UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
WINCHESTER DIVISION

I.P., a minor, by and through B.P.,

Plaintiff,

v.

TULLAHOMA CITY SCHOOLS, a political subdivision of the State of Tennessee; JASON QUICK, in his individual capacity; and DERRICK CRUTCHFIELD, in his individual capacity,

Defendants.

Case Number: 4:23-cv-26

Hon. Katherine A. Crytzer
Magistrate Judge Susan K. Lee

PLAINTIFF'S REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Darrick L. O'Dell
(BPR #26883)
SPICER RUDSTROM, PLLC
414 Union St., Ste. 1700
Nashville, TN 37219
(615) 259-9080
dlo@spicerfirm.com

Conor T. Fitzpatrick
(Mich. No. P78981, D.C. No. 90015616)*
FOUNDATION FOR INDIVIDUAL RIGHTS AND EXPRESSION
700 Pennsylvania Ave. SE, Ste. 340
Washington, D.C. 20003
(215) 717-3473
conor.fitzpatrick@thefire.org

Jeffrey D. Zeman
(Penn. No. 328570)*
FOUNDATION FOR INDIVIDUAL RIGHTS AND EXPRESSION
510 Walnut St., Ste. 900
Philadelphia, PA 19106
(215) 717-3473
jeff.zeman@thefire.org

*Admitted *Pro Hac Vice*

Counsel for Plaintiff

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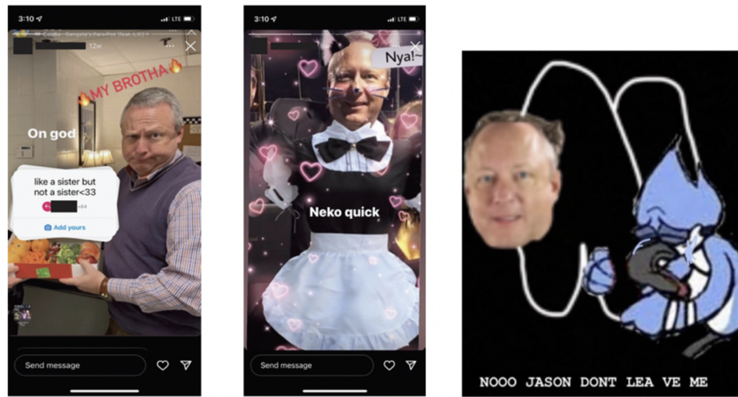
INTRODUCTION

If the best the School District can muster on summary judgment is to strenuously argue that I.P.'s three Instagram Posts are "obscenity" and "harassment," that two others (which the District can't rely on) are "incitement," and that a single student rushing to the principal to show him a social media post is "disruption," this case is all the more straightforward. To begin, the Supreme Court made clear in *Miller v. California* that unprotected "obscenity" involves "hard core" pornography. 413 U.S. 15, 27, 29 (1973). Yet the District's response newly insists I.P.'s Instagram Posts depicting THS Principal Jason Quick holding a box of vegetables, in a French maid dress with cat whiskers, and being hugged by a cartoon bird, are somehow "obscene." The images speak for themselves in debunking this last-minute ploy:



The District also newly labels I.P.'s Instagram Posts "harassment" and invokes "incitement" against the New Images that the Court already barred the School District from relying on. But with the precise definitions those categories of unprotected speech carry, the District loses here, too.

The reason for the School District's abrupt pivot is clear: Unable to satisfy *Mahanoy* and *Tinker*'s demanding substantial disruption standard, the District is throwing a Hail Mary, trying to shove a high schooler's satirical memes into categories of unprotected speech that have no application here. Not only are these post hoc excuses impermissible under *Bremerton*, they are

legally meritless. The Court should thus grant I.P.'s motion for summary judgment and deny the School District's cross-motion.

ARGUMENT

I. The School District Cannot Overcome that *Mahanoy* Protects I.P.'s Instagram Posts.

The School District could not constitutionally suspend I.P. because his off-campus, after-hours Instagram Posts did not substantially disrupt school and the School District has no evidence to support a reasonable forecast of substantial disruption.

At the outset, there is no genuine issue of fact that in August 2022, the School District suspended I.P. solely because his three Instagram Posts "embarrassed" Quick. That is what Quick told I.P. in person on August 10, 2022, and confirmed in writing to I.P.'s mother and the School District's superintendent in the days that followed. (Doc. 122-13, Ex. L, Quick Aug. 16, 2022 Email to B.P.; Doc. 120-8, Quick Tr. 139:18–142:12, 166:10–167:14.) Crutchfield, too, told I.P. and the District's superintendent only that I.P.'s posts had "embarrassed and discredited" Quick. (Doc. 120-5, Crutchfield Tr. 83:18–84:23.) And the First Amendment does not permit the School District to punish "embarrass[ing]" speech. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 910 (1982).

The Supreme Court has made clear, rather, that the school must demonstrate actual or reasonably forecast substantial disruption from I.P.'s speech, with "diminished" latitude to punish off-campus speech. *Mahanoy Area Sch. Dist. v. B.L.*, 594 U.S. 180, 192–93 (2021). (*See* Doc. 127, Pl.'s Mem. in Opp. To Def.'s Mot. Summ. J., 9–10.) The School District cannot dispute that I.P.'s Instagram Posts did not substantially disrupt school activities, or that District administrators conceded they had no evidence to support a reasonable forecast of substantial disruption. (Doc. 120-8, Quick Tr. 66:21–24, 67:4–6, 78:12–18, 93:6–12, 200:3–14; Doc. 120-5, Crutchfield Tr. 39:17–40:6, 44:15–45:12, 49:23–50:8; Doc. 120-6, Flowers Tr. 27:22–28:7, 30:9–24, 33:8–18.)

Therefore, I.P.'s speech remained outside the School District's reach. *Mahanoy*, 594 U.S. at 192–93.

Though the School District attempts to "dispute" certain facts (Doc. 126, Def.'s Opp. Pl.'s Mot. Summ. J., 1–7), only two relate to substantial disruption, and the School District's only response is to pivot to discussing the New Images. (*Id.* at 12–13, 17–20.) Even then, all the School District can muster is that an upset student "went to [Quick's] office to tell him about" the New Images. (*Id.* at 17.) Even accepting the School District's bait-and-switch, it remains woefully short of satisfying *Mahanoy*. *See Mahanoy*, 594 U.S. at 185, 192–93 (students "visibly upset" at student's social media posts "d[id] not meet *Tinker*'s demanding standard") (citing *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 509 (1969)).

That is why *Kutchinski* does not support the School District's defense: In *Kutchinski*, the school produced evidence of social media posts specifically targeting teachers with violent threats—including "I will find and kill [teacher's name] I'm going to strangle him with my barehands [sic] until he is barely conscious then let go. Once he is awake again I'm gonna run him over with my fucking car and crush his skull into a million pieces"—caused a targeted teacher to cry in one of her classes and "several classroom disruptions." *Kutchinski v. Freeland Cmty. Sch. Dist.*, 69 F.4th 350, 354–55, 359 (6th Cir. 2023) (cleaned up). Here, the School District did not even field a single *complaint* about I.P.'s Instagram Posts. (Doc. 120-8, Quick Tr. 67:14–22, 78:19–79:2; Doc. 120-5, Crutchfield Tr. 40:7–24, 45:13–21, 50:19–51:11; Doc. 120-6, Flowers Tr. 28:11–29:8, 31:9–32:1, 34:8–25.)

The School District's invocation of *Wisniewski* similarly does not help. (Doc. 126, Def.'s Opp. Pl.'s Mot. Summ. J., 23 (citing *Wisniewski v. Bd. of Educ. of Weedsport Cent. Sch. Dist.*, 494 F.3d 34, 36 (2d Cir. 2007)). *Wisniewski* involved an off-campus image of "a pistol firing a bullet

at a person's head" with spattered blood and the words "Kill [student's English teacher]." 494 F.3d at 35–36. Even without *Mahanoy*'s 2021 admonition to evaluate student speech in light of schools' diminished power off campus, the Second Circuit's decision in *Wisniewski* is distinguishable: As in *Kutchinski*, the court found an evidentiary basis to reasonably forecast substantial disruption because the speech triggered a police investigation and caused the school to replace the threatened teacher. *Id.* at 36, 40. That is substantial disruption, and nowhere close to the facts at THS.

The Court can and should end its inquiry here. The School District is locked into relying on I.P.'s Instagram Posts and its contemporaneous explanations related to them to justify I.P.'s suspension. (Doc. 109, Order on Mot. Dismiss 17.) And the undisputed record shows the School District lacks evidence upon which a jury could find that it satisfied *Mahanoy*'s "demanding standard" of demonstrating actual or reasonably forecast disruption from I.P.'s Instagram Posts. *Mahanoy*, 594 U.S. at 193. That is all the Court needs to grant I.P.'s motion.

II. The School District's Newest Post Hoc Justifications Regarding I.P.'s Instagram Posts Butcher Settled First Amendment Doctrines.

In defiance of this Court's holding that justifications for suspending I.P. "must be genuine, not hypothesized or invented post-hoc in response to litigation" (Doc. 109, Order on Mot. Dismiss 17 (quoting *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 543 n.8 (2022))), the School District responds to I.P.'s summary judgment motion by proposing *more* new justifications never uttered during this litigation, let alone in August 2022. Worse, it does so by trying to remove I.P.'s Instagram Posts from constitutional protection *entirely* by invoking First Amendment concepts like "obscenity" and "harassment" that have no application here.[1]

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[1] The District's invocation of unprotected "incitement" likewise fully misunderstands how that concept applies, as discussed below. *See infra* § III.

This fails at the outset because the School District "never raised concerns along these lines in its contemporaneous correspondence" with I.P. or B.P. *Bremerton*, 597 U.S. at 543 n.8. Neither "obscenity" nor "harassment" appear in contemporaneous explanations to I.P., B.P., or the School District's superintendent. (Doc. 122-13, Ex. L, Quick Aug. 16, 2022 Email to B.P.; Doc. 120-8, Quick Tr. 139:18–142:12, 166:10–167:14.) The term "obscenity" appears for the first time only in the District's summary judgment response, filed three years after I.P.'s suspension, and after two years of litigation, two responsive pleadings, the close of discovery, and three other merits briefs by the School District.

In any event, the School District's attempt to cram I.P.'s satirical memes into various categories of unprotected speech reflects a fundamental misunderstanding of what "unprotected speech" is and how it works. "From 1791 to the present, … the First Amendment has permitted restrictions upon the content of speech in a few limited areas, and has never include[d] a freedom to disregard these traditional limitations." *United States v. Stevens*, 559 U.S. 460, 468 (2010). These "well-defined" and "narrowly limited" "historic and traditional categories long familiar to the bar" include obscenity, child pornography, defamation, fraud, incitement, fighting words, and speech integral to criminal activity. *Id.* at 468–69 (cleaned up) (collecting cases). And the Court has rejected calls for speech protection to "depend[] upon a categorical balancing of the value of the speech against its societal costs" as "startling and dangerous." *Id.* at 470. Here, the School District's invocation of obscenity and harassment (and, later, incitement) bears no resemblance to those doctrines' actual scope.

A. "Obscenity" means "hard core" pornography and is thus irrelevant here.

I.P.'s Instagram Posts are far from legally "obscene." The Supreme Court has been clear that only "hard core" pornography falls into the First Amendment exception for obscenity. *Miller*, 413 U.S. at 27. The School District runs I.P.'s Instagram Posts through the *Miller* test (Doc. 126,

Def.'s Opp. Pl.'s Mot. Summ. J., 8, 11–12), but for it to apply *at all*, speech must depict "hard core" content like "ultimate sexual acts," "masturbation, excretory functions," or "lewd exhibition of the genitals." *Jenkins v. Georgia*, 418 U.S. 153, 160–61 (1974) (citing *Miller*, 413 U.S. at 25). The District thus ignores the "threshold limitation that restricts … coverage to specifically defined 'hard core' depictions." *Brown v. Ent. Merchants Ass'n*, 564 U.S. 786, 809 (2011) (Alito, J., concurring) (describing "the current adult obscenity test … set out in *Miller*"). Its attempt to escape liability for its First Amendment violations thus never makes it out of the starting blocks.[2]

I.P.'s Instagram Posts easily fall outside the *Miller* test otherwise, in any event. They have political and social value as commentary on his high school principal as leader of I.P.'s "community." *Mahanoy*, 594 U.S. at 190. And the posts do not satisfy the "prurient interest" prong that requires "material whose predominate appeal is to a shameful or morbid interest in nudity, sex, or excretion." *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 498 (1985). Depicting someone in a French maid dress (for instance) does not appeal to a "shameful or morbid interest in nudity, sex, or excretion" both as a matter of undisputed fact, and of common sense and common usage. (*See* Doc. 127, Pl.'s Mem. in Opp. To Def.'s Mot. Summ. J., 16–17, discussing *The Flintstones* and *SpongeBob SquarePants*.)

Were more needed (and it isn't), Supreme Court obscenity jurisprudence makes clear I.P.'s Instagram Posts are far from actual obscenity. In *Jenkins*, for example, the Court held the movie

[2] The School District's attempt to contort its conspiracy theory of "violent" imagery in the *Among Us* meme into "obscenity" through various Tennessee statutes (Doc. 126, Def.'s Opp. Pl.'s Mot. Summ. J., 11–12) further highlights how badly the School District bungles the doctrine. The Supreme Court was unequivocal in *Brown*: "[S]peech about violence is not obscene." 564 U.S. at 793 (holding California could not rely on obscenity doctrine to restrict sales of violent video games to minors). Rather, "[o]ur cases have been clear that the obscenity exception to the First Amendment does not cover whatever a legislature finds shocking, but only depictions of 'sexual conduct.'" *Id.* at 792–93.

Carnal Knowledge retained First Amendment protection despite the film's depictions of "ultimate sex acts" and "occasional scenes of nudity" because even that did not rise to the level of "hard core sexual conduct" and thus "could not, as a matter of constitutional law, be found … obscene." 418 U.S. 153, 160–61. The Sixth Circuit has similarly held non-obscene nude dancing performances, *Currence v. City of Cincinnati*, 28 Fed. Appx. 438, 444 (6th Cir. 2002); photos of "couples engaged in sexually explicit conduct," *Connection Distrib. Co. v. Reno*, 154 F.3d 281, 285, 289 (6th Cir. 1998); and a phone call calling the listener a "herpes slut," "cuntless fuck," and "unmotherly piece of crap." *United States v. Landham*, 251 F.3d 1072, 1086 (6th Cir. 2001).

That I.P.'s Instagram Posts are not obscene as a matter of law is not surprising. Principal Quick testified he did not assert to anyone in August 2022 that he viewed the posts as *sexual*, much less obscenity:

6 Q. On August 10th, 2022, do you have any
7 recollection of asserting to I.P. that the Neko
8 quick meme sexualized you?
9 A. I did not assert that to him.
10 Q. In the subsequent meeting or correspondence
11 that you had with B.P., did you assert to her that
12 you believed that I.P.'s post sexualized you?
13 A. I don't believe that I did, no.

(Doc. 120-8, Quick Tr. 199:6–13.) All told, there is no basis upon which a jury could return a finding of obscenity. *See Jenkins*, 418 U.S. at 159; *cf. id.* at 160 ("[I]t would be a serious misreading of *Miller* to conclude that juries have unbridled discretion in determining what is 'patently offensive.'") The School District's obscenity argument is meritless.

B. Unprotected harassment requires "severe, pervasive, and objectively offensive" speech and cannot encompass that which simply bruises a school principal's ego.

I.P.'s Instagram Posts similarly do not constitute harassment, the District's next new excuse. The First Amendment prevents public schools from punishing speakers for discriminatory

harassment unless speech is "severe, pervasive, and objectively offensive." *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 651 (1999). Even if the First Amendment gave schools power to police speech about administrators as "harassment,"[3] the School District's failure to show I.P.'s Instagram Posts were severe, pervasive, ***or*** objectively offensive—let alone all three, as *Davis* requires—or that they deprived Quick *of anything*, means the First Amendment protects I.P.'s speech. *See Meriwether v. Hartop*, 992 F.3d 492, 511 (6th Cir. 2021) (First Amendment protected professor's repeated refusal to use transgender student's preferred pronouns, which could not constitute actionable harassment absent evidence it "den[ied] the victim equal access to an educational program or activity." (citing *Davis*, 526 U.S. at 652)); *see also B.H. ex rel. Hawk v. Easton Area Sch. Dist.*, 725 F. 3d 293, 322–23 (3d Cir. 2013) (en banc) (school district could not invoke "harassment" to prohibit students from wearing nondisruptive "I <3 boobies" bracelets).

As with obscenity, the School District fundamentally misunderstands harassment, and its invocation of it fails both for being a post hoc excuse and of its own weight.[4]

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[3] The rest of the *Davis* standard is that conduct, including speech, must so undermine and detract from a victim's educational experience they are "effectively denied equal access to an institution's resources and opportunities," 526 U.S. at 651, the application of which to student-to-administrator speech is not obvious, and the School District cites no example of such a case. *Cf. Peries v. New York City Bd. of Educ.*, 2001 WL 1328921, at *8 (S.D.N.Y. Aug. 6, 2001) ("Although the Supreme Court in *Davis* established that students have a right to be protected by school officials from harassment by other students, neither the Supreme Court nor the Second Circuit has extended that right to teachers.")

[4] Not only was no such concern raised in August 2022, the School District cites non-existent deposition testimony that I.P. intentionally "depict[ed] Mr. Quick as a 'Crewmate' that was a murder victim of an 'Imposter.'" (Doc. 126, Def.'s Opp. Pl.'s Mot. Summ. J., 9–10.) Nothing in I.P.'s (or anyone else's) deposition supports that I.P. intended to portray Quick as a murder victim merely by virtue that that is *one* of the video game character's potential fates, which is akin to arguing that portraying someone as Princess Peach from the *Super Mario Bros.* games necessarily depicts them as "a kidnapping victim." Even more to the point, the entire premise of *Among Us* is that "imposters" appear *identical* to "crewmates"—meaning it is impossible for anyone viewing the Mordecai meme to know which one Quick is supposed to be. (Doc. 120-1, I.P. Tr. 71:3–11.) Here again, common sense defeats the School District's lawyer-manufactured post hoc excuse.

III. The School District Cannot Justify Its Violation of I.P.'s First Amendment Rights By Citing the New Images.

The Court should reject the School District's reliance on the New Images to justify I.P.'s suspension. At the outset, the District previously disclaimed reliance on them, and based on that the Court held the District may not rely on them (Doc. 109, Order on Mot. Dismiss 17 (citing Doc. 53, Mot. to Dismiss Br., 24)), so judicial estoppel and the law-of-the-case bar apply. *See Teledyne Indus., Inc. v. NLRB*, 911 F.2d 1214, 1217 (6th Cir. 1990) (judicial estoppel "forbids a party 'from taking a position inconsistent with one successfully and unequivocally asserted by the same party in a prior proceeding.'" (cleaned up)); *Howe v. City of Akron*, 801 F.3d 718, 739 (6th Cir. 2015) ("The doctrine of law of the case provides that the courts should not reconsider a matter once resolved in a continuing proceeding." (cleaned up)). In any case, the School District's legal positions based on the New Images are untenable.

The School District's (similarly impermissible) *new justification* that the New Images are unprotected "incitement" misapplies basic First Amendment law again, just as with obscenity and harassment. Incitement is expression "directed to inciting or producing imminent lawless action … likely to incite or produce [that] action." *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969). And as the Sixth Circuit explained, when "[a]dvocacy for the use of force or lawless behavior, intent, and imminence" are absent, "incitement has absolutely no application." *Bible Believers v. Wayne County*, 805 F.3d 228, 244 (6th Cir. 2015). The New Images plainly do not advocate use of force or lawless behavior, and the School District does not cite any evidence they were directed to or likely to cause imminent lawless action—in fact, it does not even identify any lawless action the New Images *could have* incited. (Doc. 126, Def.'s Opp. Pl.'s Mot. Summ. J., 12–14.)

That the New Images are not incitement is evident under *Bible Believers*, where street preachers walked through Dearborn, Michigan's Arab International Festival with signs reading

"Islam is a Religion of Blood and Murder," "Turn or Burn," and "Your prophet is a pedophile." 805 F.3d at 238, 244. As the Sixth Circuit explained, "[t]hese messages, however offensive, do not advocate for, encourage, condone, or even embrace imminent violence or lawlessness," and even if the speech "was intended to anger their target audience, the record is devoid of any indication that they intended imminent lawlessness to ensue." *Id.* at 244. So, too, with the New Images, which are even milder by far than the Bible Believers' signs. Were more needed, it lies in the irony that the School District correctly cites *Brandenburg* as stating the incitement standard for evaluating the New Images—one of which portrays Quick photoshopped into a KKK meeting (Doc. 126, Def.'s Opp. Pl.'s Mot. Summ. J., 13)—given that, in *Brandenburg*, the Court invalidated punishment of an *actual* Klan member who explicitly advocated "revengeance" against the federal government at a Klan meeting with a burning cross in the background. 395 U.S. at 446, 449.

The New Images also fail *Tinker*'s substantial disruption test for punishing I.P., even if the School District could rely on them. The District claims the New Images upset one student (Doc. 126, Def.'s Opp. Pl.'s Mot. Summ. J., 17), but that student submitted an uncontradicted sworn declaration to the Court affirming the New Images did not interrupt her school day or disrupt her ability to learn or participate in school. (Doc. 122-10, Ex. I, A.L. Decl. ¶¶ 20–22.) Besides, one student potentially being upset neither constitutes "substantial disruption" nor offers enough evidence to reasonably forecast substantial disruption. *See Mahanoy*, 594 U.S. at 192–93 (citing *Tinker*, 393 U.S. at 509) (holding several students "upset about the content" of student's social media posts "does not meet *Tinker*'s demanding standard").

A single student reporting the New Images to Quick is the *only* evidence of the New Images having any impact on THS. (Doc. 122-10, Ex. I, A.L. Decl. ¶¶ 10–12, 16–19; Doc. 120-8, Quick Tr. 116:19–23.) The "racial tensions" to which the School District alludes refers only to a rumor

that Quick himself was racist and an assembly he held the previous school year addressing student concerns about the dress code's perceived racial disparity. (Doc. 126, Def.'s Opp. Pl.'s Mot. Summ. J., 17.) That, too, falls short of the evidence required to support a reasonable forecast that the New Images would cause substantial disruption. (*See* Doc. 127, Pl.'s Mem. in Opp. to Def.'s Mot. Summ. J., 20–23.) *See also Castorina ex rel. Rewt v. Madison Cnty. Sch. Bd.*, 246 F.3d 536, 543–44 (6th Cir. 2001) (noting prior cases finding "substantial disruption" based on race-related speech relied on evidence of tensions in recently desegregated schools or past instances of race-related violence).

CONCLUSION

The School District suspended I.P. because Quick felt embarrassed—that's it. And that is not a constitutional basis to punish a student for nondisruptive speech. No material factual disputes stand in that way of that conclusion. For those and all the foregoing reasons, Plaintiff I.P. respectfully requests that this Court grant I.P.'s motion for summary judgment and deny the School District's cross-motion.[5]

Dated: June 9, 2025

Respectfully Submitted,

/s/ Conor T. Fitzpatrick

CONOR T. FITZPATRICK
(Mich. No. P78981, D.C. No. 90015616)*
FOUNDATION FOR INDIVIDUAL RIGHTS AND EXPRESSION
700 Pennsylvania Ave. SE, Ste. 340
Washington, D.C. 20003
(215) 717-3473
conor.fitzpatrick@thefire.org

JEFFREY D. ZEMAN
(Penn. No. 328570)*

DARRICK L. O'DELL
(BPR #26883)
SPICER RUDSTROM, PLLC
414 Union St., Ste. 1700
Nashville, TN 37219
(615) 259-9080
dlo@spicerfirm.com

[5] On *Monell*, I.P. relies on the section addressing the issue in his response brief because the School District's response to I.P.'s motion regurgitates the District's argument from its opening brief and does not respond to I.P.'s arguments. (Doc. 127, Pl.'s Mem. in Opp. to Def.'s Mot. Summ. J., 23–24.)

FOUNDATION FOR INDIVIDUAL
RIGHTS AND EXPRESSION
510 Walnut St., Ste. 900
Philadelphia, PA 19106
(215) 717-3473
jeff.zeman@thefire.org

*Admitted *Pro Hac Vice*

Counsel for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on June 9, 2025, I electronically filed the foregoing document with the Clerk of the Court using the ECF system, which will send notification of such filing upon all ECF filing participants.

/s/ Conor T. Fitzpatrick
Conor T. Fitzpatrick
FOUNDATION FOR INDIVIDUAL RIGHTS AND EXPRESSION