived.

It has been clearly established law for over 50 years in this country that "disagreement with a disfavored political stance or controversial viewpoint, by itself, is not a valid reason to curtail expression of that viewpoint at a public school." *Dodge*, 56 F.4th at 786. And, in *Dodge*, the Ninth Circuit held that it is was "patently unreasonable for [school officials] to believe that [they] could restrict [a teacher's] speech to quell what was, in reality, nothing more than the natural effect that disfavored political speech often has on those with different viewpoints. *Id*. at 784.

Defendants not only subjected Mr. Shelton to an unwarranted disciplinary investigation, but publicly announced it to the entire community while falsely accusing him of "hate speech" and of being a threat to the safety of students and his fellow employees. For a teacher to be publicly accused of these things by his principal but also the school superintendent is not only mortifying but a social and professional death sentence. And to exacerbate the situation, Defendants needlessly kept Mr. Shelton on leave for almost two months—flagrantly allowing the false accusations to simmer and increasing his anxiety and worry. Defendants were clearly on notice that they could not

[7] Instead, they conflate the two steps by arguing about whether it was clearly established that the actions they took could be considered adverse employment actions (which, as illustrated above, it was and they are).

retaliate against Mr. Shelton for engaging in political speech. But they did it anyway. They are, therefore, not entitled to qualified immunity here.

E. The SAC Sufficiently States a Municipal Liability Claim

"For purposes of liability under *Monell,* a 'policy' is 'a deliberate choice to follow a course of action ... made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question." *Fogel v. Collins,* 531 F.3d 824, 834 (9th Cir. 2008). Alternatively, "[a]n act performed pursuant to a 'custom' that has not been formally approved by an appropriate decision-maker may fairly subject a municipality to liability on the theory that the relevant practice is so widespread as to have the force of law." *Bd. of Cnty. Comm'rs v. Brown,* 520 U.S. 397, 404 (1997) "Normally, the question of whether a policy or custom exists would be a jury question." *Trevino v. Gates*, 99 F.3d 911, 920 (9th Cir. 1996).

Here, Plaintiff alleges that GUSD implemented the Sex-Change Policies and enforced them in a totalitarian manner. SAC ¶¶ 92-94. In essence, the Board knew that the community opposed its Sex-Change Policies and crafted policies to retaliate against them and keep them from speaking out in opposition. Further, Defendants' disparate treatment of employees who supported their Sex-Change Policies from those that opposed them establishes their deliberate indifference. SAC ¶¶ 84-88. The Board's indifference to this, as well as the emails by Tonoli and Ekchian, illustrate that this was their policy. See *Castro v. County of Los Angeles*, 833 F.3d 1060, 1068-69 (9th Cir. 2016) (proof of a pattern of similar incidents not required where government knew of the risk of a particular harm and adopted regulations that acknowledged it).; *see also, Menotti v. City of Seattle*, 409 F.3d 1113, 1147 (9th Cir. 2005) ("discriminatory enforcement of a speech restriction amount[s] to viewpoint discrimination in violation of the First Amendment.")

Finally, "[i]f the authorized policymakers retain the authority to measure the official's conduct for conformance with *their* policies, or if they approve a subordinate's

decision and the basis for it, their ratification would be chargeable to the municipality because their decision is final." *Bouman v. Block*, 940 F.2d 1211, 1231 (9th Cir. 1991) (cleaned up). As discussed, above, the Board Members retained this authority and ratified the retaliation against Mr. Shelton. Thus, the SAC sufficiently alleges a claim for municipal liability.

F. Defendants' Conspiracy is Adequately Detailed in the SAC

To state a conspiracy claim under § 1983, a plaintiff must "demonstrate the existence of an agreement or meeting of the minds to violate constitutional rights." *Crowe v. Cnty. of San Diego*, 608 F.3d 406, 440 (9th Cir. 2010) (internal quotation marks omitted). "Such an agreement need not be overt, and may be inferred on the basis of circumstantial evidence such as the actions of the defendants." *Id.* "A plaintiff may allege a § 1983 claim based on a conspiracy to deprive him of his constitutional rights so long as there has been an actual constitutional deprivation." *Minster*, 2001 WL 1112684, at *4. "Under a § 1983 conspiracy theory, liability may be imposed on all participants in the conspiracy without regard to who committed the particular act." *Id.* (internal quotation marks omitted).

Here, Plaintiff has demonstrated the existence of a constitutional violation. He has also demonstrated an overt conspiracy, specifically regarding his forced leave and unwarranted disciplinary investigation. He has also adequately alleged Defendants' meeting of the minds with respect to the collaborative drafting and dissemination of the false accusations against him in Tonoli and Ekchian's emails that served as a threat to chill his speech as well as that of others who dared to speak out against GUSD's Sex-Change Policies. The overt acts also extended to the unwarranted length of time Mr. Shelton was forced to remain on leave and the Board's ratification of these decisions by refusing to reinstate him before the end of the school year.

Even without these overt acts, the conspiracy can be inferred from the evidence surrounding the immediate punitive actions taken against Mr. Shelton by Defendants

the day after he spoke out at the school board meeting and everything that followed. See *Crowe*, 608 F.3d at 440.

G. GUSD Does Not Have Immunity Because It is Not an Arm of the State

GUSD does not enjoy immunity under the Eleventh Amendment because it is not an 'arm of the state' under the new test established by the Ninth Circuit in *Kohn v. State Bar of California*, 87 F.4th 1021 (9th Cir. 2023) (en banc). Prior to *Kohn*, the Ninth Circuit relied on a multi-factor test to determine whether an entity enjoyed sovereign immunity as an 'arm of the state.' *Id.* at 1027 ("Our version of the arm of the state test, the so-called *Mitchell* factors, arose from a grab bag of Supreme Court and Ninth Circuit precedent."). Using this test, the Ninth Circuit "held that California school districts have sovereign immunity, relying on *Mitchell*." *Health Freedom Defense Fund, Inc. v. Carvalho* 104 F.4th 715, 727 (9th Cir. 2024) (R. Nelson, J., concurring).

But in *Kohn* the Ninth Circuit "overruled *Mitchell*," meaning that cases relying on its reasoning need to be reevaluated as they may no longer be good law. See *Health Freedom Defense Fund, Inc.* 104 F.4th at 726. This applies to the cases holding that California school districts are arms of the state, which Defendants rely on to claim that GUSD has sovereign immunity, and all of which preceded *Kohn*. *See, e.g., Belanger v. Madera Unified Sch. Dist.*, 963 F.2d 248, 254 (9th Cir. 1992); *see also, Sato v. Orange Cnty. Dep't of Educ.*, 861 F.3d 923, 934 (9th Cir. 2017).

A district court is bound by Ninth Circuit precedent unless that precedent is "effectively overruled," which occurs when "the reasoning or theory of our prior circuit authority is clearly irreconcilable with the reasoning or theory of intervening higher authority." *Miller v. Gammie*, 335 F.3d 889, 890, 893 (9th Cir. 2003) (en banc). An en banc decision of the Ninth Circuit constitutes such higher authority. See *Ortega–Mendez v. Gonzales*, 450 F.3d 1010, 1019 (9th Cir. 2006) (noting that intervening higher authority includes decisions of the Supreme Court and of circuit courts sitting en banc). And *Kohn* was an en banc Ninth Circuit decision. As Judge Nelson observed in *Health Freedom Defense Fund* "[o]ur new entity-based test in *Kohn* seems to conflict

with (and likely overrule) our reasoning in *Belanger* and *Sato*. Because of this, the district court's holding that LAUSD is an 'arm of the state' (as well as our prior holdings in *Belanger* and *Sato*) may need to be revisited." *Health Freedom Defense Fund, Inc.* 104 F.4th at 727.

The Ninth Circuit's newly established "three-factor [arm of the state] test evaluates '(1) the state's intent as to the status, including the functions performed by the entity; (2) the state's control over the entity; and (3) the entity's overall effects on the state treasury.'" *Id.* at 726-727. Under the first factor of this entity-based test, GUSD is not an arm of the state because it is a completely independent entity that can sue and be sued in its own name. See Cal. Educ. Code § 35162 ("In the name by which the district is designated the governing board may sue and be sued, and hold and convey property for the use and benefit of the school district."). As to the second step, in 2013, "California enacted AB 97, which 'reformed education funding and governance in California.' As a result, public education in California became more locally funded and educational achievement more locally controlled—thus reducing the State's involvement in both." *Health Freedom Defense Fund, Inc.* 104 F.4th at 727. This also cuts in favor of GUSD being an independent entity rather than an arm of the state. And although school districts still impact the state's treasury, AB 97's impact in making schools more locally funded further vitiates the argument that GUSD is an arm of the state. Thus, GUSD, as an independent entity, does not enjoy Eleventh Amendment immunity from suit in federal court.

H. The Motion to Strike is Meritless

"Motions to strike are generally disfavored because of the limited importance of pleadings in federal practice and because it is usually used as a delaying tactic," *RDF Media Ltd. v. Fox Broadcasting Co.,* 372 F.Supp.2d 556, 561 (C.D. Cal. 2005). A motion to strike is also inappropriate where there has been substantial compliance with a court order and no prejudice has been shown by the moving party. *Ducre v. Veolia Transportation*, 2010 WL 11549863, at *4 (C.D. Cal. 2010). Here, the Court granted

Defendants' motion for a more definite statement with respect to 14 points. Defendants now want the Court to strike the entire SAC because they claim (erroneously) that Plaintiff did not comply with five.

These claims are frivolous. The SAC alleges that Mr. Shelton lost skills because of his forced nearly two-month leave from his classroom (SAC ¶ 79), how a special needs student in GUSD was abused and harassed (SAC ¶ 94), and when Mr. Shelton's employment ended (his leave never ended as Defendants never rescinded it) (SAC ¶¶ 73, 96). The instant opposition also lays out how Tonoli's exposure of his personnel matter email violated his right to privacy. Finally, the opposition also explains in detail how the SAC alleges Defendants' specific policies deterred opponents of its policies from speaking out. Thus, the frivolous motion to strike must be denied.

I. The SAC States a Claim Under the California Constitution

Finally, Plaintiff has stated a claim to remedy free speech violations under California Constitution, article I, section 2. This article is "self-executing" without requiring effectuating legislation to make it binding on government entities and "supports an action, brought by a private plaintiff against a proper defendant, for declaratory relief or for injunction." *Degrassi v. Cook*, 29 Cal.4th 333, 338 (2002). The California Constitution provides greater restrictions on government interference with speech than the First Amendment. See, *e.g.*, *Pines v. Tomson*, 160 Cal.App.3d 370 (1984). Because Plaintiff has adequately alleged his First Amendment claims, he is also entitled to declaratory and injunctive relief under the California Constitution.

IV. CONCLUSION

Based on the foregoing, Plaintiff respectfully requests that the Court deny Defendants' motion to dismiss and/or strike in its entirety. If the Court dismisses any claim, Plaintiff requests the opportunity to amend to cure the deficiency.

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Dated: September 17, 2024

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