NO. _____

IN THE

Supreme Court of the United States

E.D., a minor, by her parents and next friends, MICHAEL DUELL and LISA DUELL; NOBLESVILLE STUDENTS FOR LIFE,

Petitioners,

v.

NOBLESVILLE SCHOOL DISTRICT, et al.,

Respondents.

On Petition for Writ of Certiorari to the U.S. Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Noblesville High School freshman E.D. worked hard to bring Noblesville Students for Life (NSFL) and its life-affirming message to her school. She took a summer job to fund its launch, secured an adviser, and met with her principal. At least initially, the principal approved NSFL as one of the school's many student-interest clubs, which are "student-driven and student-led," and not school-sponsored. App.29a–30a.

These noncurricular clubs could hang flyers in school common areas to promote non-school meetings and events; no written policy governed the flyers' content. Yet when E.D. asked for permission to post flyers advertising the first NSFL meeting, the school said no because the flyers contained a picture of students holding "Defund Planned Parenthood" signs. The school then revoked NSFL's recognition.

The Seventh Circuit upheld the school's censorship under *Hazelwood School District* v. *Kuhlmeier*, 484 U.S. 260 (1988), on the theory that a "reasonable observer could easily conclude that the flyers reflected the school's endorsement." App.13a. In so doing, it exacerbated a deep, longstanding circuit split over when *Hazelwood*'s reduced speech protection applies.

The question presented is:

Whether *Hazelwood* applies (1) whenever student speech might be erroneously attributed to the school, as the Fifth, Seventh, and Tenth Circuits have held; (2) when student speech occurs in the context of an "organized and structured educational activity," as the Third Circuit has held; or (3) only when student speech is part of the "curriculum," as the Sixth and Eleventh Circuits have held.

PARTIES TO THE PROCEEDING

Petitioners are Michael and Lisa Duell, individually and as parents and next friends of E.D.; and Noblesville Students for Life.

Respondents are Noblesville School District, Beth Niedermeyer, Craig McCaffrey, Janae Mobley, and Jeremy Luna.

LIST OF ALL PROCEEDINGS

U.S. Court of Appeals for the Seventh Circuit, No. 24-1608, *E.D.* v. *Noblesville School District*, judgment entered August 14, 2025.

U.S. District Court for the Southern District of Indiana, No. 1:21-cv-03075, *E.D.* v. *Noblesville School District*, order on cross motions for summary judgment entered March 15, 2024.

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The Seventh Circuit's opinion affirming the district court's order is reported at 151 F.4th 907 and reprinted at App.1a.

STATEMENT OF JURISDICTION

The Seventh Circuit entered judgment on August 14, 2025. Petitioners moved for rehearing, which the Seventh Circuit denied on September 29, 2025. App.87a. On December 18, 2025, Justice Barrett extended the time to file a petition until January 28, 2026. Lower courts had jurisdiction under 28 U.S.C. 1331, 28 U.S.C. 1367(a), and 28 U.S.C. 1291. This Court has jurisdiction under 28 U.S.C. 1254(1).

PERTINENT CONSTITUTIONAL PROVISIONS AND STATUTES

The First Amendment to the United States Constitution provides, in relevant part: "Congress shall make no law … abridging the freedom of speech." U.S. Const. amend. I.

INTRODUCTION

"[S]tudents do not 'shed their constitutional rights to freedom of speech or expression,' even 'at the school house gate.'" *Mahanoy Area Sch. Dist.* v. *B.L.*, 594 U.S. 180, 187 (2021) (quoting *Tinker* v. *Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969)). "This has been the unmistakable holding of this Court" for more than a century. *Tinker*, 393 U.S. at 506 (citing *Meyer* v. *Nebraska*, 262 U.S. 390 (1923), and *Bartels* v. *Iowa*, 262 U.S. 404 (1923)).

One narrow exception to that broad protection is *Hazelwood School District* v. *Kuhlmeier*, which allowed restrictions on student speech in certain school settings—there, a student newspaper in a high-school journalism class. 484 U.S. 260, 267–270 (1988). But lower courts have struggled mightily to determine *when* this reduced speech protection applies.

Here, for example, the Seventh Circuit asked only whether a "reasonable observer" *could* conclude that flyers posted by Petitioner E.D.'s "student-driven and student-led" club, App.13a, 29a–30a, in a school's common areas, "reflected the school's endorsement" of the flyers' speech, App.13a. The court purported to follow Tenth and Eleventh Circuit decisions that also applied *Hazelwood* to student speech that "reasonably appears school-sanctioned." App.13a–14a (citing *Fleming* v. *Jefferson Cnty. Sch. Dist. R-1*, 298 F.3d 918, 924–26 (10th Cir. 2002), and *Bannon* v. *School Dist. of Palm Beach Cnty.*, 387 F.3d 1208, 1214 (11th Cir. 2004) (per curiam)). The Fifth Circuit uses that same test. *Morgan* v. *Swanson*, 659 F.3d 359, 409 (5th Cir. 2011) (en banc) (*Hazelwood* extends to any "speech that could be erroneously attributed to the school").

But the Eleventh Circuit in *Bannon* did not adopt such a pro-censorship test. Instead, it clarified that *Hazelwood* applies "only" to "school-sponsored expression that occurs in the context of a curricular activity." *Bannon*, 387 F.3d at 1214. That curricular approach aligns with *Hazelwood* itself and the Sixth Circuit, which likewise applies *Hazelwood* to student speech that is part of "a curricular assignment." *Curry* v. *Hensiner*, 513 F.3d 570, 579 (6th Cir. 2008).

One Circuit—the Third—takes a middle ground. Under that court's approach, *Hazelwood* applies to any "student speech within an organized and structured educational activity." *Walz* v. *Egg Harbor Twp. Bd. of Educ.*, 342 F.3d 271, 278 (3d Cir. 2003). That test could include at least some noncurricular speech.

This 3–1–2 circuit split is mature and will not be resolved absent this Court's intervention. And the disparity in student-speech protection is stark. E.D.'s noncurricular flyer would have received full First Amendment protection in the Sixth and Eleventh Circuits, and likely the Third Circuit, too. Meanwhile, public-school students in the Fifth, Seventh, and Tenth Circuits have vanishingly small speech rights because any speech that a school *allows* can be cast as speech that "appears school-*sanctioned*." App.13a–14a (emphasis added). Under that test, even *Tinker* itself would come out differently.

Hazelwood's scope has implications far beyond primary and secondary education. Numerous courts have applied the *Hazelwood* free-speech exception to collegiate speech as well. The Court should grant the petition and hold that *Hazelwood* applies only to school-sponsored curricular speech.

STATEMENT OF THE CASE

I. Factual background

A. E.D. starts Noblesville Students for Life to bring a life-affirming message to her public school.

The summer before starting high school, E.D. earned money working at an ice-cream shop with a specific goal: she wanted to bring a chapter of Students for Life of America (SFLA) to Noblesville High School. Doc. 43. ¶¶ 14, 95, 150. SFLA is a pro-life, life-affirming organization that seeks to mobilize the pro-life generation. *Id.* ¶ 15. E.D. planned to use the money she earned over the summer to help launch the chapter, Noblesville Students for Life (NSFL), to spread its pro-life message at Noblesville High School. Doc. 158-2; Doc. 152-2 at 545.

Specifically, E.D. wanted "to raise awareness," "generate discussion," and ultimately "do[] something about" abortion. Doc. 158-2. She expected the club would engage in "a lot of activities on and off campus," including "flyering, tabling, chalking, volunteering at a local pregnancy resource center," and hosting pro-life speakers. *Ibid.* Before her freshman year even started, E.D. found a faculty sponsor and scheduled a meeting with Principal McCaffrey to present her club idea. Doc. 152-2 at 5, 8. On August 3, 2021, E.D. met with Principal McCaffrey, and because E.D. satisfied all the school's requirements, he initially approved the club. *Id.* at 6, 15.

B. Noblesville's noncurricular clubs are "student-led and initiated."

Noblesville High has created a forum for over 70 approved "noncurriculum based" student-interest clubs to bring their ideas to campus. Doc. 101 ¶ 347; Doc. 158-30 at 1–3. According to Principal McCaffrey, these groups allow students to "talk about their common interests." Doc. 152-2 at 106; Doc. 158-3. And the approved groups reflect the "wide range" of interests of Noblesville's 3,200 students. Doc. 158-3; Doc. 152-2 at 323. Clubs range from the Young Democrats to the Young Republicans and from the Gender and Sexuality Alliance to the Fellowship of Christian Athletes and Campus Crusade for Christ (CRU). Doc. 158-30 at 1–3.

These "student interest clubs are 100% student-driven." Doc. 158-3. They "are student-led and initiated." Doc. 158-25 ¶ 10. They "are *not* school sponsored." *Ibid.* (emphasis added). And while they must have a "teacher sponsor to meet the supervision requirement," "even the teacher cannot have anything to do with the club other than advising on school rules and policy and making sure everyone is safe." Doc. 158-3.

Approved student-interest clubs could meet at school during noninstructional time, hang flyers and posters at school, and attend the student activity fair. Doc. 152-2 at 58, 339; Doc. 101 ¶¶ 10, 339, 342. When displaying flyers and posters, clubs could hang them in common areas, such as the main hallway of the freshman center, the cafeteria, near bus entrances, and near the school auditorium. Doc. 158 at 13.

C. Noblesville allows pictures on student-club flyers but not "political" speech.

Noblesville's student handbook required flyers to "have administrative approval to be posted." Doc. 152-2 at 173. All flyers advertising student meetings needed the club's name and the meeting location, date, and time. Doc. 158-5 at 4. Noblesville allowed flyers to have pictures, a QR code, and clip art, like the logo of the national organization affiliated with the student-interest club. Doc. 101 ¶¶ 108, 154; Doc. 152-2 at 53. The school district had no written policy governing the substance of student-club flyers. But the school district's unwritten custom prohibited photos that school officials deemed "political" or "inappropriate." Doc. 152-2 at 53; Doc. 158 at 28–29.

Because Noblesville didn't have a written policy governing flyer content, the district did not define the terms "political" and "inappropriate" for its students. Even administrators didn't know what those terms meant. Assistant Principal Mobley understood "political" to implement a "really broad and vague" standard. Doc. 158-22 at 6. She gave the word "political" a circular definition: a "political topic … would be political in nature." *Id.* at 17.

To Principal McCaffrey, what qualified as a "political organization" was "very much in turbulent flux at the moment." Doc. 152-2 at 67. He didn't know if "feminism" was "a political ideology." *Id.* at 68. He "hope[d]" feminism wouldn't be "deemed political" because—to him—"feminism" is "important." *Ibid.* He simply "call[ed] it 'girl power.'" *Ibid.*

The criterion for what qualified as an "appropriate" flyer photo was similarly amorphous. Principal McCaffrey had "no steadfast" way of determining appropriateness. Doc. 152-2 at 103. Instead, he would look broadly to the school's "general standard" and "rules," *ibid.*, whatever those were. And he would examine "the current hot topic" in "culture." *Ibid.*

As a result, no student group would know in advance what was an acceptable flyer photo—unless they "talk[ed] to an administrator" who could tell them "what would be appropriate and what would be not appropriate." *Id.* at 321. So students were forced to engage in significant "guessing" as to what the district would allow or prohibit on club flyers. *Id.* at 56, 104. Worse, no written or publicly available policy notified students *which* administrator could approve flyers. *Id.* at 44, 317. Even Principal McCaffrey didn't "know" how students would discern which administrator to ask for approval. *Id.* at 51. The student handbook purported to allow any administrator to approve flyers. *Id.* at 322.

D. Administrators deny approval for Petitioner E.D.'s flyers.

E.D. and NSFL hit the ground running her freshman year. They set up a table at Noblesville's club fair. Doc. 152-2 at 16. During the fair, E.D. handed out flyers about the group. *Id.* at 18. Many students took the flyers. *Id.* at 19–20. And E.D. signed up over 30 potential members. *Id.* at 42.

On August 27, E.D. met with Assistant Principal Mobley to discuss scheduling an initial club meeting and posting flyers for that meeting. Doc. 158-5 at 5. Assistant Principal Mobley told E.D. that any administrator could approve a flyer and that Dean Jeremy Luna approved meeting dates. Doc. 152-2 at 44. The same day, Assistant Principal Mobley emailed Luna to schedule the meeting. *Id.* at 24. And E.D.'s faculty sponsor also emailed Dean Luna about scheduling a meeting. *Id.* at 26–27. E.D. did, too. *Id.* at 27. Luna saw those emails but didn't respond. *Id.* at 27–28, 30.

Assistant Principal Mobley and E.D. didn't discuss the specific flyers E.D. wanted to use, so a few days later, E.D. emailed two proposed flyer templates to Mobley for approval. Doc. 158-22 at 19; Doc. 158-5 at 1. E.D. obtained the templates from the SFLA website. Doc. 158-5 at 5. Both proposed flyers included a picture of students holding "Defund Planned Parenthood" placards:

Assistant Principal Mobley denied approval, explaining the flyers did not "need the pictures of the signage," only information "that this is a 'Noblesville Students for Life' Club meeting location, date, and time." Doc. 158-5 at 4. E.D. was confused. Doc. 158-18 at 17. She found it "unclear whether there was an issue with the specific picture on [the] flyer, an issue that there was a picture at all," or an issue because the flyer lacked "meeting information," which E.D. still planned to add before hanging the flyers. *Ibid.*

On September 3, still waiting for a response from Dean Luna, E.D. went to his office to schedule a date for the club's first meeting and resolve any questions about the flyers. Doc. 152-2 at 28. E.D. showed Luna the flyers and asked "why" they "had been vetoed." *Id.* at 33–34. Luna "[i]nitially" told E.D. the flyers had a "picture," which was "not allowed." *Id.* at 34–35. When E.D. pointed out that other clubs had "approved flyers with pictures," Luna "changed his mind" and said the "Defund Planned Parenthood" signage was the problem. *Id.* at 35. Luna said the school was "dancing on eggshells" and referenced ongoing controversies about "political ideology." *Ibid.* He also told E.D. he "might" have time "over th[e] weekend" to schedule a club meeting date. *Id.* at 30.

E. Principal McCaffrey responds to the proposed flyers by revoking NSFL's recognition.

Immediately after talking with E.D., Dean Luna went to Principal McCaffrey's office. Doc. 158-23 at 5–6. Principal McCaffrey, Dean Luna, and Assistant Principal Mobley discussed the meeting Luna had just had with E.D. *Id.* at 6.

Later that morning, Principal McCaffrey emailed E.D.'s mother, Mrs. Duell—but not E.D. Doc. 158-3; Doc. 152-2 at 75. Principal McCaffrey informed her that "[a] poster cannot contain any content that is political" and falsely said that Assistant Principal Mobley had told E.D. the flyers were "not appropriate for school due to the content." Doc. 158-3. He also said he was "not sure" why E.D. took the flyers to Dean Luna after Assistant Principal Mobley's feedback. *Ibid.* And although E.D. had initiated all the meetings and engaged in all the conversations to date, Principal McCaffrey expressed doubt that the club was student-driven because Mrs. Duell had participated in two meetings with school administrators. *Ibid.*

At that point, rather than simply disapprove the flyers and direct that new ones be designed without the pictures, Principal McCaffrey "remov[ed] the club's approval" entirely. *Ibid.* That decision was unprecedented, as Principal McCaffrey had never before revoked a student club's recognition. Doc. 158-20 at 20. Perhaps given the unusual nature of the penalty imposed, Principal McCaffrey called his superintendent, Beth Niedermeyer, to inform her about his decision to terminate NSFL's approved status. Doc.164-1 at 5. Superintendent Niedermeyer "felt" Principal McCaffrey "had justification" for his decision, *ibid.*, but she never contacted E.D. or her mother to discuss the issue.

II. Procedural History

A. The district court applies *Hazelwood* to the student group's flyers.

E.D. (through her parents) and NSFL filed suit, bringing First Amendment claims, among others, against Defendants' censorship of her flyers. Doc. 43 ¶¶ 285, 331. Principal McCaffrey subsequently reinstated NSFL, App.8a, and the district court granted Defendants summary judgment, App.85a.

The court recognized that Noblesville "[s]tudent interest clubs … are created by students who want to gather with other students who hold similar interest in a particular subject." App.30a. These clubs "are student-driven and student-led," with no teachers "actively participat[ing]." App.30a. Yet the court rejected as "a non-starter" E.D.'s argument that she had a First Amendment right "to post a flyer containing political speech" at school. App.63a.

E.D. argued that *Tinker*'s "substantial disruption" test should control. *Tinker*, 393 U.S. at 514. App.64a. But the district court held that *Hazelwood*'s censorship-friendly rule applied because the flyers "could reasonably be perceived to bear the imprimatur of the school." App.65a. "[I]t would be reasonable for parents and other members of the public entering NHS … to erroneously attribute any political messaging the [flyers] contained to the school district or the school itself." App.65a.

Applying *Hazelwood*, the district court upheld Noblesville's ban on the proposed flyers. App.67a.

B. The Seventh Circuit also applies *Hazelwood* to the student group's flyers.

The Seventh Circuit affirmed on the same ground. App.17a. It applied the same rule as the district court: *Hazelwood* controls "student speech that others might reasonably perceive to bear the imprimatur of the school." App.10a–11a (citation modified). It, too, recognized that "student interest club[s]" are "student-initiated, student-led groups." App.3a. Though that would seem to take student-club flyers outside the school-sponsored curricular context that drove the result in *Hazelwood*, the Seventh Circuit held nonetheless that *Hazelwood* applied based on "where and how E.D. sought to display her posters":

- Without citing any record evidence, the panel assumed "the flyers would have appeared on school walls alongside announcements for school-sponsored events and remained in common areas for days." App.11a.
- Despite acknowledging that the flyers required the student group's name, the panel wrote that flyers were "[u]ntethered to any identifiable student and indistinguishable from official school materials," so "they would naturally (and perhaps inevitably) be seen by students, parents, and visitors as reflecting the school's endorsement." App.11a–12a.
- And according to the panel, "every student flyer" required "a faculty member's initials for approval," which the panel thought might "mislead observers into thinking the school endorses" the "Defund Planned Parenthood" view stated on NSFL's flyers. App.12a, 15a.

The Seventh Circuit thought the *Hazelwood* rule "precisely" targets any purported "*risk of mistaken attribution*." App.12a (emphasis added). And a "reasonable observer could easily conclude," the panel continued, "that the flyers reflected the school's endorsement" when they "promoted a club meeting during school hours, on school property, and under the supervision of a faculty advisor," and when they "would have been posted alongside official school-sponsored communications in high-traffic common areas." App.13a.

The court then held that the ban on "political" flyers survived *Hazelwood* scrutiny because it "serve[d] the pedagogical goal of maintaining neutrality on matters of political controversy." App.15a. It rejected E.D.'s argument that her flyers fostered "the very kind of robust debate secondary schools should encourage." App.16a.

The panel also excused Noblesville's censorship because E.D. and NSFL could still speak in other ways. For example, the court said that E.D. could wear a pro-life shirt to school and hand out flyers at the student activities fair. App.12a, 16a. All that was at stake, the panel insisted, was the school's authority to "limit[] how certain messages may be disseminated." App.16a.

In sum, the court concluded that Noblesville's "content restriction aligns with both the nature of the school walls as a limited forum for student expression and its broader pedagogical duty to create a stable, neutral educational environment." App.16a.

REASONS FOR GRANTING THE WRIT

An entrenched 3–1–2 circuit split exists over when *Hazelwood*'s censorship-friendly standard applies. Three circuits—including the court below—apply it to *any* speech someone might erroneously think the school endorses. One applies it to speech arising from any "organized and structured educational activity." Two others get it right: *Hazelwood* applies only when students engage in school-sponsored curricular speech—like in a high-school journalism class.

The majority rule applied here perpetuates for student speech the reasonable-observer standard extrapolated from *Lemon*'s "effects" test. See *Lemon* v. *Kurtzman*, 403 U.S. 602, 612 (1971). But speech protections do not rise or fall on the perceptions of a hypothetical observer. *Lemon* granted a heckler's veto, allowing the assumed views of an observer to control the constitutional analysis. That created chaos and inconsistent results. So too here. Who is the reasonable person? Would that person really think a school endorsed the views expressed on a pro-life club flyer? What if that flyer were displayed next to a sign of a student group with opposing views?

The implications of the question presented extend beyond K–12 schools. Courts have applied *Hazelwood* to collegiate student speech, including an extracurricular newspaper, and to uphold college speech codes under the guise of enforcing "professionalism." As a result, K–12 schools and universities use *Hazelwood* to censor speech they label "controversial." That can't be the right rule for our nurseries of democracy.

This case cleanly presents an important legal issue. E.D.'s free-speech rights—and those of other students—shouldn't depend on the judicial circuit where the students attend school. This Court should grant the petition and rein in the lower courts' expansive applications of *Hazelwood*.

I. The circuits are split 3-1-2 over whether *Hazelwood* applies to speech outside a school's curriculum.

This Court's landmark decision in *Tinker* held that, "[i]n the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views." 393 U.S. at 511. Since *Tinker*, this Court has recognized only limited exceptions to students' robust speech rights. One such exception exists for "school-sponsored" student expression that "may fairly be characterized as part of the school curriculum." *Hazelwood*, 484 U.S. at 271, 273.

The *Hazelwood* decision began by recognizing *Tinker*'s general rule that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Id.* at 266 (quoting *Tinker*, 393 U.S. at 506). For expression arising from activities that "may fairly be characterized as part of the school curriculum," government schools can "exercise greater control … to assure that participants learn whatever lessons the activity is designed to teach," that young students aren't "exposed to material that may be inappropriate," and that "views of the individual speaker are not erroneously attributed to the school." *Id.* at 271–72.

Curricular speech, the Court clarified, includes "school-sponsored publications, theatrical productions, and other expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school … so long as they are supervised by faculty members and *designed to impart particular knowledge or skills* to student participants and audiences." *Id.* at 271 (emphasis added).

Applying that test, the Court easily concluded that school officials had not "open[ed] the pages" of the school newspaper—produced and graded as part of a Journalism II class and indisputably "part of the educational curriculum and a regular classroom activity"—for the students' "indiscriminate use." *Id.* at 270. So the school could prevent students from running controversial articles on divorce and student pregnancy. *Id.* at 274–76. What mattered was that the school had reserved the forum for its intended curricular purpose, namely "as a supervised learning experience for journalism students." *Id.* at 270.

The lower courts have diverged sharply over how far *Hazelwood*'s narrow exception to students' free speech extends, fracturing into three camps. Three circuits—including the Seventh here—have expanded the exception to cover *any* student expression, even non-curricular speech, that an observer might wrongly think "reflect[s] the school's endorsement" or "reasonably appears school-sanctioned." App.13a. Another circuit has broadened *Hazelwood* to apply to expression arising in any "organized and structured" school activity—sweeping in at least some non-curricular speech. And two have properly confined *Hazelwood* to speech occurring within the curriculum.

This 3–1–2 split has produced a patchwork of constitutional protections, with some students receiving the full measure of *Tinker*'s protection, while others face near-plenary state control over identical speech. The need for clarity is especially acute as public schools and educators increasingly engage in political advocacy and indoctrination, heightening the risk that students who dissent from the prevailing orthodoxy will be censored. Cf. *L.M.* v. *Town of Middleborough*, 145 S. Ct. 1489, 1494 (2025) (Alito, J., dissenting from denial of certiorari); *Mahmoud* v. *Taylor*, 606 U.S. 522, 531–37 (2025).

Reining in the types of student expression subjected to *Hazelwood*'s speech-restrictive standard is particularly important given the significant deference courts afford to schools under *Hazelwood*. For example, the Seventh Circuit below explained that when *Hazelwood* applies, schools can restrict student expression so long as the government articulates some "valid educational purpose." App.14a. Courts have even accepted rationales as broad as preventing speech that might "divert attention from the business of learning." App.15a; *Fleming*, 298 F.3d at 931 (accepting that a "school's hallways" could "be a pedagogical concern" because they "affect[] the learning process"). Applying *Hazelwood* instead of *Tinker* gives public-school officials an almost free hand to censor any speech they dislike.

Only this Court can restore uniformity and ensure that *Hazelwood* remains a narrow exception tied to genuine curricular authority, not an ever-expanding displacement of *Tinker*'s constitutional shield.

A. The Tenth, Fifth, and now Seventh Circuits have extended *Hazelwood* by reducing it to a reasonable-observer test.

The Seventh Circuit has expanded *Hazelwood* far beyond the curricular setting, joining the camp of circuits that allow broad government censorship of student expression. As the court below acknowledged, NSFL was an "extracurricular" "student interest club." App.21a. Yet it still held *Hazelwood* governed because a supposedly reasonable observer *might* mistakenly perceive the noncurricular flyer as bearing the school's imprimatur. App.11a–12a. That holding divorces *Hazelwood* from its facts and transforms it from a limited exception into broad censorship authority. And it divorces *Hazelwood*'s passing reference to what "the public might reasonably perceive to bear the imprimatur of the school" from its explicit tie to curricular programs "designed to impart particular knowledge or skills." *Hazelwood*, 484 U.S. at 271.

The Seventh Circuit adopted the same "reasonable observer" standard as the Tenth Circuit in *Fleming* v. *Jefferson County School District R-1*, 298 F.3d 918 (10th Cir. 2002). App.13a (citing *Fleming*). *Fleming* applied *Hazelwood* to a community tile-painting project. Even though the court had "[n]o doubt" a reasonable observer would "understand that the school itself did not paint the tiles," the school could still suppress expression because an observer might suppose "the school had a role in setting guidelines for, and ultimately approving, the tiles." 298 F.3d at 930. Rejecting as "too narrow" the district court's conclusion that *Hazelwood* "only appl[ies] to activities conducted as part of the school curriculum," the Tenth Circuit broadened *Hazelwood* to cover

anything "that might reasonably be perceived to bear the imprimatur of the school and that involve[s] pedagogical concerns." *Ibid.*; accord *id.* at 926 (quoting David L. Dagley, *Trends in Judicial Analysis Since* Hazelwood*: Expressive Rights in the Public Schools*, 123 Ed. Law Rep. 1, 9 (1998)).

The Fifth Circuit's decision in *Morgan* v. *Swanson* also applied a broad standard. 659 F.3d 359 (5th Cir. 2011). There, a majority of the en banc court correctly said that *Hazelwood* "should be construed narrowly," *id.* at 408, and only "allows a school to regulate what is in essence the schools own's speech," *id.* at 409 (quoting *Morse* v. *Frederick*, 551 U.S. 393, 423 (2007) (Alito, J., concurring)). But the majority then said that the school's "latitude" to censor student expression included "speech that could be erroneously attributed to the school." *Id.* at 409.

In holding that sharing pencils with a religious message with "friends after school on the sidewalk" did *not* fall within *Hazelwood*'s ambit, the majority focused not on the non-curricular context but on what others *might* have "erroneously attributed to the school." *Id.* at 410. And in analyzing censorship of other messages expressed "at non-curricular times"—including candy-cane shaped pens with a religious message distributed at a winter break party—the majority again focused on whether the speech could be "erroneously attributed to the school" by friends and classmates. *Ibid.* This en banc analysis controls future disputes in the Fifth Circuit. *E.g.*, *Bell* v. *Itawamba Cnty. Sch. Bd.*, 799 F.3d 379, 191–92 (5th Cir. 2015) (en banc) (*Hazelwood* didn't apply to a student's off-campus social-media posts where there was no potential of "perceived sponsorship" by the school).

The Seventh Circuit here adopted the same overbroad rationale. The court thought it controlling that a reasonable observer *could* think "the flyers reflected the school's endorsement" because they weren't "confined to a designated bulletin board for private, unsanctioned materials." App.13a.

Notably, the Seventh Circuit's tolerance for censorship exceeded the Tenth Circuit's in *Fleming*. While the Tenth Circuit was concerned about "permanently affixed tiles" becoming "a lasting part of the school," *Fleming*, 298 F.3d at 930, the Seventh Circuit approved school control of paper flyers bearing the names of student-run clubs displayed "in common areas for" mere "days." App.11a, 4a.

Some state courts have similarly misread *Hazelwood*. For example, the New Jersey Supreme Court applied *Hazelwood* to allow a school to censor a middle schooler's newspaper articles reviewing movies, even though the paper was not "part of regular classroom assignments," and students "did not receive grades or academic credit." *Desilets* v. *Clearview Reg'l Bd. of Educ.*, 647 A.2d 150, 152 (N.J. 1994) (per curiam). The court held it was enough that a faculty member exercised some oversight, so someone "might reasonably perceive" the paper "to bear the imprimatur of the school." *Ibid.* (citation modified).

These expansive approaches cannot be reconciled with *Hazelwood*. That decision rested on schools' authority over purely curricular content—the power to shape pedagogy and curricular coherence. 484 U.S. at 271–73. Those rationales have no bearing on student-initiated, noncurricular expression. The reasonable-observer test threatens to swallow *Tinker*.

B. The Third Circuit's "educational activity" test also broadens *Hazelwood* beyond the curricular context.

The Third Circuit also enlarges *Hazelwood*'s reach—albeit to a lesser extent than the Fifth, Seventh, and Tenth Circuits. Under the Third Circuit's approach, *Hazelwood* applies to any "student speech within an organized and structured educational activity." *Walz*, 342 F.3d at 278.

As in *Morgan*, the student in *Walz* gave candy canes with a religious message to classmates during a class holiday party. *Id.* at 273–74. The Third Circuit applied *Hazelwood* because the party was a "classroom activit[y] that had a clearly defined curricular purpose to teach social skills and respect for others in a festive setting." *Id.* at 279. Although gifts were supplied and handed out by students, the court deemed the activity sufficiently "organized and structured" to trigger *Hazelwood*. *Id.* at 278.

The Third Circuit's standard greatly expands governmental authority to "[d]etermin[e] the appropriate boundaries of student expression." *Id.* at 277. Nearly every aspect of school can be characterized as "organized" and "educational." So the Third Circuit's rule subjects a dizzying array of speech to state control. Lunchtime is scheduled, supervised, and governed by school rules and is a setting to cultivate social development. That means school officials in the Third Circuit could discipline high-school students for discussing social issues or religious beliefs at lunch. But that allows *Hazelwood* to gut *Tinker*'s promise of robust speech protection.

C. The Sixth and Eleventh Circuits confine *Hazelwood* to curricular speech.

On the opposite side of the split, the Sixth and Eleventh Circuits recognize the proper limits of *Hazelwood*. Those courts allow schools to invoke *Hazelwood* only when speech arises within a school's curriculum.

The Sixth Circuit's decision in *Curry* v. *Hensiner* exemplifies this approach. 513 F.3d 570 (6th Cir. 2008). Again, a dispute arose over a student giving candy canes with a religious message to classmates. *Id.* at 574. This time, the speech occurred during "Classroom City"—a curricular exercise in which students designed, marketed, and sold products for a grade. *Id.* at 575, 577. The Sixth Circuit applied *Hazelwood* not because of what a reasonable observer may have thought, or because this was an organized and structured educational activity, but rather because it was "undisputed that Classroom City was part of the fifth grade curriculum." *Id.* at 577. The exercise was akin to "a school newspaper, or speech made as part of a school's curriculum." *Ibid.* (citing *Hazelwood*, 484 U.S. at 273).

The Eleventh Circuit has similarly held that *Hazelwood* applies "only" to "school-sponsored expression that occurs in the context of a curricular activity." *Bannon*, 387 F.3d at 1214. That court in *Bannon* applied *Hazelwood* because a student painted a mural "in the context of a curricular activity" and thus the mural "bore the imprimatur of the school." *Id.* at 1215. Unlike E.D. and NSFL's flyers, the painting was closely supervised and "designed to impart particular knowledge and skills to student participants." *Ibid.*

The Seventh Circuit here cited *Bannon* in support of its "reasonably appears school-sanctioned" test. App.13a–14a. And to be sure, the Eleventh Circuit discussed whether "students, parents, and other members of the public might reasonably believe Sharah's murals bear the imprimatur of the school." 387 F.3d at 1214. But the court clarified that "[t]he *real* question is whether Sharah's expression *occurred in the context of a curricular activity*." *Ibid.* (emphasis added). That approach does not support but directly conflicts with the Seventh Circuit's test here.

There is substantial danger to student speech rights when *Hazelwood* is unmoored from its curricular foundation. The expansive reasonable-observer test or the amorphous "educational activity" standard lays waste to *Tinker* and gives school officials nearly unfettered discretion to censor. That's why *Hazelwood*—while referencing that "members of the public might reasonably perceive" school-sponsored activities, such as "school-sponsored publications" and "theatrical productions," "to bear the imprimatur of the school," 484 U.S. at 271—emphasized that such activities were "part of the school curriculum," "supervised by faculty members[,] and designed to impart particular knowledge or skills," *ibid.*

The 3–1–2 circuit split confirms the pervasive uncertainty facing students, educators, and courts in evaluating First Amendment protections for student expression. Only this Court can resolve the split and reaffirm that *Hazelwood* is a narrow exception tied to curricular authority—not a roaming license to regulate student expression based on speculation about an observer's perceptions.

II. The majority rule perpetuates *Lemon*'s now-abandoned reasonable-observer test for student speech.

This Court "long ago abandoned" a test like the majority rule here—"*Lemon* and its endorsement test offshoot." *Kennedy* v. *Bremerton Sch. Dist.*, 597 U.S. 507, 534 (2022). That "abstract" rule "involve[d] estimations about whether a 'reasonable observer' would consider the government's challenged action an 'endorsement' of religion." *Ibid.* It "invited chaos" and "led to differing results in materially identical cases." *Ibid.* (citation modified).

When *Lemon* reigned, members of the Court disagreed on who the "reasonable observer" was. *E.g.*, *Capitol Square Rev. & Advisory Bd.* v. *Pinette*, 515 U.S. 753, 768 n.3 (1995) (plurality). Was it any person? An "average" person with knowledge of the surrounding circumstances? Or an "ultrareasonable beholder" familiar with legal doctrine? See *ibid.* And even if an archetypal reasonable observer existed, it would still "be unrealistic to expect different judges … to reach consistent answers as to what" that person "would think." *Ibid.* This Court thus rejected *Lemon* as implementing a "modified heckler's veto, in which religious activity can be proscribed based on perceptions or discomfort." *Kennedy*, 597 U.S. at 534 (citation modified).

The Fifth, Seventh, and Tenth Circuits' reasonable-observer rule requires courts to undertake a similarly fraught task for student speech. It, too, asks whether someone would view the speech as bearing the school's imprimatur, even if the speech is non-curricular—like E.D.'s pro-life club flyers.

Like *Lemon*, that rule invites chaos by conditioning First Amendment protections on how judges assess post hoc the view of a hypothetical observer who may erroneously attribute the speech to the school. Like *Lemon*, that test can create different results in similar cases. (That's why students distributing candy canes with religious messages at school have created their own circuit split.) And like *Lemon*, a "reasonable observer" standard imposes a heckler's veto by allowing the perceptions of others to dictate free-speech rights in public schools.

Limiting *Hazelwood* to curricular speech solves the *Lemon* problem and remains faithful to *Hazelwood*. Under that approach, schools still control their curricula "to assure that participants learn whatever lessons the activity is designed to teach." *Hazelwood*, 484 U.S. at 271. That curricular speech bears the school's imprimatur because the school has the essential function to transmit knowledge. What a purportedly reasonable observer thinks about speech has no relation to whether the speech is part of the curriculum.

"[S]econdary school students are mature enough and are likely to understand that a school does not endorse or support student speech that it merely permits on a nondiscriminatory basis." *Board of Educ. of Westside Cmty. Sch.* v. *Mergens*, 496 U.S. 226, 250 (1990). Discussion—not censorship—is the premise of our "nurseries of democracy," where students should learn from the school and from each other the value of a "free exchange" of ideas, which "facilitates an informed public opinion." *B.L.*, 594 U.S. at 190.

III. Lower courts have expanded *Hazelwood* far outside K–12 curriculum.

Hazelwood's rule has also expanded well beyond the K–12 schoolhouse gate. *Hazelwood* itself considered only a newspaper created as part of a high-school class and explicitly declined to "decide whether the same degree of deference is appropriate with respect to school-sponsored expressive activities at the college and university level." 484 U.S. at 273 n.7. It also distinguished its facts from a prior case involving censorship of "an off-campus 'underground' newspaper that school officials merely had allowed to be sold on a state university campus." *Id.* at 271 n.3 (citing *Papish* v. *University of Mo. Bd. of Curators,* 410 U.S. 667 (1973) (per curiam)). Yet the lower courts have applied *Hazelwood* to college student speech—including an extracurricular newspaper. Granting the petition and clarifying that *Hazelwood* applies only to school-sponsored curricular speech will protect *all* students, including at the university level.

This Court protects college student speech just like in "the community at large." *Healy* v. *James*, 408 U.S. 169, 180 (1972). Yet lower courts have expanded *Hazelwood* and wielded it to (A) censor extracurricular college-student speech, and (B) uphold content and viewpoint-discriminatory speech codes under the guise of vague concerns about "professionalism." Granting the petition and holding that *Hazelwood* applies to school-sponsored curricular speech will cabin *Hazelwood*'s misadventures on college campuses.

A. The en banc Seventh Circuit has upheld a university's prior restraint on an admittedly "extra-curricular" student newspaper. *Hosty* v. *Carter*, 412 F.3d 731, 736 (7th Cir. 2005) (en banc). The student newspaper was "an independent publication organized and published by students on their own time" outside "of an academic program." *Id.* at 744 (Evans, J., dissenting).

Hosty ran roughshod over *Hazelwood*'s curricular focus and express disclaimer that it didn't decide whether its rule applied to colleges. See *id.* at 734 (majority op.). The court saw "no sharp difference between high school and college papers" because either could include "speech that is ungrammatical, poorly written, inadequately researched, biased or prejudiced, vulgar or profane, or unsuitable for immature audiences," and both high schools and colleges had an interest in avoiding "any position other than neutrality on matters of political controversy." *Id.* at 735 (quoting *Hazelwood*, 484 U.S. at 271–72). It held "that *Hazelwood*'s framework applies to subsidized student newspapers at colleges as well as elementary and secondary schools." *Ibid.*

Similarly, the Eleventh Circuit extended *Hazelwood* to uphold the University of Alabama's restrictions on distributing campaign literature—both on and off campus—for student government elections. *Ala. Student Party* v. *Student Gov't Ass'n of the Univ. of Ala.*, 867 F.2d 1344, 1345 (11th Cir. 1989); *id.* at 1352 (Tjoflat, J., dissenting). A university official testified that the speaker was "a student government association … not a university government association." *Id.* at 1351 (Tjoflat, J., dissenting). And the student government association received funding

from the "student activity fee," not the college itself. *Id.* at 1348 n.1 (Tjoflat, J, dissenting). But the panel nonetheless held that *Hazelwood* allowed the university to "place reasonable restrictions on this" loosely defined "learning experience." *Id.* at 1347 (majority op.).

As the four-judge Seventh Circuit dissent noted in *Hosty*, such decisions give "the green light to school administrators to restrict student speech in a manner inconsistent with the First Amendment." 412 F.3d at 742 (Evans, J., dissenting). The Seventh and Eleventh Circuits erred in extending the *Hazelwood* rule—created by this Court "for use in the *narrow* circumstances of elementary and secondary education"—to college students, who are generally adults. *Id.* at 739. Whereas K–12 schools have "custodial and tutelary responsibility for children," colleges function as the quintessential "marketplace of ideas." *Id.* at 741 (citation modified). *Hazelwood*'s focus on retaining the integrity of curriculum has no application to extracurricular collegiate activities. See *id.* at 742.

The *Hosty* dissent also lamented "the manner in which *Hazelwood* has been used in the high school setting to restrict controversial speech," *ibid.*, just as Noblesville did here. The university in *Hosty* imposed a prior restraint because the newspaper published articles critical of school administrators. *Ibid.* Likewise, a previous Seventh Circuit decision allowed a principal to "prohibit[] a student from wearing shirts with messages such as 'Unfair Grades' and 'Racism.'" *Ibid.* (citing *Baxter* v. *Vigo Cnty. Sch. Corp.,* 26 F.3d 728, 737–38 (7th Cir. 1994)).

B. Lower courts have also wielded *Hazelwood* to uphold discipline based on colleges' purported concerns about "professionalism." For example, the Eighth Circuit applied *Hazelwood* to reject a First Amendment challenge to a college's dismissal of a nursing student for off-campus social-media posts. *Keefe* v. *Adams*, 840 F.3d 523, 526 (8th Cir. 2016).

The college claimed that the student's posts and "failure to appreciate the seriousness of the problem" showed "a lack of professionalism." *Id.* at 532. The college required nursing students to follow the national American Nurses Association Code of Ethics, which mandated "respect for … all individuals with whom the nurse interacts," prohibited "disregard for the effect of one's actions on others," and demanded that nurses "integrat[e]" "the values of the profession … with personal values." *Id.* at 528–29. The court applied *Hazelwood* and interpreted the decision to govern a student's speech anytime, anywhere: "A student may demonstrate an unacceptable lack of professionalism off campus, as well as in the classroom, and by speech as well as conduct." *Id.* at 531.

Similarly, the Tenth Circuit affirmed a grant of qualified immunity to university administrators who punished a medical student for his off-campus social-media post about the 2012 election. *Hunt* v. *Board of Regents of Univ. of N.M.*, 792 F. App'x 595, 597 (10th Cir. 2019). The university cited its "Respectful Campus Policy," which required a respectful environment that "'exhibits and promotes' professionalism, integrity, harmony, and accountability." *Ibid.*

The Tenth Circuit reviewed this Court's school-speech precedents, including *Hazelwood* and *Healy*. *Id.* at 602–05. *Healy* explicitly recognized colleges' authority to enforce "generally accepted standards of *conduct*." *Id.* at 605 (quoting 408 U.S. at 192) (emphasis added). But the Tenth Circuit still thought that—in light of *Hazelwood*—*Healy* left "space for administrators" to censor *speech* "in professional schools that appears to be at odds with customary professional standards." *Id.* at 604–05.

In sum, granting the petition and holding that *Hazelwood* applies only to school-sponsored curricular speech will rein in the ongoing censorship of college-student speech. That would be a particularly welcome development given how lower courts have used *Hazelwood* to allow universities to punish students for their speech, even speech occurring off campus.

IV. This case is an ideal vehicle to resolve the circuit split and protect students from censorship for "controversial" views.

Both the district court and Seventh Circuit agreed that the reasonable-observer test determines whether *Hazelwood*'s less-protective standard applies to E.D.'s speech. No disputes of material fact cloud this legal issue. Six circuits have already weighed in on that question. And given that three circuits are in the reasonable-observer-test camp and two are in the curricular camp, it is extraordinarily unlikely that this split will be resolved by mere percolation. This case cleanly presents this Court with the legal issue dividing the circuits.

Subjective tests that rely on a hypothetical viewer's perception "invite[] chaos" and yield unfair and different results in similar cases. *Kennedy*, 597 U.S. at 534. Such tests allow schools to censor any view labeled "controversial" or "political"—an anti-democratic solution in what should be the nation's nurseries of democracy.

By contrast, the school-sponsored, curricular-speech test that *Hazelwood* strongly suggests and the Sixth and Eleventh Circuits have applied is an objective inquiry and easy to apply in many contexts, including the one here. After all, the district required that E.D.'s flyers say explicitly on their face "that this is a 'Noblesville *Students for Life' Club* meeting location, date, and time." Doc. 158-5 at 4 (emphasis added). A meeting held by a student-initiated, student-driven Students for Life Club is the opposite of a school-sponsored, curricular event that involves the school's own speech.

"In our system, state-operated schools may not be enclaves of totalitarianism," and students "may not be confined to the expression of those sentiments that are officially approved." *Tinker*, 393 U.S. at 511. All E.D. sought to do was post flyers—like all other club leaders could do—for an extracurricular club meeting she worked hard to organize. Her free-speech rights shouldn't depend on the circuit where she attends school. The Court should grant the petition and provide needed uniformity on an issue of obvious national importance.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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JANUARY 2026

APPENDIX

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In the
United States Court of Appeals
For the Seventh Circuit

No. 24-1608

E.D., a minor, by her parent and next friend, LISA DUELL, *et al.*

Plaintiffs- Appellants,

v.

NOBLESVILLE SCHOOL DISTRICT, *et al.*

Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division.
No. 1:21-cv-03075-SEB-TAB — **Sarah Evans Barker**, *District Judge.*

ARGUED OCTOBER 29, 2024 — DECIDED AUGUST 14, 2025

Before EASTERBROOK, JACKSON-AKIWUMI, and MALDONADO, *Circuit Judges.*

MALDONADO, *Circuit Judge.* E.D. came to Noblesville High School intent on starting a pro-life student club. The school made it happen. Administrators explained the process, approved the club within weeks, and gave her a table at the activities fair where she wore a pro-life shirt and displayed pro-life signs while recruiting more than thirty members.

The trouble began when E.D. submitted flyers with political slogans and images for posting on the

school's walls. Administrators told her—multiple times—to revise them to comply with the school's neutral content rules for all student-club wall postings. Instead, she brought her mother to meet with another administrator to press for approval, an attempted end-run around the officials who had already rejected the flyers. Concerned that the club was no longer student-led and that E.D. had violated established procedures, the principal suspended the club's status for the remainder of the semester. The principal stated that E.D. could reapply for recognition a few months later; she did so, and the club has remained active since.

E.D., through her parents Michael and Lisa Duell, sued the school district and several officials, claiming the rejection of her flyers and the club's suspension were driven by hostility to her pro-life views, in violation of the First Amendment and the Equal Access Act, 20 U.S.C. § 4071(a). The district court disagreed and granted summary judgment to the defendants.

We affirm. The record shows that school officials approved E.D.'s club, reasonably accommodated her speech, and suspended the club only for neutral, conduct-related reasons.

BACKGROUND

The following facts are undisputed unless otherwise noted and are presented in the light most favorable to the Duells. *Milligan-Grimstad v. Stanley*, 877 F.3d 705, 708 (7th Cir. 2017).

I. Facts

In the summer of 2021, before beginning her freshman year at Noblesville High School (NHS), E.D. contacted school administrators to ask how she could form a student club focused on pro-life advocacy. She was promptly told that to form a student interest club—a category reserved for student-initiated, student-led groups—she would need to find a faculty sponsor and complete a brief questionnaire describing the club's mission and activities. With student interest clubs, faculty sponsors supervise the use of school facilities and provide logistical support. Dr. Craig McCaffrey, NHS's principal, reviewed questionnaire responses and approved student interest clubs.

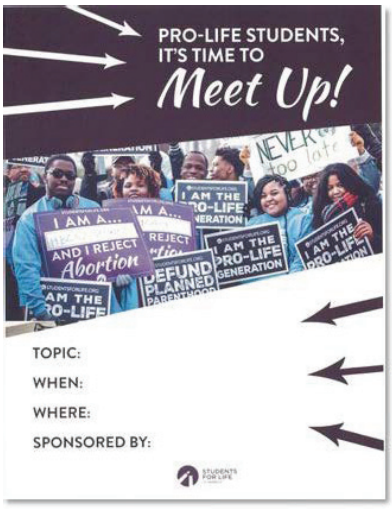
On August 3, the second day of the school year, E.D. met with Principal McCaffrey to discuss next steps after she successfully secured a faculty sponsor. E.D.'s mother, Lisa Duell, also attended the meeting. During the meeting, E.D. explained that she wanted to start a group called Noblesville Students for Life (NSFL) to educate peers on abortion and promote pro-life events. E.D. led the conversation, though her mother chimed in with several logistical questions and also recorded the meeting. McCaffrey was supportive. He gave E.D. a copy of the required club questionnaire and told her that submission of the form was the only step remaining before the club could be approved.

Within a few weeks, E.D. submitted the completed questionnaire, Principal McCaffrey approved the club, and E.D. represented NSFL at the fall activities fair. At her table, she displayed a tri-fold

board with the club's mission statement, a sign reading "I Am the Pro-Life Generation," and wore a t-shirt with the same phrase. More than 30 students signed up to participate.

After the fair, E.D. met with Assistant Principal Janae Mobley to discuss scheduling the club's first meeting and posting flyers to advertise it. At the time, NHS had no formal written policy governing the content of flyers for student interest clubs, beyond the general guidance in the 2021–2022 NHS Student Handbook. The handbook stated that flyers must be posted only in designated areas and must be taken down after the event date. It also required that all posters either promote a school-sponsored event or have administrative approval. NHS officials testified that, in practice, administrators expected student club flyers to include only the club's name and the meeting's time, date, and location, and to exclude any "disruptive" or "political" content. In addition, all flyers had to be approved in advance, include a written take-down date, and bear the initials of the administrator who approved them.

E.D. emailed Mobley two flyer templates she had obtained from Students for Life of America (SFLA), a national pro-life organization. The proposed flyers had the headline, "Pro-Life Students, It's Time to Meet Up!", followed by images of young protestors holding signs reading "Defund Planned Parenthood" and "I Am the Pro-Life Generation." Below the images were spaces to fill in the club's meeting details.



The next day, Mobley emailed back that the flyers should include only the name of the club and the time, date, and location of the meeting and not include the pictures. As a point of comparison, she noted that NHS's Young Republicans Club did not use party logos or slogans on its flyers but only included meeting information. Mobley told E.D. that club members could, of course, make these very statements at their meetings, she just could not post them on the school's walls. That same day, Mobley emailed NSFL's faculty sponsor, Brian McCauley, and asked him to work with E.D. to revise the flyer.

McCauley and E.D. exchanged several emails over the following day. McCauley, whose role was to provide faculty support to E.D.'s effort, reiterated that the "best thing" was for the flyer to include only the club's name and meeting information, with "no pictures." E.D. initially responded that she had hoped to use the SFLA template, but after McCauley again emphasized the guidelines, she replied: "Sounds good,

thanks! I'll get to work on making the flyers." McCauley also advised her to contact Dean of Students Jeremy Luna to schedule NSFL's first meeting.

A couple days later, E.D. met with Luna, accompanied again by her mother. Despite her earlier agreement with McCauley, E.D. re-raised the issue of the flyer. Luna told them the flyer could not be approved because it included a political image and that the school was already walking "on eggshells." Specifically, he explained that the flyer could not include the "Defund Planned Parenthood" sign and that a version without the image "should" or "would possibly work," but that approval was not ultimately his decision.

After the meeting, Luna debriefed with Principal McCaffrey and Assistant Principal Mobley and told them he thought the conversation had been driven primarily by E.D.'s mother. Mobley then explained to McCaffrey that E.D. had previously submitted the flyers to her, that she had rejected them, and that she had already explained what content was acceptable. Based on that email exchange, Mobley believed there was a plan in place to revise the flyers accordingly. But after E.D.'s mother re-appeared in the meeting with Luna, McCaffrey and Mobley voiced concerns with Luna about Mrs. Duell's leadership role in the club. Student clubs are supposed to be student-run.

On September 3, Principal McCaffrey suspended NSFL's status as an approved student interest club. He viewed E.D.'s effort to revisit the flyer issue with Luna—after having already received guidance from Assistant Principal Mobley and faculty sponsor

McCauley—as an "attempt at insubordination led by an outside adult advocating with the student." In McCaffrey's view, E.D. and her mother's attempted end-run around the problems with her flyers warranted discipline. He testified that the decision to suspend NSFL's club status was his alone, and that he did not inform Superintendent Beth Niedermeyer until after he issued his decision.

Principal McCaffrey sent an email to E.D.'s mother later that day explaining why he suspended NSFL's club status and outlining the school's process for student interest clubs. He noted that while it was "unusual and [un]orthodox" for Mrs. Duell to attend the initial meeting since student interest clubs are supposed to be "100% student driven and can have no involvement from any adult," he allowed it to proceed because E.D. had done the talking.

He then expressed confusion as to why E.D. and Mrs. Duell had approached another administrator about a flyer that had already been denied by the assistant principal. He reiterated that "posters cannot contain any content that is political or that could disrupt the school environment," and that flyers should "only state the name of the club and the details of the meeting time and location." Once the students actually meet, he wrote, they are free to "talk about their common interests." He stated that he was "no longer confident that th[e] club [wa]s student-driven" and was "removing the club's approval to meet in the school." He added that he was not accepting new club applications at the time due to a "revamp" of the process, but that E.D. could reapply in January.

E.D. resubmitted her application as instructed and Principal McCaffrey reinstated NSFL in January 2022.

II. Procedural History

On appeal, the Duells press only a handful of the numerous claims they pleaded, each under 42 U.S.C. § 1983. First, they assert that Noblesville School District violated E.D.'s free speech rights by vetoing the pictures in her flyers. Second, they contend the District violated E.D.'s First Amendment rights again (both free speech and freedom of association) by suspending NSFL's club status. Third, they maintain that the District, Superintendent Niedermeyer, and Principal McCaffrey, retaliated against E.D., again in violation of the First Amendment, when they suspended NSFL's club status. Finally, they allege that the District, the same two officials, as well as Assistant Principal Mobley and Dean Luna, all violated the Equal Access Act, also based on the suspension of NSFL's club status.

On cross-motions for summary judgment, the district court ruled for the defendants on each claim. The Duells now appeal.

DISCUSSION

We review the district court's grant of summary judgment de novo. *N.J. ex rel. Jacob v. Sonnabend*, 37 F.4th 412, 420 (7th Cir. 2022). On an appeal from cross-motions for summary judgment, we view the evidence and draw all reasonable inferences "in favor of the party against whom the motion under consideration [was] made." *Id.* (quoting *Dunnet Bay Constr. Co. v. Borggren*, 799 F.3d 676, 688 (7th Cir.

2015)). "Summary judgment is appropriate where there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law." *Kemp v. Liebel*, 877 F.3d 346, 350 (7th Cir. 2017) (citation omitted).

I. First Amendment Claims

Before turning to the merits, we note that the Duells bring the free speech and association claims solely against Noblesville School District and not against any of the individual defendants. Because the District is a municipal entity, liability under 42 U.S.C. § 1983 must meet the requirements of *Monell v. Department of Social Services*, 436 U.S. 658, 694–95 (1978). That is, the Duells must show not only a constitutional violation, but also that an official policy, a widespread practice, or a decision by a final policymaker caused the violation. *See First Midwest Bank, Guardian of Est. of LaPorta v. City of Chicago*, 988 F.3d 978, 986 (7th Cir. 2021).

The parties dispute not only whether any constitutional violations occurred, but also whether the District can be held liable under *Monell*. The district court resolved the claims against the District solely on *Monell* grounds and did not reach the underlying constitutional questions. We take the opposite approach: we do not address *Monell* liability and instead resolve the case on the merits.[1] *See LaPorta*, 988 F.3d at 987. We hold that the Duells have not established any constitutional violation—against the District or any individual official—an

[1] We may affirm summary judgment on any ground supported by the record. *Moore v. W. Ill. Corr. Ctr.*, 89 F.4th 582, 595 (7th Cir. 2023).

outcome that is dispositive regardless of *Monell* liability.

A. Regulation of E.D.'s flyers

We begin with the Duells' claim that the District violated E.D.'s First Amendment right to free speech when it rejected the images on her proposed flyers. To assess that claim, we must first resolve a threshold issue: whether *Tinker v. Des Moines Independent Community School District,*, 393 U.S. 503 (1969) or *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988) supplies the governing standard.

1. *Tinker* or *Kuhlmeier*

In *Tinker*, the Supreme Court struck a balance regarding student speech. It held that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate," but recognized that those rights are subject to the realities of the school environment. *Tinker*, 393 U.S. at 506. There, the Court struck down suspensions imposed on high school students for wearing black armbands to protest the Vietnam War, finding no evidence that the expression "would materially and substantially disrupt the work and discipline of the school"—the standard it established for evaluating school-based speech. *Id.* at 513–14.

Since *Tinker*, the Supreme Court has identified three different categories of student speech that public schools may regulate even absent a substantial disruption. *See Mahanoy Area Sch. Dist. v. B.L.*, 594 U.S. 180, 187–88 (2021). Relevant here is the category addressed in *Kuhlmeier*: student speech that others "might reasonably perceive to bear the imprimatur of

the school." 484 U.S. at 271. There, school officials removed two articles, one on student pregnancy and the other on the impact of divorce on students, from a school-sponsored newspaper produced as part of a high school journalism class. Applying First Amendment forum analysis, the Court held that school officials could "exercis[e] editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns." *Id.* at 273. The Court distinguished *Tinker*, explaining that while *Tinker* concerned whether schools must tolerate private student speech, *Kuhlmeier* addressed whether they must affirmatively promote it. *Id.* at 270–71. Critically, the Court recognized that school-sponsored speech appears to bear the school's imprimatur, so schools must be able to assert greater authority over it. *Id.* at 271–72.

The Duells argue that *Tinker*'s substantial disruption standard governs because E.D.'s flyers represented her private student speech. The District counters that *Kuhlmeier*'s forum-analysis approach applies, given the school's central role in facilitating the flyers' placement on its walls. We agree that *Kuhlmeier* provides the appropriate framework.

Because of where and how E.D. sought to display her flyers, they could reasonably be perceived as bearing the school's imprimatur. If posted, the flyers would have appeared on school walls alongside announcements for school-sponsored events and remained in common areas for days. Untethered to any identifiable student and indistinguishable from official school materials, they would naturally (and

perhaps inevitably) be seen by students, parents, and visitors as reflecting the school's endorsement. In fact, every student flyer in the school must bear a faculty member's initials for approval—a literal stamp of the school's authority. That risk of mistaken attribution is precisely the kind of institutional concern *Kuhlmeier* addresses. This is not a case about tolerating private student speech. To the contrary, E.D. was permitted to wear her pro-life shirt to school and hand out her flyers to students at the activities fair. Instead, it is a case about whether the school must lend its resources (here, literally its walls)—and, by extension, its authority—to disseminate student messages. *See id.* at 271–72.

The Duells resist this conclusion, relying chiefly on Judge Rovner's concurring opinion in *Muller ex rel. Muller v. Jefferson Lighthouse School*, 98 F.3d 1530 (7th Cir. 1996), which was later endorsed by this Court in *N.J. ex rel. Jacob v. Sonnabend*, 37 F.4th 412, 425 (7th Cir. 2022). In *Muller*, an elementary school student was prohibited from distributing and posting flyers inviting classmates to a Bible study at his church. *Muller*, 98 F.3d at 1532. The majority applied *Kuhlmeier* and upheld the restriction. *Id.* at 1537. Judge Rovner agreed that the restriction did not violate the First Amendment but contended that *Tinker* instead applied. *Id.* at 1546. In *Sonnabend*, our Court expressly adopted the reasoning of that concurrence and overruled *Muller* to the extent it had "mistakenly applied *Kuhlmeier* and speech-forum analysis." 37 F.4th at 425.

But we held that principle to be limited to *Muller*'s facts. *Sonnabend* concluded that the flyers in *Muller*, which promoted an off-campus church event,

could not reasonably be perceived as bearing the school's imprimatur. *Id.* As a result, *Kuhlmeier* did not apply; however, *Sonnabend* did not hold that *Tinker* governs all restrictions on posting student flyers. It simply reaffirmed that *Kuhlmeier* is limited to situations where student speech might reasonably be attributed to the school, which it found lacking in *Muller*.

This case is completely different. E.D.'s flyers did not advertise a private, off-campus event; they did the opposite. They promoted a club meeting during school hours, on school property, and under the supervision of a faculty advisor. Unlike *Muller*, where flyers were confined to a designated bulletin board for private, unsanctioned materials, *Muller*, 98 F.3d at 1541, E.D.'s flyers would have been posted alongside official school-sponsored communications in high-traffic common areas throughout the school. In that setting, a reasonable observer could easily conclude that the flyers reflected the school's endorsement.

Accordingly, even under the *Muller* concurrence and *Sonnabend*, the proper inquiry remains whether the speech bears the school's imprimatur. Because E.D.'s flyers were closely tied to school resources and would appear on the school's walls largely indistinguishable from other school-sponsored postings, *Kuhlmeier* applies. That conclusion is also consistent with decisions from other circuits, which have applied *Kuhlmeier* to student speech displayed on school property that reasonably appears school-sanctioned. *See Fleming v. Jefferson Cnty. Sch. Dist. R-1*, 298 F.3d 918, 924–26 (10th Cir. 2002); *Bannon v.*

Sch. Dist. of Palm Beach Cnty., 387 F.3d 1208, 1214 (11th Cir. 2004).[2]

2. Application of *Kuhlmeier*

Applying *Kuhlmeier*, we now consider whether the school's restriction was "reasonably related to legitimate pedagogical concerns." 484 U.S. at 273. Under this standard, schools may regulate student expression in school-sponsored forums so long as their actions are tied to a valid educational purpose. *Id.* The Supreme Court has "cautioned courts … to resist substituting their own notions of sound educational policy for those of the school authorities which they review." *Christian Legal Soc'y v. Martinez*, 561 U.S. 661, 686 (2010) (citation modified). "[T]he education of the Nation's youth is primarily the responsibility of parents, teachers, and state and local school officials, and not of federal judges." *Kuhlmeier*, 484 U.S. at 273. We conclude that the District's decision to prohibit E.D.'s flyers satisfies that standard and did not violate the First Amendment.

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[2] The Duells also argue that *Fujishima v. Bd. of Educ.*, 460 F.2d 1355 (7th Cir. 1972), requires us to invalidate the District's pre-approval flyer policy. There, under the prior-restraint doctrine, we struck down a rule that prohibited any person from distributing materials on school premises without prior approval from the superintendent. *Id.* at 1358–59. But *Fujishima* predates *Kuhlmeier*, which significantly reshaped the legal framework for student speech. *See Muller*, 98 F.3d at 1540 ("Prior restraint of student speech in a nonpublic forum is constitutional if reasonable."). In any event, *Fujishima* addressed a blanket restriction on distribution of materials, not a school's decision to control what may be posted on its own walls. That is a materially different question, and one *Fujishima* did not consider.

The District's restriction on political content in student flyers is reasonably related to legitimate pedagogical concerns. The school designated its walls as a limited public forum for the narrow purpose of allowing student clubs to advertise only meeting times and locations. In keeping with that purpose, the District may impose reasonable limitations to preserve the forum's intended function. *See id.* at 269–70. That includes requiring preapproval of flyers and restricting messaging to basic club information. Excluding political content, in particular, serves the pedagogical goal of maintaining neutrality on matters of political controversy. Schools must "retain the authority to refuse to sponsor student speech that might reasonably be perceived to … associate the school with any position other than neutrality on matters of political controversy." *Id.* at 272. Flyers promoting a polarizing political slogan ("Defund Planned Parenthood") and bearing an administrator's initials alongside school-sponsored postings could mislead observers into thinking the school endorses that view. The potential for such misunderstanding—and for disruption—is greater here than in *Kuhlmeier*, where the disputed student articles addressed pregnancy and divorce. That concern with disruption is itself part of the school's broader pedagogical mission. "Order and discipline are part of any high school's basic educational mission; without them, there is no education." *Gernetzke v. Kenosha Unified Sch. Dist. No. 1*, 274 F.3d 464, 467 (7th Cir. 2001). The District could reasonably conclude that covering its walls with warring political messages would undermine that order and divert attention from the business of learning.

In short, the District's content restriction aligns with both the nature of the school walls as a limited forum for student expression and its broader pedagogical duty to create a stable, neutral educational environment. It passes constitutional muster under *Kuhlmeier*.

The Duells see it differently. They argue that the District's restriction on political content suppresses the very kind of robust debate secondary schools should encourage. But this dramatically overstates both the scope and effect of the District's policy. Recall that E.D. was permitted to form NSLF, promote it at the student activities fair, and distribute materials without limitation on what she could wear, say, or hand out. She is free to express her views and engage in debate during club meetings and elsewhere on campus. The "no political message" restriction applies only to the use of school walls to post flyers, not to students' broader right to express political opinions. The rule merely limits how certain messages may be disseminated, not whether they may be expressed at all. That distinction matters. So long as the restriction is tied to the purpose of the forum—and here, it plainly is—it satisfies *Kuhlmeier*'s standard.

The Duells also cite to *Minnesota Voters Alliance v. Mansky*, 585 U.S. 1 (2018), arguing that the District's restriction on "political" content is too vague to be enforced fairly. *See id.* at 16–17. But *Mansky* is both factually and legally distinguishable. First, *Mansky* did not involve student speech or schools at all. It involved a polling place, which is an entirely different constitutional context where political neutrality is required for constitutional reasons. *Cf. Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886) ("[T]he

political franchise of voting … is … a fundamental political right, because [it is] preservative of all rights."). By contrast, schools have broader authority to restrict speech that may be perceived as bearing the school's imprimatur or undermining the learning environment. *See Kuhlmeier*, 484 U.S. at 271–72.

Second, even if *Mansky*'s standards apply, they are satisfied. *See Mansky*, 585 U.S. at 16 (requiring "some sensible basis" for a rule limiting "political" messaging at polling places). The flyer policy gives administrators sufficient guidance to make reasoned decisions: flyers may contain the club's name and meeting information, but no political messaging. *See Muller*, 98 F.3d at 1541 ("The Supreme Court has never held that a detailed administrative code is required before student speech may be regulated."). The risks of arbitrary enforcement that were dispositive in *Mansky* are simply not present.

Finally, the Duells argue that the school rejected E.D.'s flyers because of their pro-life message, amounting to impermissible viewpoint discrimination. Courts are divided over whether *Kuhlmeier* requires viewpoint neutrality in school-sponsored speech. *See Robertson v. Anderson Mill Elementary Sch.*, 989 F.3d 282, 290 (4th Cir. 2021) (noting circuit split). We have yet to rule on the issue, and we need not do so now because the Duells offer no evidence that E.D.'s flyers were rejected because of the views they expressed.

The flyer policy is viewpoint neutral both on its face and in its application. Under the handbook, all flyers for non–school-sponsored events must receive prior administrative approval, regardless of the views

expressed. As noted, administrators also enforced a rule limiting club flyers to basic content—the club's name and meeting details—while excluding any material "political in nature." This restriction regulates content, not viewpoint. *See Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828–29 (1995) (distinguishing content-based from viewpoint-based restrictions).

School officials also applied the policy evenhandedly. According to undisputed testimony, the rule equally prohibits all clubs from including political content on flyers beyond the club name. The same rule barred any group from promoting pro-choice messaging or using political images. Nothing in the record suggests that officials treated E.D.'s flyers differently because of their pro-life perspective. To the contrary, the policy disallowed political messages of any kind, from any speaker. *Cf. Choose Life Ill., Inc. v. White*, 547 F.3d 853, 866 (7th Cir. 2008) (upholding viewpoint-neutral restriction on abortion-related license plates).

The Duells point to no example of an approved flyer with opposing political content. Their only reference involves a flyer posted by the Black Student Union featuring an image of three raised fists. But that issue was raised only in passing at oral argument and does not appear in their appellate briefing. It is therefore waived. *Roberts v. Columbia Coll. Chicago*, 821 F.3d 855, 862 n.2 (7th Cir. 2016) (arguments not preserved in briefing are waived).

Even setting waiver aside, the argument fails. The Duells offer no evidence that school officials ever even approved the Black Student Union flyer.

Assistant Principal Mobley testified only that she "possibly" saw it posted, but she neither approved it nor remembered when or where she saw it. The flyer also lacked the required administrator initials and takedown date, further suggesting that it was never officially approved. At oral argument, the Duells suggested that the flyer's presence on the school walls implies approval. But speculation is insufficient to survive summary judgment. *Flowers v. Kia Motors Fin.*, 105 F.4th 939, 946 (7th Cir. 2024). At most, the record shows that one unauthorized flyer may have been posted at some point. That isolated fact does not create a triable issue as to whether administrators applied the content policy in a discriminatory or inconsistent manner.

Nor do the comments of any NHS staff support an inference of viewpoint discrimination. Administrators consistently told E.D. that club flyers must include only basic logistical information. Nothing suggested that her flyers were rejected because of their message. Mobley explained that other clubs followed the same rules. Luna and Principal McCaffrey both testified that no club was permitted to include political content. The Duells cite Luna's remark that the school was already walking "on eggshells" and McCaffrey's email saying that the flyers were "not appropriate for school due to the content." But these statements, in context, reflect concern over compliance with the content-neutral policy, not hostility toward E.D.'s viewpoint. In fact, Mobley, Luna, and McCaffrey each testified that they personally agreed with E.D.'s pro-life views. Their personal beliefs, while not dispositive, make it

especially difficult to infer discrimination based on viewpoint.

The record, taken as a whole, reflects a consistently enforced policy applied equally to all viewpoints. No reasonable jury could conclude otherwise. The Duells have not identified a single instance in which the school approved a flyer with political content to be posted while denying E.D.'s because of its message. The policy is facially neutral, and the evidence confirms that it was applied without regard to viewpoint.

B. Suspension of NSFL's club status

We next consider the Duells' claim that the District violated E.D.'s free speech and association rights when Principal McCaffrey suspended NSFL's status as an approved student interest club. The parties agree that the Supreme Court's limited-public-forum precedent governs. "[A] limited public forum … is a place the government has opened only for specific purposes or subjects." *Milestone v. City of Monroe*, 665 F.3d 774, 783 n.3 (7th Cir. 2011). Speech restrictions in limited public fora must be "reasonable in light of the purpose served by the forum" and "viewpoint neutral." *Martinez*, 561 U.S. at 685, 690 (citations omitted). When dealing with limited public fora in schools, courts proceed "with special caution," recognizing that schools "enjoy … a significant measure of authority over the type of officially recognized activities in which their students participate." *Id.* at 686–87 (citations omitted). Applying those principles, we conclude that the suspension of NSFL's club status was constitutionally permissible.

The District reasonably applied its generally applicable rules when it suspended NSFL's club status. The purpose of NHS's student-interest-club forum is to facilitate extracurricular opportunities that are entirely student-led and student-run. That structure serves legitimate pedagogical goals: it fosters student initiative, prevents outside domination of the forum, and keeps the school's resources directed toward student-driven activities. McCaffrey reasonably concluded that NSFL was not adhering to this requirement. After approving the club with full knowledge of its pro-life mission, he learned that E.D. and her mother attempted to game the system, seeking approval from another administrator for their template flyer with an explicitly political message after it had already been rejected. Luna reported that Mrs. Duell—not E.D.—led that conversation. In McCaffrey's view, this was contrary to the basic premise of "student run" clubs.

In addition, the family's approach to the flyer issue reflected noncompliance with the procedural rules governing the forum. Administrators, including the faculty sponsor who supported the club, had instructed E.D. to revise the flyer to remove prohibited political images before resubmitting it for approval and she agreed at first (i.e., "Sounds good."). But then with her mother accompanying her, she later sought approval from another administrator without making the required changes. The school may insist that recognized student groups adhere to school rules and procedures, including "reasonable standards respecting conduct." *Healy v. James*, 408 U.S. 169, 193 (1972). Nothing in the record suggests that McCaffrey's response was disproportionate—

particularly given that the suspension was temporary, with a reasoned explanation, and with a defined opportunity to reapply.

The undisputed evidence also shows that McCaffrey's decision to suspend the club was not motivated by disagreement with E.D.'s pro-life views. He approved NSFL knowing its mission, permitted E.D. to promote it at the activities fair wearing pro-life slogans and distributing pro-life materials, and reinstated the club a few months later with the same mission intact. Those actions are inconsistent with any intent to suppress E.D.'s views. Instead, McCaffrey consistently identified two neutral grounds for his decision: the involvement of Mrs. Duell in what must be a student-run process, and E.D.'s perceived insubordination in trying to obtain permission to post her already-rejected flyer. Those reasons apply regardless of the content of the club's advocacy: they "draw[] no distinction between groups based on their message or perspective." *Martinez*, 561 U.S. at 694. The record contains no example of another club being allowed to circumvent the student-led requirement or flyer rules based on the message it sought to promote.

The Duells nonetheless argue that the temporal proximity between the flyers incident and McCaffrey's suspension decision suggests that suppressing her speech was the true motive at work. But "suspicious timing alone [is] rarely [] sufficient to create a triable issue." *Manuel v. Nalley*, 966 F.3d 678, 681 (7th Cir. 2020) (citation modified). And, regardless, the timing of the decision supports rather than undermines McCaffrey's stated reasoning. He allowed the club to form knowing its pro-life mission

and permitted it to operate for a month. He acted only after E.D. and her mother's meeting with Luna to revisit the flyer issue that had already been addressed. He reasonably viewed this conduct as inconsistent with the forum's student-led requirement and the posting rules.

On this record, McCaffrey's suspension of NSFL's club status was reasonable in light of the forum's purpose and was based on concerns wholly unrelated to E.D.'s viewpoint. The Duells' speech and association claims based on the suspension therefore fail.

Likewise, the First Amendment retaliation claim also fails because McCaffrey acted on viewpoint-neutral, forum-related concerns rather than in response to E.D.'s speech. To prevail, the Duells had to show that E.D.'s protected expression was "a motivating factor" in McCaffrey's decision to suspend NSFL's club status. *Douglas v. Reeves*, 964 F.3d 643, 646 (7th Cir. 2020) (citation omitted). The record does not permit that inference. As explained, McCaffrey approved NSFL knowing its pro-life mission, suspended its status only after learning of conduct he viewed as inconsistent with the student-led requirement, and promptly reinstated the club at the first available opportunity. No reasonable jury could find that E.D.'s protected expression was a motivating factor in his decision.[3]

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[3] The Duells also bring retaliation claims against Superintendent Niedermeyer and Principal McCaffrey in their individual capacities. Those claims also fail because there was no First Amendment retaliation in the first instance. McCaffrey alone made the suspension decision, and Niedermeyer had no

II. Equal Access Act Claims

Finally, we address the Duells' claims under the Equal Access Act. The Act prohibits a public secondary school that receives federal funding and maintains a limited open forum from denying "equal access or a fair opportunity to, or discriminat[ing] against, any students who wish to conduct a meeting within [any] limited open forum on the basis of the religious, political, philosophical, or other content of the speech at such meetings." 20 U.S.C. § 4071(a). E.D. advances two theories: first, that the suspension of NSFL's club status violated the Act; and second, that the denial of her flyers constituted a separate violation. Both fail—the former on the merits, and the latter for lack of preservation.

The Act requires proof that the school acted "on the basis of" the content of the speech at the meeting in question. *See Gernetzke*, 274 F.3d at 466. For reasons already discussed ad nauseum, the record forecloses that inference. Principal McCaffrey suspended NSFL's status because he believed the club was run in part by Mrs. Duell in violation of the forum's rules, and because E.D. attempted to circumvent uniform flyer restrictions by seeking approval from another administrator after her proposal had already been rejected, conduct he viewed as insubordinate. His decision was not tied to the club's pro-life mission. The absence of content-based causation defeats the claim against McCaffrey and, by extension, the District. *See id.* at 466–67. It also forecloses the claim against Niedermeyer, Mobley,

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role in it so any potential supervisory claim against her falls flat at the start.

and Luna, none of whom played any role in the suspension decision. Because McCaffrey's decision did not violate the Act, no other defendant can be liable.

The Duells' alternative theory, that the denial of E.D.'s flyers independently violated the Act was not preserved in the district court. The Southern District of Indiana's local rules require the parties to submit a case management plan identifying "a statement of [the] plaintiff's claims" they intend to prove at trial, including "the legal theories and facts" supporting each claim. S.D. Ind. Uniform Case Management Plan for Civil Cases; *see* S.D. Ind. L.R. 16-1. The Duells' submission defined E.D.'s Equal Access Act claim solely as a denial of the right to "conduct meetings" due to the content of her speech. Nothing in their Local Rule 16 statement (or in their amended complaint) suggested that the claim also encompassed a right to post flyers under the Act.

The Duells advanced this new theory for the first time in their summary judgment briefing. The district court therefore declined to consider it, finding that it exceeded the scope of the Equal Access Act claim as preserved in the statement of claims and in the pleadings. We review the enforcement of local rules for abuse of discretion, keeping in mind "that district courts may require strict compliance with their local rules." *Hinterberger v. City of Indianapolis*, 966 F.3d 523, 528 (7th Cir. 2020) (collecting cases). We find that the district court acted well within its discretion.

District courts may require parties to define their claims and theories in advance of summary judgment, and they may hold parties to those definitions. *See*

Elizarri v. Sheriff of Cook Cnty., 901 F.3d 787, 790–91 (7th Cir. 2018); *DeliverMed Holdings, LLC v. Schaltenbrand*, 734 F.3d 616, 628–29 (7th Cir. 2013). Several of the Duells' other claims in the same Local Rule 16 statement expressly referenced the posting of flyers, underscoring that they knew how to identify such a theory when they wished to do so. The district court reasonably concluded that the Equal Access Act claim was confined to the suspension of NSFL's status and that the flyer-based theory, raised for the first time at summary judgment, was not properly before the court.

CONCLUSION

For all the forgoing reasons, we AFFIRM the judgment of the district court.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

E. D., et al. Plaintiffs, v. NOBLESVILLE SCHOOL DISTRICT, et al., Defendants.	)	No. 1:21-cv-03075-SEB-TAB

ORDER ON CROSS MOTIONS FOR SUMMARY JUDGMENT

This litigation arises out of events surrounding the temporary revocation of approval by school officials for the formation of a pro-life club at Noblesville High School and the ensuing public discussion of those events on social media and in the press. Plaintiffs E.D., a minor, by and through her parents and next friends Michael and Lisa Duell, and Noblesville Students for Life, a student club formed by E.D., have jointly brought this action against Defendants Noblesville School District, Noblesville High School, and various school employees and administrators, originally alleging nineteen separate counts against Defendants under federal and state law.

Following the Court's ruling on Defendants' motion to dismiss and Plaintiffs' motion to reconsider parts of that ruling, the following claims remain to be decided: Count I (First Amendment Right of Association); Count II (First Amendment Freedom of Speech); Count III (Fourteenth Amendment Due

Process); Count IV (Fourteenth Amendment Equal Protection); Counts V and VI (First Amendment Retaliation; Count VII (Equal Access Act); Count VIII (Violation of School Policies Against Bullying); Count IX (Libel, Slander, and Defamation); Count XI (Intimidation and Bullying); Count XIII (Intentional Infliction of Emotional Distress); Count XV (Privacy by Publication of Private Facts); and Count XIX (Indiana Constitution). These twelve claims are now before us on cross-motions for summary judgment filed by Plaintiffs [Dkt. 152] and Defendants [Dkt. 157], respectively.

For the reasons detailed below, we DENY Plaintiff's Motion for Summary Judgment and GRANT Defendant's Cross Motion for Summary Judgment.

Factual Background[1]

The Parties

Plaintiff E.D. is a student who attends Noblesville High School ("NHS"), located in Noblesville, Indiana. In August 2021, when E.D. was a freshman at NHS, she formed a student organization, Plaintiff Noblesville Students for Life ("NSFL").

Defendant NHS is a part of the Defendant Noblesville School District, a public, state-funded

[1] Plaintiffs include facts in their briefing regarding current school policies, arguing that those policies create an unconstitutional "caste system" among different categories of student groups. However, no such allegations or claims were included in Plaintiffs' amended complaint and thus are not part of this lawsuit. Accordingly, we have not addressed those policies in this entry.

school system. Also named as Defendants in this litigation are several individual employees of Noblesville School District. During the time period relevant to this litigation, the individually named Defendants occupied the following positions: Dr. Beth Niedermeyer was Noblesville Schools Superintendent; Dr. Craig McCaffrey was the NHS Principal; Janae Mobley and Daniel Swafford were NHS Assistant Principals; Jeremy Luna was Dean of Students at NHS; Alison Rootes was a technical assistant who worked primarily at North Elementary and Stony Creek Elementary Schools; Elizabeth Kizer was a special education teacher and transition coordinator at NHS; Emily Patterson-Jackson was an instructional assistant in special education classes at Noblesville West Middle School; Grace Tuesca was an after-school and before-school teacher for grades two through five with Miller Explorers; Allison Schwingendorf-Haley was an English teacher at NHS; and Stephanie Eads was a second grade teacher at Stony Creek Elementary. Defendant Alexandra Snider Pasko was an attendance and in-school suspension assistant at Noblesville East Middle School at the beginning of the fall 2021 semester but resigned from her employment prior to the date on which she engaged in the conduct for which she is being sued by Plaintiffs.

NHS Student Interest Clubs

There are several types of student groups at NHS, including school clubs, academic teams, extra-curricular activities, co-curricular activities, and student interest clubs. McCaffrey Dep. II at 49. With the exception of student interest clubs, these groups are school sponsored and led by a school-approved

adult who is actively involved in organizing and running the group.

Student interest clubs, by contrast, are created by students who want to gather with other students who hold similar interest in a particular subject. These groups are student-driven and student-led. A faculty sponsor is present to supervise the students during their use of school facilities, to remain available to answer questions, and to assist with logistics, but the adult does not actively participate in the club. In the fall of 2021, several active student interest clubs were active at NHS, including, but not limited to, the Conservation Club, Campus Crusade for Christ, Fellowship of Christian Athletes, Gender and Sexuality Alliance, Key Club, Leo Club, Noblesville Young Democrats, Young Republicans, and Police Explorers. Dkt. 158-30.

During the 2021–2022 school year, Noblesville Schools had not promulgated written rules or policies governing the procedures for starting a new student interest club. McCaffrey Dep. II at 24–25. When students came up with club proposals, they were directed to find a faculty sponsor and fill out a brief questionnaire. McCaffrey Dep. I at 21, 23. Once a faculty member agreed to serve as a club sponsor, that faculty member was available to answer the student leader's questions as well as assist with meeting supervision and logistics. *Id.* at 37–38. Dr. McCaffrey, as principal, was responsible for reviewing all the proposals and questionnaires and for approving the formation of student interest clubs.

Policies Regarding Student Flyers

The 2021–2022 Noblesville High School Student Handbook set forth rules applicable to the posting of flyers at the school, which requirements provided as follows:

> Any materials posted at [NHS] must be posted only in the cafeteria and/or commons areas, and they should be removed after the date of the event. Posters must promote a school-sponsored event or have administrative approval to be posted.
>
> If materials promote a non-school event, they must list the sponsoring group. The sponsoring group must be local, must be clearly named on the posters, and must be a non-for-profit organization. The event itself must be educational in nature.

Dkt. 158-13.

Other than these provisions, there was no written policy in place the fall of 2021 governing the content of student interest club advertising flyers, including whether they could contain graphics, photographs, or logos. Nor were there written policies or procedures for receiving school approval to post such flyers. According to Defendants, despite there being no official written policy, school administrators and club sponsors knew that flyers for all club call-out meetings were to include the name of the club and the date, time, and location of the meeting, and anything disruptive to the school environment was prohibited. *Id.* at 34–35; Mobley Dep. I at 15–19.

During the time period relevant to this litigation, NHS students were not permitted to display posters on school walls without prior approval from an administrator. Approved posters were required to include a written take-down date and the initials of the administrator who had approved the poster and be affixed to the wall surfaces only with blue tape. Mobley Dep. I at 14; Swafford Dep. at 19–20, 31. During the fall of 2021, NHS administrators limited the display of posters to the main hallway of the freshman center, near bus the entrances and the auditorium, and in the cafeteria. Swafford Dep. at 37.

Formation of Noblesville Students for Life

During the summer of 2021, E.D. contacted school administrators at NHS seeking information regarding the formation of a student interest club, to wit, the Noblesville Students for Life ("NSFL"). She was informed that she would first need to find a faculty advisor for the club, which she accomplished on July 28, 2021. On August 3, 2021, which was the second day of the 2021–2022 school year, E.D. met with Dr. McCaffrey to discuss the next steps for securing school approval for establishing NSFL. E.D. Dep. I at 10. At E.D.'s request, her mother, Lisa Duell, also attended that meeting and in fact audio-recorded the conversation. E.D. had asked her mother to attend because her family had a rule that she was not to be alone with any male adult and, in addition, E.D. wanted to have a recording of the meeting in case "Dr. McCaffrey decided [based on] discriminatory or other false reasons not to permit [her] club," thereby allowing her to "pursue the steps necessary to make sure [she] did get [her] club." E.D. Dep. I at 13–14. Neither E.D. nor Ms. Duell mentioned to Dr.

McCaffrey that one of the reasons Ms. Duell was attending the meeting was because of their family no contact policy.

During the meeting, E.D. informed Dr. McCaffrey that she wanted to start NSFL and explained to him the club's pro-life mission. Duell Dep. at 19; E.D. Dep. I at 13–23. Through formation of the club, E.D. sought "to educate [her] peers on the issue of abortion and empower [her] peers to volunteer in the local community with pregnancy-related items." E.D. Dep. I at 18. Dr. McCaffrey provided E.D. with a club questionnaire form to complete and advised that its completion and submission was the only other step she needed to take before NSFL could be approved as a student interest club. *Id.* at 16–17. He specifically stated during that meeting that, because NSFL would be designated as a student interest club, it was important that the club be student-based.

Ms. Duell spoke at several points during the meeting, inquiring as to the date when the club fair was scheduled, the process of securing a speaker to address the club, whether NSFL could have a booth at NHS's activities fair and, if so, whether E.D. should prepare anything for the fair. She also coached E.D. to clarify for Dr. McCaffrey the involvement of Students for Life of America ("SFLA"),[2] specifically, regarding whether SFLA was requiring NSFL to adhere to a code of conduct and whether SFLA's contract addressed the organization's use of photographs of NHS and its students. This discussion

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[2] SFLA is a national pro-life advocacy organization that, among other things, helps organize student groups at high schools and on college campuses.

prompted Dr. McCaffrey's mention to Ms. Duell of a prior situation when student photos appeared on an organization's website. E.D. Dep. II at 18–25, 92–93.

Following the August 3rd meeting, E.D. completed the questionnaire and returned it to Dr. McCaffrey. In her responses, E.D. explained that she intended to establish NSFL "to raise awareness and generate discussion about the abortion issue while also doing something about it through volunteering." Dkt. 158-1; Dkt. 158-2. She wrote that the club would "empower students to knowledgably and courageously speak about abortion," "strive to bring awareness to the abortion issue," and "positively impact [her] peers' respect and value for life and the unborn." *Id.* Her plans for the club's activities included "flyering, tabling, chalking, volunteering at a local pregnancy resource center, participating on national pro-life days, and conducting drives for various needs [the] local pregnancy resource center may have." *Id.* E.D. referenced her plan for NSFL to invite guest speakers to present programs on pro-life topics. *Id.* She also indicated that she would recruit members through her church and social media as well as "flyering about activities the club has planned and tabling at the clubs fair." *Id.*

After receiving E.D.'s completed club questionnaire, Dr. McCaffrey approved the creation of NSFL as a student interest club. E.D. Dep. I at 21–22. Once approved, NSFL was allowed to participate in the fall activities fair at NHS held on August 19, 2021. E.D. staffed the NSFL booth at the fair wearing a message t-shirt that stated, "I am the pro-life generation." The booth displayed a tri-fold poster that E.D. had created with NSFL's mission statement

including a sign that read, "I am the pro-life generation." E.D. Dep. II at 40–43. NSFL advertised at the fair the activities in which the club planned to participate in the future, including a trip to Washington D.C. for the March for Life planned for January 2022. E.D. Dep. I at 26. More than thirty students signed up for NSFL during the activities fair. *Id.* at 29–30, 65.

Noblesville Students for Life Flyers

Approximately two weeks following the fair, on August 27, 2021, E.D. met with Assistant Principal Mobley to schedule a callout meeting date for NSFL and to secure clarification of the rules applicable to advertising flyers. *Id.* at 26. On August 31, 2021, E.D. emailed Ms. Mobley digital copies of two flyers she planned to post in NHS to advertise NSFL's callout meeting. Both flyers included photographs of students in front of the United States Supreme Court building in Washington D.C. carrying signs that read, "I Reject Abortion," "Defund Planned Parenthood," and "I Am the Pro-Life Generation," among other similar messages. The proposed flyers also contained text stating: "Pro-Life Students, It's Time to Meet Up!" and included blank spaces at the bottom for E.D. to insert specific details regarding the meeting's time, place, topic, and sponsor. Also, at the bottom of both flyers, was a very small logo depiction for SFLA. Neither poster included the words "Noblesville Students for Life." *See* Dkt. 158-5.

The next morning, on September 1, 2021, Ms. Mobley responded to E.D.'s email regarding NSFL's proposed flyers, as follows:

> We need flyers advertising that this is a "Noblesville Students for Life" Club meeting location, date, and time. We do not need the pictures of the signage. For example, our Young Republican's [sic] club does not display items for the Republican Party. Their flyers just simply state the club name and meeting/call-out information. Then obviously at the club meeting and call-out, you guys can discuss whatever is your topic at hand.
>
> In the future, I will probably have you run these by Mr. McCauley first to get appropriate revisions made. After his approval, we can get them to an administrator to approve prior to hanging in the halls.

Id. at 3–4.

After sending this response to E.D., Ms. Mobley emailed Mr. McCauley, NSFL's faculty advisor, asking him to work with E.D. to revise the flyers. *Id.* at 4. Less than an hour after receiving Ms. Mobley's email, Mr. McCauley emailed E.D. to give her instructions, as follows:

> The best thing to do for the flyers is to simply put this info on them:
>
> Noblesville Students for Life Club
> Meeting Date: ???
> Meeting Time: ???
> Meeting Location: ???
>
> Once you get the flyer finished, will you please email it to me so that I can approve it?

Id. at 4. In his communications with E.D., Mr. McCauley also instructed E.D. to email Mr. Luna to confirm the call-out date, time, and location. *Id.* at 5.

Later that same evening, E.D. responded to Mr. McCauley's email, stating that she had hoped to use the template flyers from the SFLA website for NSFL's poster and simply add the call-out meeting details to the template. *Id.* She also noted that she had been trying to contact Mr. Luna but that he was not responding. She offered to email Mr. Luna again, copying Mr. McCauley, but suggested that it might be better for Mr. McCauley to reach out to Mr. Luna directly. *Id.*

The next morning, on September 2, 2021, at 9:29 a.m., Mr. McCauley responded to E.D.'s email by offering to contact Mr. Luna that day for approval of the call-out date and time. He also reiterated his prior instructions regarding the content of the poster, as follows:

I think it is best just to have this info only on the flyers: (no pictures, etc.)

Noblesville Students for Life Club

Meeting Date: ???

Meeting [T]ime: ???

Meeting [L]ocation: ???

Send me a pic of the final flyer and we'll get it figured out.

Id. At 10:14 a.m., E.D. responded again by email as follows: "Sounds good, thanks! I'll get to work on making the flyers." *Id.*

On September 3, 2021, before school began that morning, E.D. requested a meeting with Mr. Luna. The meeting occurred later in the morning; Ms. Duell also attended so that E.D. would not be alone with a male adult per their family rule. (The reason for Ms. Duell's presence was not communicated to Mr. Luna.) At that meeting, E.D. requested a specific callout date for NSFL because she had not received a response to her prior emails to Mr. Luna. Mr. Luna responded that he might "do it over the weekend." E.D. Dep. I at 43–44; Luna Dep. I at 33, 36–37.

E.D. showed Mr. Luna the posters she had previously sent to Ms. Mobley for approval. E.D. has testified that Mr. Luna told her that the posters were inappropriate because they contained a picture and that the pictures were inappropriate because of their political nature. E.D. Dep. I at 48–49. According to E.D. and her mother, Mr. Luna also stated that he could not approve the posters because the school was already dancing or walking "on eggshells." *Id.* at 49; Duell Dep. at 32.

Mr. Luna has testified that he told E.D. and her mother that the flyer could not include a political photo of a "picket" with multiple signs reading "Defund Planned Parenthood." Luna Dep. I at 40–41. When E.D. asked if she would be permitted to hang the flyers if she removed the "Defund Planned Parenthood" signs, Mr. Luna said that that "should" or "would possibly work," but that he was not the school administrator who approved student clubs and flyers, so he did not know what would be allowed. Luna Dep. I at 18–19, 40–41, 42; E.D. Dep. I at 49–50. This was not entirely consistent with what Dr. Mobley had told E.D. in informing her that any

administrator could approve flyers. E.D. Dep. I at 67; Mobley Dep. II at 40–41.

E.D. has testified that she left the meeting with Mr. Luna feeling disappointed and unsure regarding the next steps for receiving approval for NSFL's flyers and callout meeting date. E.D. Dep. I at 51–52.

Dr. McCaffrey Revokes NSFL's Club Status

Immediately following his meeting with E.D. and her mother on the morning of September 3rd, Mr. Luna spoke with Dr. McCaffrey and Ms. Mobley about what had occurred. According to Mr. Luna, he felt that the meeting was a three-way conversation between E.D. Ms. Duell, and himself, with Ms. Duell driving the conversation. Luna Dep. I at 47. Both Dr. McCaffrey and Ms. Mobley expressed their concerns to Mr. Luna regarding Ms. Duell's participation in E.D.'s meetings about NSFL. Luna Dep. at 46, 62–63; Mobley Dep. I at 35. Ms. Mobley also informed Dr. McCaffrey that E.D. had previously presented the same flyers to her (Mobley) for approval, but that she had declined to approve them and told E.D. what she needed to do to fix them. McCaffrey Dep. I at 103.

Later, on September 3rd, at 11:57 a.m., Dr. McCaffrey emailed Ms. Duell to "clarify some points about student interest clubs and [NHS's] process," (Dkt. 157-3), informing her that "student interest clubs are 100% student driven and can have no involvement from any adult," which was why he viewed it as "unusual and [un]orthodox" for Ms. Duell to have attended the initial meeting he had with E.D. regarding the formation of NSFL. *Id.* The email further explained that Dr. McCaffrey had allowed their first meeting to continue, despite Ms. Duell's

presence, because E.D. "did all of the talking and did a good job of representing what she wanted to do." *Id.* However, Dr. McCaffrey said, after E.D. spoke with Ms. Mobley about NSFL's flyers and was told that they were not appropriate for school, instead of revising the flyers, E.D. and Ms. Duell met with Mr. Luna again to discuss the posters, approval of which had previously been denied by Ms. Mobley. Consistent with what E.D. had been told by Ms. Mobley, Dr. McCaffrey reiterated in his email to Ms. Duell that:

> A poster cannot contain any content that is political or that could disrupt the school environment. Club advertising posters only state the name of the club and the details of the meeting time and location. When the students actually meet, they are able to talk about their common interests.

Id. In his email, Dr. McCaffrey stated that, because he was no longer "confident that this club is a student-driven club," he "therefore [was] removing the club's approval to meet in the school." *Id.* Dr. McCaffrey also informed Ms. Duell that NHS was in the process of "revamping" its club approval process "to handle the large number of requests [the school was] getting along with the wide range of interest requests" and would not be taking new requests for student interest clubs until the new process was finalized "for the second semester." *Id.* Dr. McCaffrey advised Ms. Duell that, if E.D. wanted "to apply for her club again

next semester, she [could] reach out to Mrs. Mobley in January and ask for the updated application."[3] *Id.*

Dr. McCaffrey testified that the decision to revoke NSFL's club status was his alone and that he informed Dr. Niedermeyer of his decision only after he had sent the revocation email to Ms. Duell. McCaffrey Dep. I at 108, 131; McCaffrey Dep. II at 128. Although E.D. was NSFL's president at the time of the revocation, Dr. McCaffrey did not send the September 3rd email to E.D. or otherwise notify her directly of the revocation. E.D. instead was informed by NSFL's faculty sponsor, Mr. McCauley, that NSFL's club status had been revoked. E.D. Dep. I at 511–52, 53.

Other Student Interest Clubs at NHS

Prior to revoking NSFL's club status in the fall of 2021, Dr. McCaffrey had never revoked authorization for a student interest club. In 2019, however, Dr. McCaffrey did receive a complaint that an adult was participating in NHS's Campus Crusade for Christ group, along with a threat of litigation by the Freedom from Religion Foundation. Dr. McCaffrey investigated that complaint by watching videos of club meetings and determined that no adults had spoken during the meetings; he therefore took no corrective action in response to the complaint. McCaffrey Dep. II at 135–36. Other than this 2019 complaint, Dr. McCaffrey had dealt with no other issues regarding suspected adult involvement in a

[3] E.D. resubmitted her application as instructed and NSFL was reinstated as a student interest club at NHS in January 2022.

student interest club until the issue arose with NSFL. McCaffrey Dep. II at 132.

NHS previously approved at least one other pro-life student interest club, about which there is no evidence that it was denied approval or ever had its club status revoked. McCaffrey Dep. I at 147; Niedermeyer Dep. at 50–51. Dr. McCaffrey, Ms. Mobley, and Mr. Luna all testified that in their personal views on abortion they are pro-life and thus their opinions align with the viewpoint and mission of NSFL. McCaffrey Dep. at 148; Mobley Dep. I at 41–43; Luna Dep. I at 58. Their actions were not motivated by any philosophic hostility to the purpose of the club.

Social Media Discussion

After NSFL's club status was revoked, Noblesville City Councilman Pete Schwartz posted on the Noblesville Schools Community Facebook page a copy of an email that E.D. had sent him regarding the revocation of NSFL's club status, in which she expressed her belief that the revocation was the result of "ideological targeting" and her desire to "get the word out" about the situation. Dkt. 154-2. Another Noblesville resident who is not a party to this litigation reposted a condensed version of E.D.'s email, omitting certain references in the reposting, including E.D.'s statements that she was not "a puppet, a Greta Thunberg" and that "Pastor Micah," a well-known local pastor and political candidate, believed many in the community would be supportive of her efforts. Dkt. 154-3. That same Noblesville resident also shared on social media a link to a news article about the revocation. These posts garnered a

large response on social media, with various of the Defendants participating in the online discussions, as described below.

Defendant Eads commented on Councilman Schwartz's post: "I really think this is inappropriate for a councilman to post [E.D.'s email] to a public forum page." Dkt. 154-2. When Councilman Schwartz rejoined to inquire as to what was unprofessional about his conduct, Ms. Eads wrote, "[U]sing your position as a councilman to push your buddy, Pastor Micah's agenda here." *Id.* Councilman Schwartz's conceded that he had "really not [done] much" to investigate the situation before posting E.D.'s email to social media, prompting Ms. Eads to respond: "[S]o basically he didn't do anything other than post this to Facebook? Wow, tax dollars hard at work." *Id.* Later in the thread, Defendant Patterson-Jackson commented, "I got all I needed to know about the true intent and purpose of this 'club' by the use of the two phrases: 'puppet, Greta Thunberg' and 'Pastor Micah.' No thanks." *Id.* Ms. Eads replied to Ms. Patterson-Jackson's comment: "EXACTLY." *Id.*

In response to the Noblesville resident's reposting of an edited version of E.D.'s email to Councilman Schwartz, Ms. Patterson-Jackson wrote: "You have deliberately and intentionally left out key parts of the original email, specifically her references to 'puppet, Greta Thunberg' and 'Pastor Micah's' endorsement. You have absolutely lost all credibility at this point. And as I said on that original post, there is no place for a club that endorses misogyny, bigotry, and conspiracy-driven politics in our public schools." Dkt. 154-3. Defendant Tuesca "liked" this comment. Dkt. 158-9. In response to Ms. Patterson-Jackson's

comment, several non-parties posted comments critical of her post. In response to those comments, Ms. Patterson-Jackson reiterated her concern that the excerpt of E.D.'s email that had been posted omitted relevant portions of the original email and stated that her "critique and questioning of misogyny, bigotry, and conspiracy-driven politics" stemmed from "the endorsement by Micah Beckwith" that was referenced in E.D.'s original email. Dkt. 154-3. Ms. Patterson-Jackson posted again on the thread, as follows: "There is no place for any club that endorses those things [misogyny, bigotry, and conspiracy driven politics]. If the Students for Life club truly doesn't, then by all means, they should be able to meet. Once again, and for the final time, my criticism was based on the fact that according to the student the club is endorsed by Micah Beckwith, which, as I said, is the basis for my concern, as it is my opinion that he does, in fact, support those things." *Id.*

With reference to NSFL's proposed flyers, Ms. Patterson-Jackson commented, "So out of curiosity, would you be good with club posters in the school for the Black Student Union that said 'Defund the Police?'" Dkt. 158-6. Defendants Rootes and Kizer both "liked" Ms. Patterson-Jackson's comment. *Id.* A non-party commented that the social media discussion appeared to be "proving [the] point" that "a bunch of adults were behind this [NSFL] group," and Defendant Schwingendorf-Haley "liked" that comment. Dkt. 158-7. Defendant Snider Pasko "liked" the following comment posted by another non-party: "Parent in on the formation meeting? Already has legal representation? I suppose I'm a skeptic, but it's almost like it was planned …." Dkt. 158-8. Ms. Tuesca

"liked" several comments on these threads that she agreed with or found funny. Tuesca Dep. at 22–38.

The Instant Litigation

On December 21, 2021, Plaintiffs filed their original complaint, which they later amended on January 11, 2022, alleging, *inter alia*, various violations of their First and Fourteenth Amendment rights and the Equal Access Act, as well as claims under the Indiana Constitution and various tort claims subject to the Indiana Tort Claims Act ("ITCA") notice provisions. Defendants moved to dismiss all claims alleged against them, which motion was granted in part and denied in part. In ruling on the motion to dismiss, the Court also *sua sponte* converted Defendants' motion to dismiss to one for summary judgment as to the ITCA notice issue and granted judgment in Defendants' favor on that issue. However, upon reconsideration, the Court granted Plaintiffs' motion for reconsideration of the *sua sponte* conversion of the motion to dismiss and provided the parties an opportunity to submit supplemental briefs and evidence on the ITCA notice issue, which they have now done.

Now before the Court are the parties' cross-motions for summary judgment as to the federal claims as well as the parties' supplemental submissions on summary judgment as to the ITCA notice issue. These motions are fully briefed and ripe for ruling.

Legal Analysis

I. Summary Judgment Standard

Summary judgment is appropriate where there are no genuine disputes of material fact and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23 (1986). A court must grant a motion for summary judgment if it appears that no reasonable trier of fact could find in favor of the nonmovant on the basis of the designated admissible evidence. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247–48 (1986). We neither weigh the evidence nor evaluate the credibility of witnesses, *id.* at 255, but view the facts and the reasonable inferences flowing from them in the light most favorable to the nonmovant. *McConnell v. McKillip*, 573 F. Supp. 2d 1090, 1097 (S.D. Ind. 2008). Because these are cross-motions for summary judgment and the same Rule 56 standards apply, our review of the record requires us to draw all inferences in favor of the party against whom a particular issue in the motion under consideration is asserted. *See O'Regan v. Arbitration Forums, Inc.*, 246 F.3d 975, 983 (7th Cir. 2001) (citing *Hendricks-Robinson v. Excel Corp.*, 154 F.3d 685, 692 (7th Cir. 1998)).

II. Federal Claims

A. Section 1983 and Equal Access Act Claims Against the Noblesville School District

Plaintiffs have framed almost all their Section 1983 claims, other than their individual capacity claims for First Amendment retaliation and Equal

Access Act violations, only against the municipal entity, the Noblesville School District (the "District").[4] Accordingly, the viability of these claims is governed by the requirements set forth in *Monell v. Department of Social Services*, 436 U.S. 658 (1978) and its progeny.[5]

Under *Monell*, "a municipal entity is not vicariously liable for the constitutional torts of its employees" and instead "may be liable only for conduct that is properly attributable to the municipality itself." *Milchtein v. Milwaukee Cnty.*, 42 F.4th 814, 824 (7th Cir. 2022) (internal quotations and citations omitted). A constitutional deprivation may be attributable to a municipality only "when execution of a government's policy or custom inflicts the injury." *Houskins v. Sheahan*, 549 F.3d 480, 493 (7th Cir. 2008) (quotation marks and citation omitted). A plaintiff can show that a constitutional violation resulted from the execution of a municipal policy or custom in the following three ways: "(1) an express policy causing the loss when enforced; (2) a

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[4] Plaintiffs have also framed these claims as against Defendant NHS, but do not dispute that NHS is not a suable entity separate from the school district. Accordingly, all claims against NHS as such are hereby dismissed.

[5] It is true, as Plaintiffs argue, that legal standards beyond those set forth in *Monell* govern whether their constitutional rights were violated by Dr. McCaffrey's decision to revoke NSFL's club status. However, as we have previously explained to Plaintiffs, they have not brought these claims against Dr. McCaffrey in his individual capacity. To instead hold the Noblesville School District responsible for any such violation, as Plaintiffs have sought to do in this litigation, they must show not just that they suffered a constitutional injury, but that that injury is directly attributable to the governmental entity itself under *Monell*.

widespread practice constituting a 'custom or usage' causing the loss; or (3) a person with final policymaking authority causing the loss." *Walker v. Sheahan*, 526 F.3d 973, 977 (7th Cir. 2008) (citing *Chortek v. City of Milwaukee*, 356 F.3d 740, 748 (7th Cir. 2004)).

Here, Plaintiffs make no attempt to show that the District had either an express policy or a widespread practice or custom that caused NSFL's revocation. Instead, Plaintiffs argue that the District's liability under *Monell* arises from the violation that was caused by Dr. McCaffrey, a final policymaker over student club policy at NHS. Specifically, Plaintiffs argue, based on testimony from the school board president and other school board members, that the school board was not involved in promulgating or approving procedures governing school clubs, but that the school district had delegated policymaking authority related to student interest clubs at NHS to Dr. McCaffrey.

In determining whether a municipal officer such as Dr. McCaffrey is acting as a final policymaker, courts look to state and local law. *Pembaur v. City of Cincinnati*, 475 U.S. 469, 483 (1986). In Indiana, courts have held that the final policymaker for a public school corporation, such as the District, is the board of school trustees. *See Harless v. Darr*, 937 F. Supp. 1339, 1349 (S.D. Ind. 1996) ("[T]he school board and not the [p]rincipal or the [s]uperintendent has final policy making authority under Indiana law."); *accord Wesley v. South Bend Cmty. Sch. Corp.*, No. 3:19-cv-00032-PPS-MGG, 2019 WL 5579159, at *7 (N.D. Ind. Oct. 29, 2019) ("In Indiana, the final policymaker for a public school corporation is its

board of school trustees."); *Herndon v. South Bend Sch. Corp.*, No. 3:15 CV 587, 2016 WL 3654501, at *1 (N.D. Ind. July 8, 2016) ("[U]nder Indiana law, it is the school board, and not the principal that has final policymaking authority.").

Here, Plaintiffs contend that the Noblesville Board of School Trustees delegated its policymaking authority regarding student clubs to Dr. McCaffrey as principal of NHS. In support of their argument, Plaintiffs point to the fact that Dr. McCaffrey, acting on his own, made the decision to revoke NSFL's club status, without seeking direction or approval from either the superintendent or the school board and without having his decision subjected to official review. However, "[u]nder the delegation theory, the person or entity with final policymaking authority must delegate the power to make *policy*, not simply the power to make *decisions*." *Darchak v. City of Chi. Bd. of Educ.*, 580 F.3d 622, 630 (7th Cir. 2009) (emphasis added). Thus, the fact that Dr. McCaffrey had discretionary authority to make decisions regarding student interest clubs at NHS does not render him the final decision maker regarding policies for purposes of § 1983 municipal liability. *See Ball v. City of Indianapolis*, 760 F.3d 636, 643 (7th Cir. 2014) ("[S]imply because a municipal employee has decisionmaking authority, even unreviewed authority, with respect to a particular matter does not render him a policymaker as to that matter."); *Kristofek v. Village of Orland Hills*, 712 F.3d 979, 987 (7th Cir. 2013) ("[T]he mere unreviewed discretion to make hiring and firing decisions does not amount to policymaking authority. There must be a delegation of authority to set policy for hiring and firing, not a

delegation of only the final authority to hire and fire.") (quoting *Valentino v. Village of S. Chi. Heights*, 575 F.3d 664, 674 (7th Cir. 2009)); *Gernetzke v. Kenosha Unified Sch. Dist. No. 1*, 274 F.3d 464, 469 (7th Cir. 2001) (holding that *Monell* liability is limited "to situations in which the official who commits the alleged violation of the plaintiff's rights has authority that is final in the special sense that there is no higher authority").

Here, the kinds of day-to-day discretionary decisions that Dr. McCaffrey and other NHS administrators were authorized to make regarding the posting of flyers in the school and student club approval do not rise to the level of policymaking decisions made on behalf of the District, the governmental entity that Plaintiffs have sued. *See Harless*, 937 F. Supp. at 1349 (holding that the delegation of authority under Indiana law to the principal to make "ad hoc decisions" to maintain order within the school was distinguishable from the school board's authority to create final policy). The evidence adduced by the parties establishes that it is the Noblesville School Board who has final authority over NHS's policies, which are set forth in the Student Handbook. When asked at his deposition what role the Noblesville School Board holds regarding student groups at a high school or middle school in the District, Noblesville School Board President Joe Forgey testified that, "other than [the principal] taking *our* policy and administrating it, none." Forgey Dep. at 24 (emphasis added).

Mr. Forgey did express some confusion regarding whether he would have seen NHS's policies regarding student clubs and whether the Board has final

approval of the Student Handbook, testifying that he "think[s] it comes to a vote to the board to approve the handbooks," but was "not sure" and "didn't want to say for sure." *Id.* at 33. However, Dr. Niedermeyer and Dr. McCaffrey both testified that NHS policies which are contained in Noblesville Schools' Student Handbooks are drafted by the principal and curriculum team at each school and then presented to the School Board for approval every school year. Dkt. 166-1 at 21, 42; Dkt. 166-4 at 24–25.

Mr. Forgey's uncertainty regarding whether he would have seen policies regarding student clubs and whether the Noblesville School Board is responsible for approving NHS's Student Handbook is not enough to create a genuine issue of material fact on this issue. Federal Rule of Evidence 201 permits a court to take judicial notice of a fact that "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned," and such notice can be taken *sua sponte* and at any stage in a proceeding. We therefore take judicial notice of the agenda and minutes of the June 15, 2021 regular school board meeting of the Noblesville School Board, which are accessible from the Noblesville Schools website and reflect that, on that date, the Board approved the 2021–2022 Noblesville Elementary and Secondary Student/Parent Handbooks in a 4 to 1 vote. *See* Section 6.7, Noblesville School Board Meeting Agenda for June 15, 2021 Regular School Board Meeting, go.boarddocs.com/in/noblesville/Board.nsf/Public (last visited March 13, 2024); *see*, *e.g.*, *Miller v. Goggin*, 672 F. Supp. 3d 14, 28 n.9 (E.D. Penn. 2023) (noting that the court had previously taken judicial notice of school board meeting minutes). Accordingly,

although Dr. McCaffrey may have had discretionary authority over *decisions* affecting student clubs within NHS, the evidence before us clearly shows that the Noblesville School Board, not Dr. McCaffrey, was the entity responsible for establishing final government *policy* covering such matters.

Finally, to the extent that Plaintiffs argue that the lack of policies in the NHS Student Handbook regarding the formation and approval of student interest clubs and the posting of flyers to advertise such clubs supports an inference that the Noblesville School Board delegated its final policymaking authority on such matters to Dr. McCaffrey, such an argument is not well-made. Seventh Circuit law is clear that "the absence of a written policy is not enough to support an inference that final policymaking authority has been delegated to a subordinate." *Cornfield by Lewis v. Consol. High Sch. Dist. No. 230*, 991 F.2d 1316, 1325 (7th Cir. 1993).

Although the absence of a policy is not enough to show a delegation of final policymaking authority to an employee, under certain circumstances the lack of a policy can nonetheless subject the governmental entity to liability under *Monell*. "But proving *Monell* liability based on an absence of policy is difficult, because 'a failure to do something could be inadvertent and the connection between inaction and a resulting injury is more tenuous,' and, therefore 'rigorous standards of culpability and causation must be applied to ensure that the municipality is not held liable solely for the action of its employee." *Watson v. Ind. Dep't of Correction*, No. 18-02791, 2020 WL 5815051, at *4 (S.D. Ind. Sept. 30, 2020) (quoting *J.K.J. and M.J.J. v. Polk Co. and Christensen*, 960

F.3d 367, 378 (7th Cir. 2020)). Insofar as Plaintiffs here have referenced the District's failure to enact a policy regarding student organization formation as the cause of their constitutional injuries, no such claim has been developed in a legally sufficient manner.

To hold the District liable under *Monell* for the failure to enact a policy, Plaintiffs must show that the District had "'actual or constructive knowledge that its agents [such as those approving student club status] will probably violate constitutional rights' in the absence of a [relevant] policy." *Watson*, 2020 WL 5815051, at *4 (quoting *Glisson v. Ind. Dep't of Corr.*, 849 F.3d 372, 381 (7th Cir. 2017)). In addition, to establish liability for the absence of a policy, a plaintiff typically must provide "more evidence than a single incident." *Calhoun v. Ramsey*, 408 F.3d 375, 380 (7th Cir. 2005). Again, Plaintiffs' briefing has fallen short of establishing that the District knew or had reason to know that, without a formal policy regarding student interest club formation, its school administrators were likely to permit, deny, or revoke a club's status based upon the club's viewpoint. As Defendants argue, the evidence shows that NHS administrators routinely approved the formation of student groups with a variety of ideologies and political viewpoints, including Young Republicans, Young Democrats, Campus Crusade for Christ, Fellowship of Christian Athletes, and Gender and Sexuality Alliance. We have been presented no evidence showing that any NHS student interest club had previously been denied or revoked for any reason, let alone for the content of the club's speech. Plaintiffs have thus failed to adduce the necessary evidence to

prove that "there is a true municipal policy at issue, not a random event" as is required to hold the District responsible for a gap in policy. *Id.*

For the foregoing reasons, we find that Plaintiffs have failed to show that their constitutional injury was caused by an official policy, widespread practice or custom, or decision by a final policymaker of the governmental entity they have sued. The District is thus entitled to summary judgment in its favor on Plaintiff's § 1983 claims against it, to wit, Counts I (First Amendment freedom of association), II (First Amendment freedom of speech), III (Fourteenth Amendment due process), IV (Fourteenth Amendment equal protection), V (First Amendment retaliation), and Count VII (Equal Access Act). Defendant's summary judgment motion is therefore GRANTED, and Plaintiff's motion is correspondingly DENIED as to these claims brought by Plaintiffs against the Noblesville School District.

B. Individual Capacity Claims Against Defendants Niedermeyer, Mobley, and Luna

Plaintiffs assert § 1983 claims for First Amendment retaliation and Equal Access Act violations against Defendants Niedermeyer, Mobley, and Luna in their individual capacities, based on the revocation of NSFL's club status. However, the undisputed evidence establishes that the revocation decision was made by Dr. McCaffrey alone, and Plaintiffs do not argue otherwise. Because the evidence shows that neither Dr. Niedermeyer, Ms. Mobley, nor Mr. Luna was personally involved, consulted, or otherwise acquiesced in the decision to

revoke NSFL's club status, these defendants cannot be held liable for whatever injury that revocation caused Plaintiffs. *See Minix v. Canarecci*, 597 F.3d 824, 833 (7th Cir. 2010) ("[I]ndividual liability under § 1983 requires personal involvement in the alleged constitutional deprivation.") (internal quotation marks and citation omitted).

Accordingly, Defendants' motion for summary judgment is GRANTED as to the individual capacity First Amendment retaliation (Count VI) and Equal Access Act (Count VII) claims brought against Defendants Niedermeyer, Mobley, and Luna in their individual capacities, and Plaintiffs' motion for summary judgment on these claims is therefore DENIED.

C. Individual Capacity First Amendment Retaliation Claims Against Defendants McCaffrey, Snider-Pasko, Rootes, Schwingednorf-Haley, Kizer, Patterson-Jackson, Tuesca and Eads

We turn next to address Plaintiffs' First Amendment retaliation claims brought against the remaining Defendants each sued in their individual capacity. Plaintiffs allege that, in retaliation for E.D.'s expressed pro-life views, Defendant McCaffrey revoked NSFL's club status and Defendants Snider Pasko, Rootes, Schwingednorf-Haley, Kizer, Patterson-Jackson, Tuesca, and Eads created a hostile environment for E.D. by participating in a public discussion on social media regarding NSFL's revocation, including writing negative comments and "liking" posts critical of NSFL.

To prevail on their First Amendment retaliation claims, Plaintiffs must show that: (1) E.D. engaged in activity protected by the First Amendment; (2) she suffered a deprivation that would likely deter future First Amendment activity; and (3) the First Amendment activity was "at least a motivating factor" in Defendants' decision to take retaliatory action. *Bridges v. Gilbert*, 557 F.3d 541, 546 (7th Cir. 2009) (citing *Woodruff v. Mason*, 542 F.3d 545, 551 (7th Cir. 2008)). "The 'motivating factor' amounts to a causal link between the activity and the unlawful retaliation," *Manuel v. Nalley*, 966 F.3d 678, 680 (7th Cir. 2020), which element may be shown using either direct or circumstantial evidence, such as "suspicious timing, ambiguous oral or written statements, behavior toward or comments directed at other[s] … in the protected group." *Long v. Teachers' Ret. Sys. of Ill.*, 585 F.3d 344, 350 (7th Cir. 2009) (citation omitted). If Plaintiffs succeed in establishing a prima facie claim, the burden shifts to Defendants to rebut the claim and establish that the deprivation "would have occurred regardless of the protected activity." *Manuel*, 966 F.3d at 680 (citing *Kidwell v. Eisenhauer*, 679 F.3d 957, 965 (7th Cir. 2012)). If such a showing is made, the burden then shifts back to Plaintiffs to show that Defendants' proffered non-retaliatory reason "is pretextual or dishonest." *Id.*

Having set forth the legal principles applicable to Plaintiffs' First Amendment retaliation claims, we turn next to address the merits of these claims.

1. First Amendment Retaliation Claim Against Defendant McCaffrey

Plaintiffs argue that they are entitled to summary judgment on their First Amendment retaliation claim against Dr. McCaffrey because the evidence establishes that he revoked NSFL's club status shortly after E.D. had sought approval to post flyers containing pro-life messages and images to advertise the NSFL's call-out meeting. Specifically, Plaintiffs argue that, when E.D. requested approval from NHS administrators to post flyers related to the pro-life movement to advertise NSFL's call-out meeting, she was given conflicting information from various administrators regarding the rules governing what could be posted, and that, within hours of seeking to clarify the rules at a meeting with her mother and Mr. Luna, Dr. McCaffrey revoked NSFL's club status. Plaintiffs claim, based on the conflicting information they say they were given regarding permissible content for the flyers and the proximity in time between E.D. seeking to clarify the rules and secure approval for her flyers and Dr. McCaffrey's revocation decision, that they have shown that their protected First Amendment activity was at least a motivating factor in Dr. McCaffrey's decision to revoke NSFL's club status.

Defendants rejoin that summary judgment should instead be entered in Dr. McCaffrey's favor because Plaintiffs have failed to establish that the viewpoint of the proposed flyers or any other protected First Amendment activity on Plaintiffs' part was a motivating factor in the revocation decision. Rather, the evidence establishes that Dr. McCaffrey revoked NSFL's club status because of Plaintiffs'

conduct—not their speech—referencing his concern about the involvement of E.D.'s mother in what was supposed to be a student-run club and his belief that E.D.'s conduct of "shopping" administrators in an effort to find one who would approve the flyer that had previously been rejected by two other NHS administrators for failing to comply with the rules applicable to NHS student interest club flyers was insubordinate behavior.

There can be no dispute that Plaintiffs' formation of a pro-life club and their efforts to advertise that club in the same manner afforded to all other student interest clubs at NHS constitutes protected activity under the First Amendment. It is also undisputed that the revocation of NSFL's club status is the kind of deprivation that would likely deter future First Amendment activity. Accordingly, Plaintiffs have satisfied these first two elements of their First Amendment retaliation claim against Dr. McCaffrey. However, we find that Plaintiffs have failed to establish the third element of their claim, to wit, that their protected First Amendment activity was a motivating factor in Dr. McCaffrey's revocation decision.

To prove that their protected speech activity was at least a motivating factor in Dr. McCaffrey's decision, Plaintiffs rely primarily on the proximity in time between E.D.'s request to post flyers advertising NSFL's call-out meeting and Dr. McCaffrey's revocation decision. It is well-settled Seventh Circuit law, however, that "[s]uspicious timing alone will rarely be sufficient to create a triable issue because '[s]uspicious timing may be just that—suspicious—and a suspicion is not enough to get past a motion for

summary judgment.'" *Manuel*, 966 F.3d at 681 (quoting *Loudermilk v. Best Pallet Co.*, 636 F.3d 312, 315 (7th Cir. 2011)). In any event, rather than being suspicious in an adverse sense, the timing here supports Dr. McCaffrey's proffered non-retaliatory reasons for his decision, to wit, that it was Plaintiffs' conduct, not their protected speech activity, that motivated his decision to revoke NSFL's club status.

Dr. McCaffrey, a self-professed pro-life supporter,[6] approved NSFL's club status in August 2021 with full knowledge of its mission and pro-life message and allowed Plaintiffs to participate in NHS's activities fair later that same month at which E.D. represented NSFL and wore an "I am the pro-life generation" t-shirt and displayed a tri-fold poster containing that same statement as well as NSFL's pro-life mission statement, all without objection from any NHS administrator. Dr. McCaffrey's decision to revoke NSFL's club status was made only after he learned that E.D. and her mother had met with Mr. Luna on September 3, 2021 in an attempt to secure approval for E.D.'s proposed flyer advertising NSFL's call-out meeting, despite the fact that flyer had already been rejected by two other NHS administrators—NHS Assistant Principal Mobley, and NSFL's faculty advisor, Mr. McCauley.

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[6] Plaintiffs maintain that Dr. McCaffrey's views are irrelevant. While clearly not dispositive, intent may in some cases be relevant to the inquiry of whether a causal relationship existed between the protected speech and the adverse action alleged. *See Whitfield v. Spiller*, 76 F.4th 698, 712 (7th Cir. 2023) (recognizing that "[a]t times, it is necessary to determine what exactly motivated a defendant," if that evidence sheds light on causation).

Immediately following his meeting with E.D. and Ms. Duell, Mr. Luna reported to Dr. McCaffrey that he felt it had been a "three-way" discussion among himself, E.D., and her mother.[7] At that time, Dr. McCaffrey also learned that Ms. Mobley and Mr. McCauley had each previously instructed E.D. on how to fix her flyer so that it could be approved, and, although E.D. had assured Mr. McCauley that she would make the changes, she instead ignored their instructions and, accompanied by her mother, attempted to obtain approval from Mr. Luna to post the original flyer.

Contrary to Plaintiffs' contention that E.D. was given inconsistent information regarding what changes she needed to make to her proposed flyers before they could be posted in NHS hallways and thus needed to consult Mr. Luna for clarification, the undisputed evidence shows that she was given clear and consistent direction from each administrator she consulted. Ms. Mobley and Mr. McCauley both told E.D. that her flyer should list the name of her club and the date, time, and location of the call-out meeting, and that the photograph on the proposed flyer (which pictured students holding signs that included messages such as "Defund Planned Parenthood") needed to be removed. Ms. Mobley went on to explain that NHS's Young Republican group, for example, "does not display items for the Republican Party" on their call-out flyers; rather, the call-out posters "just simply state the club name and

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[7] Although Plaintiffs argue that Ms. Duell's attendance was due to a family rule that E.D. not be alone with adults, particularly men, there is no evidence that either Dr. McCaffrey or Mr. Luna was ever made aware of that rule at the time of these meetings.

meeting/call-out information" and "[t]hen obviously at the club meeting and call-out, you guys can discuss whatever is your topic at hand." Dkt. 158-5. Nor is there any indication that E.D. was confused or otherwise upset by these instructions. To the contrary, she responded to Mr. McCauley, "Sounds good, thanks! I'll get to work on making the flyers." *Id.*

The next morning, however, E.D. and her mother met with Mr. Luna and presented him with the original flyer for his approval. Consistent with Ms. Mobley's and Mr. McCauley's instructions, Mr. Luna told E.D. that the photograph needed to be removed before the flyer could be posted. When E.D. told him that other flyers posted at NHS contained images, he explained that her photograph needed to be removed because it was political. He told E.D. that he believed her flyer could be approved once the "Defund Planned Parenthood" sign was removed, but that he was not usually the administrator who approved flyers.

Dr. McCaffrey, Mr. Luna, and Ms. Mobley all testified consistently that their discussion following Mr. Luna's meeting with E.D. and her mother centered around their shared concern regarding Ms. Duell's participation in the meeting, which represented the second NSFL-related meeting she had attended within approximately one month's time, as well as the inappropriateness of E.D.'s having gone to Mr. Luna after she had already been instructed on how to fix her flyers so that they could be approved and posted in the NHS hallways. McCaffrey Dep. II at 103; *accord* Mobley Dep. II at 35; Luna Dep. II at 46. There is no evidence of any concern being raised at that time by Dr. McCaffrey or the other NHS

administrators regarding NSFL's pro-life mission or E.D.'s right to advertise NSFL's call-out meeting in the same manner as other NHS student organizations, only that E.D. had eschewed those rules and then, together with her mother, had sought approval to post the flyer from a different administrator.

Within a few hours of this discussion, Dr. McCaffrey informed Ms. Duell of his decision to temporarily revoke NSFL's club status. In that email, Dr. McCaffrey expressed his concerns regarding Ms. Duell's involvement in NSFL and her attendance at a meeting at which E.D. attempted to secure approval for her flyer from Mr. Luna without making the changes necessary to comply with the instructions that she had been given by other NHS administrators. Consistent with what E.D. had been told by Ms. Mobley, Mr. McCauley, and Mr. Luna, Dr. McCaffrey reiterated in his email to Ms. Duell that flyers advertising clubs at NHS must "state the name of the club and the details of the meeting time and location" and "cannot contain any content that is political or could disrupt the school environment." Dkt. 157-3.

This timeline supports Dr. McCaffrey's purported non-retaliatory reasons for revoking NSFL's club status: he had approved NSFL as a student organization with full knowledge of its pro-life message, permitted Plaintiffs to participate in the activities fair and promote NSFL using pro-life messaging, and took action against Plaintiffs only after E.D. and her mother met with Mr. Luna in what Dr. McCaffrey viewed as an attempted end-around Ms. Mobley's and Mr. McCauley's instructions. Plaintiffs in contrast have pointed to no evidence that

casts any doubt on the veracity of Dr. McCaffrey's belief that Ms. Duell's participation at both meetings between E.D. and NHS administrators about NSFL raised concerns by school officials that NSFL was not entirely student-run. Plaintiffs cite the fact that Dr. McCaffrey admitted that E.D. had represented herself well in the first meeting as evidence that his concern regarding Ms. Duell's involvement was disingenuous, but Dr. McCaffrey explained in his revocation email that his concerns increased following E.D.'s mother's attendance at a second meeting and participation in E.D.'s attempt to obtain Mr. Luna's approval for the original flyer.

To the extent Plaintiffs argue that they had a protected First Amendment right to post a flyer containing political speech on NHS's walls, this argument is a non-starter. Plaintiffs maintain that the Supreme Court's seminal decision in *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969) governs this analysis, in which "[b]alancing the speech rights of students with the need for school officials to set standards for student conduct, the Court held that restrictions on student speech are constitutionally justified if school authorities reasonably forecast that the speech in question 'would materially and substantially disrupt the work and discipline of the school' or invade the rights of others." *N.J. by Jacob v. Sonnabend*, 37 F.4th 412, 423 (7th Cir. 2022) (quoting *Tinker*, 393 U.S. at 513). The "substantial disruption" standard requires "more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint" or an "undifferentiated fear or apprehension of disturbance

… to overcome the right to freedom of expression." 393 U.S. at 508, 509. Plaintiffs argue that there is no evidence on the record before us to support a finding that *Tinker*'s substantial disruption standard has been satisfied here; thus, E.D. must be deemed to have been engaging in protected First Amendment activity when she sought to post her flyer that included the "Defund Planned Parenthood" message on school walls.

Since *Tinker*, however, the Court has "identified 'three specific categories of speech that schools may regulate' regardless of whether the circumstances satisfy *Tinker*'s 'substantial disruption' standard." *Sonnabend*, 37 F.4th at 423. One of these categories is student speech that others "might reasonably perceive to bear the imprimatur of the school." *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260, 271 (1998). At issue in *Kuhlmeier* was the issue of school officials' authority to maintain editorial control over the content of a high school student newspaper that was school-sponsored, supported, and supervised. The Court found under those circumstances that the editorial content of the newspaper, although written by students, carried the imprimatur of the school. "The issue, then, was not the same as in *Tinker*: the question was not whether the school must *tolerate* particular student speech but whether it must *affirmatively promote* particular student speech." *Sonnabend*, 37 F.4th at 424. Rather than apply *Tinker*, the *Kuhlmeier* Court instead applied established First Amendment forum doctrine. 484 U.S. at 267–70. Concluding that the school-sponsored newspaper was a non-public forum, the Court held that school officials were entitled to

regulate its contents "in any reasonable manner," which, in the public-education setting, permits regulation "reasonably related to legitimate pedagogical concerns." *Id.* at 273.

The student expression at issue in our case is more akin to that addressed in *Kuhlmeier* than *Tinker*. Here, E.D. was not prohibited, for example, from personally expressing a political message on a t-shirt she wore in the classroom nor was she told she would be prohibited from sharing a political message, including "Defund Planned Parenthood," if she so desired at NSFL meetings. NHS administrators told her only that she could not include such a political message on flyers that would be displayed on school walls to advertise NSFL's call-out meeting. Hanging flyers on school walls advertising clubs that meet during school hours and on school grounds with a faculty advisor is expressive activity that could reasonably be perceived to bear the imprimatur of the school. As Defendants argue, it would be reasonable for parents and other members of the public entering NHS for sporting events, student concerts, theater performances, parent-teacher conferences, or any other reason who observed such flyers displayed on school walls to erroneously attribute any political messaging they contained to the school district or the school itself, despite the clubs being student-run. Accordingly, we apply that First Amendment forum analysis, rather than the *Tinker* standard as the appropriate template here.

The evidence before us establishes that, during the time period relevant to this litigation, NHS administrators limited the information and materials that students could post on the walls of the school and

members of the general public were not permitted to post flyers on school walls. Student interest clubs at NHS were permitted to advertise their call-out meetings by posting flyers on the walls in designated areas of the school containing the club name and details regarding the date, time, and location of the call-out meeting after receiving approval from an administrator, thereby establishing a nonpublic forum for speech under First Amendment jurisprudence. This term ("nonpublic forum") denotes areas "where the government controls public property which is not, by tradition or designation, a forum for public communication, and is open only for selective access." *John K. MacIver Inst. for Pub. Policy*, 994 F.3d 602, 609 (7th Cir. 2021) (citing *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 48 (1983)). In such locations, "[t]he government, like other private property holders, can reserve property for the use for which it was intended, 'as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view.'" *Id.* (quoting *Perry*, 460 U.S. at 46); *see also Cornelius v. NAACP Legal Defense and Educ. Fund, Inc.*, 473 U.S. 788, 806 (1985) ("Control over access to a nonpublic forum can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral.").

The evidence before use here shows that, during the relevant time period, other than identifying the name of the student organization (which might in some cases be political, such as the Young Republicans), no advertising flyers for NHS student

organizations were permitted to include political speech, regardless of viewpoint. The evidence further supports Defendants' contention that such a prohibition has a valid educational purpose as it ensures the school does not become a facilitator of warring political messages on its walls that could unnecessarily disrupt the learning environment. As the Supreme Court has recognized, schools "must [] retain the authority to refuse … to associate the school with any position other than neutrality on matters of political controversy." *Kuhlmeier*, 484 U.S. 272. Thus, we will not hold, for obvious reasons, that a prohibition on political speech in flyers advertising student clubs that are displayed on school walls "has no valid educational purpose" as would "require judicial intervention to protect students' constitutional rights." *Id.* at 273.

Although Plaintiffs contend that E.D. was provided inconsistent and unclear information regarding this rule, that contention is not supported by the evidence. As detailed above, each administrator E.D. consulted told her that her flyer should contain only NSFL's name and the pertinent details regarding the date, time, and location of the call-out meeting and that the photograph depicting students holding protest signs reading, among other things, "Defund Planned Parenthood," would need to be removed before the flyer could be posted. No administrator ever told E.D. that she was prohibited altogether from advertising NSFL's call-out meeting, that her flyer would be rejected even if she removed the politically-charged photograph, or that she would be restricted in some way from speaking freely on the topics of her choice at NSFL's meetings.

Nor does the evidence support Plaintiffs' contention that NHS administrators applied the prohibition inconsistently on political speech in student organization advertising flyers. The only specific example cited by Plaintiffs of a student interest club at NHS that was permitted to post flyers containing political speech was a flyer advertising the Black Student Union that contained a graphic at the bottom left-hand corner of the flyer depicting three raised fists of varying skin tones. Even assuming that the image displayed on the Black Student Union flyer is properly construed as political speech, the only evidence cited by Plaintiffs to establish that the flyer was ever posted at NHS or that it was posted with the approval of any NHS administrator is the testimony of Ms. Mobley. However, Ms. Mobley testified only that, while she "[p]ossibly" may have seen the flyer posted at NHS, it was "not something [she could] remember that [she] walked by." Mobley Dep. I at 43–44. When asked if she had approved the flyer, she said she had not, and when asked if she could tell from looking at the flyer whether it had been approved, she responded, "[n]o, not really." *Id.* at 44.

Moreover, the Black Student Union flyer contained neither a take-down date nor the initials of the administrator who approved it, which Dr. McCaffrey testified were typically required before a flyer could be posted on the wall at NHS. The fact that a single, unauthorized flyer containing political speech may on one occasion have been posted at NHS is not sufficient evidence to establish that the prohibition on political speech was enforced in a viewpoint discriminatory way by NHS administrators. Because viewpoint neutral subject matter

restrictions are permissible in a limited forum such as that at issue here, Plaintiffs have not shown that they had a protected First Amendment right to post a flyer advertising NSFL's call-out meeting that contained political speech.

In sum, the adduced evidence would not permit a reasonable jury to conclude that Plaintiffs' protected First Amendment activity was a motivating factor in Dr. McCaffrey's decision to revoke NSFL's club status. Rather, the evidence establishes that Dr. McCaffrey's revocation decision was motivated, not by Plaintiffs' protected First Amendment activity, to wit, forming NSFL and seeking to advertise their call-out meeting in a manner equal to all other student organizations at NHS, but instead by their conduct, namely, what he believed were E.D.'s and her mother's efforts to "shop" administrators to find one who would approve a flyer advertising NSFL's call-out meeting that, contrary to the constitutionally-permissible restriction on political speech applicable to NHS student organization advertising flyers, contained a political message.

Plaintiffs have failed to establish that they had a First Amendment right to post their political speech on the school walls. Accordingly, they cannot show that Dr. McCaffrey's decision to revoke NSFL's club status based on E.D.'s efforts, with her mother's knowledge and participation, to find an administrator who would let her do so was a decision made in retaliation for Plaintiffs' protected First Amendment activity. For these reasons, Plaintiffs' First Amendment retaliation claim against Dr. McCaffrey does not survive summary judgment. Defendants' summary judgment motion on this claim is

GRANTED and Plaintiffs' corresponding request for summary judgment is DENIED.

2. First Amendment Retaliation Claim Against Defendants Snider-Pasko, Rootes, Schwingendorf-Haley, Kizer, Patterson-Jackson, Tuesca, and Eads

We turn next to Plaintiffs' First Amendment retaliation claim against Defendants Snider-Pasko, Rootes, Schwingendorf-Haley, Kizer, Patterson-Jackson, Tuesca, and Eads. The specific complaint against them is that they each personally commented and/or "liked" others' comments on social media in response to two posts from nonparties sharing an email E.D. sent to Noblesville City Councilman Pete Schwartz regarding the revocation of NSFL's club status. Even if we assume that Defendants' conduct constitutes activity "under the color of law," as required under § 1983, Defendants are entitled to summary judgment on this claim because Plaintiffs have failed to establish the second essential element of their First Amendment retaliation claim, to wit, that an adverse action was taken against them.

For purposes of First Amendment retaliation, an action is adverse if it is "likely [to] deter a person of ordinary firmness from continuing to engage in protected activity." *Surita v. Hyde*, 665 F.3d 860, 878 (7th Cir. 2011) (citations omitted). As Defendants posit, where, as here, the alleged adverse action "is in itself speech," that "[r]etaliatory speech is generally actionable only in situations of 'threat, coercion, or intimidation that punishment, sanction, or adverse regulatory action will immediately follow.'" *Novoselsky v. Brown*, 822 F.3d 342, 356 (7th Cir.

2016) (quoting *Hutchins v. Clarke*, 661 F.3d 947, 956 (7th Cir. 2011)). Although "[i]n certain cases, a public official may also face liability where he retaliated by subjecting an individual to 'embarrassment, humiliation, and emotional distress,'" such cases are "usually limited to the release of 'highly personal and extremely humiliating details'" to the public. *Id.* (quoting *Hutchins*, 661 F.3d at 957). Short of these extremes, "the First Amendment gives wide berth for vigorous debate …." *Id.*

Defendants maintain, and we agree, that, even viewing the evidence in the light most favorable to Plaintiffs, none of Defendants' social media activity "rise[s] to the level of threat, coercion, intimidation, or profound humiliation." *Id.* at 357; *see also X-Men Security, Inc. v. Pataki*, 196 F.3d 56, 71 (2d Cir. 1999) (holding that legislators' public accusations that private security firm was part of a hate group and practiced "racism, gender discrimination, anti-semitism, and other religious discrimination" fell short of "any semblance of threat, coercion, or intimidation"). In fact, the majority of the comments challenged by Plaintiffs were directed at or were critical of third parties not involved in this litigation and thus cannot be said to have qualified as retaliation against E.D. Plaintiffs do not argue otherwise or posit that the applicable legal standard is relaxed or in some relevant way altered when a minor is involved. Indeed, Plaintiffs, having failed to address this argument anywhere in their responsive briefing, have waived it. *See*, *e.g.*, *Rock Hemp Corp. v. Dunn*, 51 F.4th 693, 704 (7th Cir. 2022) ("[P]erfunctory and undeveloped arguments, as well as arguments that are unsupported by pertinent

authority, are waived.") (quotation marks and citation omitted). Accordingly, Plaintiffs' First Amendment retaliation claim against Defendants Snider-Pasko, Rootes, Schwingednorf-Haley, Kizer, Patterson-Jackson, Tuesca, and Eads cannot survive summary judgment.[8]

D. Equal Access Act Claim Against Individual Defendants

Under the Equal Access Act, it is

> unlawful for any public secondary school which receives Federal financial assistance and which has a limited public forum to deny equal access or a fair opportunity to, or discriminate against, any students who wish to conduct a meeting within that limited open forum on the basis of religious, political, philosophical, or other content of the free speech at such meetings.

20 U.S.C. § 4071(a). Under this statute, a limited public forum is created "whenever such school grants an offering to or opportunity for one or more

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[8] Even if Plaintiffs had managed to establish a constitutional violation, Defendants would still be entitled to summary judgment on qualified immunity grounds, given Plaintiffs' failure to cite any analogous case establishing that Plaintiffs' First Amendment right to be free from such social media commentary was clearly established at the time Defendants engaged in the challenged conduct. *See Siddique v. Laliberte*, 972 F.3d 898, 903 (7th Cir. 2020) (holding that the plaintiff bears the burden of establishing that the federal constitutional right alleged to be violated was "clearly established" at the time of the alleged violation to avoid dismissal based on qualified immunity and that "the clearly established law must be 'particularized' to the facts of the case").

noncurriculum related student groups to meet on school premises during noninstructional time." *Id.* § 4071(b).

Plaintiffs claim that Dr. McCaffrey violated the Equal Access Act by revoking NSFL's club status and by denying them the right to conduct meetings due to the content of their speech at such meetings.[9] This claim fails for the same reasons Plaintiffs' First Amendment retaliation claim against Dr. McCaffrey failed. The evidence establishes that Dr. McCaffrey did not revoke NSFL's club status because of the content of Plaintiffs' speech at their meetings. Nor did he engage in viewpoint discrimination or otherwise deny NSFL the right to announce or advertise its meetings "on equal terms" with other student organizations at NHS. *See Gernetzke*, 274 F.3d at 466 ("Had the school, therefore, while permitting the Bible Club to meet on school premises, forbidden it to announce its meetings or otherwise compete on equal terms with comparable but nonreligious student groups, it would have violated the [Equal Access] Act. … But there is no evidence of discrimination against the Bible Club."). Accordingly, Dr. McCaffrey is entitled to summary judgment on Plaintiffs' Equal Access Act claim. For all these reasons, Defendants'

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[9] In their briefing, Plaintiffs also argue that it was a violation of the Equal Access Act for NHS administrators to deny NSFL the privilege of advertising political speech in school hallways, having permitted other clubs to do so. However, the only Equal Access Act claim asserted in Plaintiffs' amended complaint and statement of claims is based on the revocation of NSFL's club status and Defendants' failure to allow Plaintiffs "to conduct meetings due to the content of their speech." Dkt. 140. Plaintiffs are prohibited from raising a new theory of liability under the Equal Access Act for the first time on summary judgment.

motion for summary judgment on this claim is GRANTED and Plaintiffs' summary judgment motion is DENIED.

III. State Law Claims

A. Indiana Constitution

Plaintiffs claim that Defendants Noblesville School District, Dr. Niedermeyer, Dr. McCaffrey, Ms. Mobley, Mr. Swafford, and Mr. Luna violated Article I, Section 9 of the Indiana Constitution by revoking NSFL's club status, thereby "restricting [Plaintiffs'] expressive activity." Am. Compl. ¶ 541. Plaintiffs seek a declaration that Defendants violated the free speech provisions of Article I, Section 9 of the Indiana Constitution, a declaration "that NSFL is a valid student group at NHS," and an injunction "against NHS's revocation of the student organization NSFL."[10] *Id.* at 63, ¶¶ f–h.

For the foregoing reasons, we find that Plaintiffs have failed to establish entitlement to injunctive or declaratory relief under the Indiana Constitution. It is well-established under Indiana law that "injunctive relief is improper when the applicant cannot demonstrate the present existence of an actual threat that the action sought to be enjoined will come about." *Kennedy v. Kennedy*, 616 N.E.2d 39, 42 (Ind. Ct. App. 1993). Nor is injunctive relief appropriate "simply to eliminate a possibility of a future injury." *Id.* Here, NSFL's club status was revoked on September 3, 2021 and reinstated approximately four months later in January 2022. To our knowledge, NSFL has been

[10] We previously held that Plaintiffs are not entitled to seek damages for their claim under the Indiana Constitution.

active at NHS since that time, and Plaintiffs have presented no evidence that any imminent or actual threat of revocation exists. Accordingly, there are no grounds to issue an injunction "against NHS's revocation of the student organization NSFL" as Plaintiffs request.

"It is also too late for a declaratory judgment because it could do [Plaintiffs] no practical good." *UWM Student Ass'n v. Lovell*, 888 F.3d 854, 860 (7th Cir. 2018). NSFL was reinstated as a student interest club at NHS in January 2022 and has been recognized as a valid student organization since that time. Courts "cannot grant declaratory relief when there is no 'immediate and definite governmental action or policy that has adversely affected and continues to affect a present interest.'" *Carver Middle Sch. Gay-Straight All. v. Sch. Bd. of Lake Cnty., Fla.*, 842 F.3d 1324, 1330 (11th Cir. 2016) (citing *Super Tire Eng'g Co. v. McCorkle*, 416 U.S. 115, 125–26 (1974)); *accord UWM Student Ass'n*, 888 F.3d 854 at 860–61 ("[A]ctions that the [defendants] allegedly took several years ago … could no longer affect plaintiffs in a real or immediate way and are not continuing or 'brooding' with a substantial adverse effect on plaintiffs' interests."). Here, the action that Plaintiffs contend adversely affected their interests was Dr. McCaffrey's revocation decision. Because NSFL's status has since been reinstated and Plaintiffs have presented no evidence that its temporary revocation restricts Plaintiffs' current ability to engage in expressive activity, their request for a declaratory judgment would at most serve "to secure emotional satisfaction from a declaration that they were wronged," but vindication alone does not justify

declaratory relief. *UWM Student Ass'n*, 888 F.3d at 862.

For these reasons, Defendants are entitled to summary judgment as to Plaintiffs' claims brought pursuant to the Indiana Constitution. Plaintiffs' request for summary judgment on these claims is therefore denied.

B. Tort Claims

The following state law tort claims remain as a part of this litigation: Count VIII (Violation of School Policies Against Bullying); Count XI (Libel, Slander, and Defamation); Count XI (Intimidation and Bullying); Count XIII (Intentional Infliction of Emotional Distress); and Count XV (Privacy by Publication of Private Facts). There is no dispute that each of these tort claims is covered by Indiana's Tort Claim Act ("ITCA"), which provides, in relevant part, that a tort claim brought "against a political subdivision is barred unless notice is filed with: (1) the governing body of that political subdivision; and (2) … the Indiana political subdivision risk management commission … within one hundred eighty (180) days after the loss occurs." IND. CODE § 34-13-3-8. Notice "must include the circumstances which brought about the loss, the extent of the loss, the time and place the loss occurred, the names of all persons involved if known, the amount of damages sought, and the residence of the person making the claim at the time of the loss and at the time of filing the notice." IND. CODE § 34-13-3-10.

After receiving notice of the claim, the government entity must approve or deny the claim within ninety days. IND. CODE § 34-13-3-11. "A person

may not initiate a suit against a governmental entity unless the person's claim has been denied in whole or in part." IND. CODE § 34-13-3-13. Thus, the filing of a claim against a political subdivision is a "two-step process—the filing of a claim, and, if denied, the filing of a lawsuit." *Brown v. Alexander*, 876 N.E.2d 376, 383 n.4 (Ind. Ct. App. 2007).

To "avoid denying plaintiffs an opportunity to bring a claim where the purpose the statute has been satisfied," *id.* at 381, "[n]ot all technical violations of the statute are fatal to a claim …." *Escobedo v. City of Ft. Wayne*, No. 1:05-CV-424-TS, 2008 WL 1971405, at *43 (N.D. Ind. May 5, 2008). Strict non-compliance may be excused and "[s]ubstantial compliance with the statutory notice requirements is sufficient when the purpose of the notice requirement is satisfied." *Chariton v. City of Hammond*, 146 N.E.3d 927, 934 (Ind. Ct. App. 2020) (quotation marks and citation omitted). "The purposes of the notice statute include informing the officials of the political subdivision with reasonable certainty of the accident and surrounding circumstances so that [the] political [sub]division may investigate, determine its possible liability, and prepare a defense to the claim." *Town of Cicero v. Sethi*, 189 N.E.3d 194, 210 (Ind. Ct. App. 2022) (quotation marks and citation omitted).

As we have previously determined, Plaintiffs here failed to file a formal notice of tort claim or otherwise to substantially comply with the ITCA notice requirements prior to filing their original complaint in this matter.[11] On December 30, 2021, nine days

[11] In making this determination, the Court considered Plaintiffs' November 12, 2021 demand letter, a January 5, 2022 letter from

after filing their complaint, Plaintiffs for the first time sent a document titled Notice of Tort Claim to Defendants Noblesville School District, Noblesville High School, Superintendent Niedermeyer, and Principal McCaffrey via U.S. Mail. Defendants received this document on January 10, 2022, and Plaintiffs filed their amended complaint one day later, on January 11, 2022.

As Defendants highlight, there are several procedural and substantive deficiencies in Plaintiffs' December 30, 2021 letter titled "Notice of Tort Claim" (the "Notice Letter"), including that it was neither delivered in person nor sent by certified mail as required by Indiana Code § 34-13-3-12; that it was sent only to Defendants' counsel and NHS's superintendent and principal rather than the school board, which is the governing body of the school; that it did not identify the extent of Plaintiffs' losses or the amount of damages sought; that it did not identify E.D.'s residence at the time of the loss or at the time of filing the notice; and that it did not include allegations related to Plaintiffs' invasion of privacy claims.

Apart from these deficiencies in the notice itself, Defendants cite Plaintiffs' failure to wait until they had received a denial of their claims or ninety days

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the Indiana Political Subdivision Committee acknowledging receipt of Plaintiffs' December 30, 2021 Notice of Tort Claim; and several email communications between Plaintiffs' and Defendants' counsel that are attached as Exhibit B to Plaintiffs' Additional Evidence Disclosure [Dkt. 169]. Having held as a matter of law that none of these documents either strictly or substantially complied with the ITCA's notice requirements, we do not address them further in this order.

had passed with no response from Defendants before filing suit in violation of Indiana Code § 34-13-3-13. Defendants point out that, by statute, the earliest date Plaintiffs were permitted to initiate their state law claims against Defendants absent a denial was April 10, 2022—ninety days after receipt of the Notice Letter. Instead, Plaintiffs filed their amended complaint on January 11, 2022, one day after Defendants received the Notice Letter.

Based on the procedural and substantive deficiencies detailed above, we cannot find that Plaintiffs strictly complied with the ITCA notice requirements prior to filing their amended complaint against Defendants. Accordingly, we address whether the notice Plaintiffs provided nonetheless substantially complied with the ITCA's notice requirements. In assessing substantial compliance, "[t]he crucial consideration is whether the notice supplied by the claimant of his intent to take legal action contains sufficient information for the city to ascertain *the full nature of the claim* against it so that it can determine its liability and prepare a defense." *Town of Cicero*, 189 N.E.3d at 210 (quoting *Schoettmer v. Wright*, 992 N.E.2d 702, 707 (Ind. 2013)) (emphasis in *Town of Cicero*). "[M]ere actual knowledge of an occurrence, even when coupled with routine investigation, does not constitute substantial compliance." *Id.* Here, although the filing of the Notice represents an attempt on Plaintiffs' part to comply with the ITCA's notice requirement provisions, that document falls well short of providing Defendants sufficient information from which they could ascertain the full nature of the claims against them, lacking as it did any information that identified

any names of the individuals involved, explaining how or to what extent Plaintiffs were damaged by Defendants' alleged conduct, or specifying the amount of damages Plaintiffs were seeking.

The Notice Letter contained no mention at all of Plaintiffs' invasion of privacy tort claims. With regard to Plaintiffs' claims for bullying, intimidation, and defamation, the Notice Letter stated only that these claims were based on "[m]ultiple Noblesville teachers [having] posted rude comments about E.D. on social media," and "administration members of Noblesville High School [having] pulled E.D. out of class and harassed her following the revocation of her student group's status," but included no information regarding how Plaintiffs were injured by such conduct or the extent of those injuries. Dkt. 169-4. The Notice Letter provided slightly more information related to Plaintiffs' intentional infliction of emotional distress claim, stating that Defendants were liable "for administrators' actions of calling her out of class, refusing to meet with her at another time, declining E.D.'s request to have another adult present, and requesting to go through her phone," which interaction the Notice Letter stated "left the student distressed, nearly in tears, and physically shaking." *Id.* The Notice Letter included no specific damages amount, stating merely that "E.D. demands monetary compensation for the violations of laws outlined in this Notice." *Id.* At some later point in the litigation, Plaintiffs provided Defendants information regarding the amount and types of damages E.D. alleges she incurred, including a claim for lost scholarship and employment opportunities, but the Notice itself provided no indication that Plaintiffs were alleging

any such damages, much less disclose even a ballpark range of the amount of compensation Plaintiffs were seeking for these losses.

Plaintiffs argue that, even if the Notice Letter was in some way deficient, Defendants were fully informed of the extent of Plaintiffs' claimed losses prior to receiving the Notice Letter from the parties' preparations for depositions to respond to Plaintiffs' motion for preliminary injunction as well as in communications between counsel that occurred the first week of January 2024, a few days prior to the filing of the amended complaint. The only reference in those communications to Plaintiffs' tort claims, however, is the following statement by Plaintiffs' counsel: "[T]here are serious problems with FERPA/ARPA, harassment, bullying, actual malice defamation, etc., that we simply cannot ignore. … The vilification of a 15-year-old 5' tall freshman young woman by the senior leadership of your client is breathtaking. … We'd expect very serious disciplinary action against the teachers, among other things." Dkt. 169-3 at 2. That statement contains no information regarding the extent of Plaintiffs' injury from the alleged "vilification" or the scope of their claimed damages.

Insofar as Plaintiffs contend that Defendants were on notice of the nature of the tort claims based on its preparations in order to respond to Plaintiffs' motion seeking preliminary injunctive relief, Plaintiffs' request for injunctive relief was limited to their federal claims alleging violations of their constitutional rights, which involved facts, individuals, and claims for relief wholly separate from Plaintiffs' state law tort claims. Additionally, the

referenced email exchanges largely contain standard communications related to planning depositions and attendance at a settlement conference. None of the emails included any of the six elements of notice required under the ITCA, nor did they satisfy the form or substance requirements of the ITCA.

Even assuming that the content of the Notice Letter was sufficient to substantially comply with the ITCA, the provision of adequate notice is not the only procedural prerequisite to suit under the ITCA. As detailed above, the statute requires that the government entity must be given time to respond to the claim. Here, Plaintiffs failed to comply with this second step of the ITCA notice process by filing their amended complaint only one day after Defendants' receipt of the Notice Letter, without having either waited the statutory ninety-day period or received a formal denial of their claims, whichever came first. It is well-established that the ITCA "prohibits a claimant from filing his suit before the claims procedure has been complied with." *Bradley v. Eagle-Union Cmty. Sch. Corp. Bd. of Sch. Trustees*, 647 N.E.2d 672, 676 (Ind. Ct. App. 1995).

Plaintiffs' contention that defense counsel's November 23, 2021 response to their November 12, 2021 demand letter constitutes a denial of the state law tort claims set forth in the Notice Letter is a nonstarter. Initially, Plaintiffs fail to explain how Defendants' actions a month and a half prior to receipt of the Notice Letter qualifies as a denial of the claims set forth in the Notice Letter. In any event, as we previously detailed in holding that Plaintiffs' demand letter did not comply with the ITCA's notice provisions, the demand letter addressed only

Plaintiffs' federal constitutional claims and did not provide *any* allegations regarding their state law tort claims. Accordingly, Defendants' counsel's response to that demand letter by declining to reinstate Plaintiffs' student club—one of the remedies requested by Plaintiffs in connection with their federal claims—cannot constitute a denial of Plaintiffs' tort claims of bullying, intimidation, defamation, intentional infliction of emotional distress, and invasion of privacy, which claims, as described above, involve facts, individuals, and forms of relief wholly separate from those related to the decision to revoke NSFL's club status.

Insofar as Plaintiffs argue that Defendants' engagement in settlement negotiations surrounding the motion for preliminary injunction that Plaintiffs had filed contemporaneously with their original complaint constituted a denial of their tort law claims, we are not persuaded by this argument. As detailed above, Plaintiffs' request for a preliminary injunction, like their November 12, 2021 demand letter, dealt only with the federal claims raised in this litigation. Accordingly, Defendants' engagement in preparations to respond to the motion for preliminary injunction could not reasonably have been understood by Plaintiffs as a denial of their state law tort claims.

For these reasons, we hold that Plaintiffs failed to either strictly or substantially comply with the ITCA's notice requirements and prematurely filed suit before receiving a denial of their claims or ninety days had passed after Defendants' receipt of the Notice Letter. In cases where a claimant prematurely files suit but submits an adequate notice of tort claim within 180 days of the date of loss, courts have determined that

dismissal without prejudice is the appropriate remedy. *See Orem v. Ivy Tech State Coll.*, 711 N.E.2d 864, 869–70 (Ind. Ct. App. 1999) (citing *Bradley*, 647 N.E.2d at 676). Here, however, the Notice Letter provided by Plaintiffs was *not* adequate and more than 180 days have now passed since the events upon which Plaintiffs base their state law tort claims occurred. Thus, any tort claims notice served at this point would be untimely and futile.

It is, of course, true that, "[s]o long as [the ITCA's] essential purpose has been satisfied, it should not function as a trap for the unwary." *Schoettmer*, 992 N.E.2d at 706 (quotation marks and citation omitted). But the legislature's purpose in enacting the ITCA has not been fulfilled here and Plaintiffs cannot be described as unwary. They knew of the existence and requirements of the ITCA at least by the time they sent the Notice Letter, yet still failed to satisfy the form, timing, and content requirements of the statute. When Plaintiffs' failure to comply with the ITCA notice requirements was first raised by Defendants in their motion to dismiss, the 180-day period had not yet run during which time period Plaintiffs could have remedied the deficiencies brought to their attention by Defendants' filing. Yet, Plaintiffs undertook no efforts to ensure their compliance with the ITCA at that time. In response to Defendants' motion to dismiss, Plaintiffs did not argue that the Notice Letter remedied the problem, nor did they even inform the Court of its existence. Instead, they compounded the problem when they again failed to make a cogent argument that the Notice Letter satisfied the ITCA notice requirements in their request for reconsideration of our initial dismissal of

their state law tort claims for failure to comply with the ITCA. Under these circumstances, Defendants are entitled to summary judgment on Plaintiffs' state law tort claims for failure to comply with the ITCA's notice requirements.

IV. Conclusion

For the reasons detailed above, Plaintiffs' Motion for Summary Judgment [Dkt. 152] is DENIED and Defendant's Motion for Summary Judgment [Dkt. 157] is GRANTED. All other currently pending motions are hereby DENIED AS MOOT. Final judgment shall be entered accordingly.

IT IS SO ORDERED.

Date: 3/15/2024

SARAH EVANS BARKER, JUDGE
United States District Court
Southern District of Indiana

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United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

September 29, 2025

Before

FRANK H. EASTERBROOK, *Circuit Judge*

CANDACE JACKSON-AKIWUMI, *Circuit Judge*

NANCY L. MALDONADO, *Circuit Judge*

No. 24-1608

E.D., a minor, by her parent and next friend, LISA DUELL, *et al.*,

Plaintiffs-Appellants,

v.

NOBLESVILLE SCHOOL DISTRICT, *et al.*,

Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division

No. 1:21-cv-03075-SEB-TAB

Sarah Evans Barker, *Judge.*

O R D E R

Plaintiffs-Appellants filed a petition for rehearing and rehearing en banc on September 11, 2025. All members of the original panel have voted to deny rehearing, and no judge in regular active service has requested a vote on the petition for rehearing en banc. The petition for rehearing and rehearing en banc is therefore DENIED.