IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE

BARTON THORNE, Plaintiff, v. SHELBY COUNTY BOARD OF EDUCATION and DR. JORIS M. RAY, in his official capacity as Superintendent of Shelby County Schools, Defendants.	Case No. 2:21-cv-02110-MSN-tmp

DEFENDANTS' MOTION TO DISMISS AMENDED COMPLAINT AND MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS WITH PREJUDICE PURSUANT TO FED. R. CIV. P. 12(b)(6)

Defendants Shelby County Board of Education and Dr. Joris M. Ray, in his official capacity as Superintendent of Shelby County Schools (collectively, "SCBE"), [1] by and through counsel, hereby submits their Motion to Dismiss Plaintiff's Amended Complaint [Doc. 10 ("Am. Compl.")] and Memorandum of Law in Support of their Motion to Dismiss with Prejudice pursuant to Fed. R. Civ. P. 12(b)(6) ("Motion"). SCBE respectfully requests the Court enter an Order dismissing the Amended Complaint filed by Plaintiff Barton Thorne ("Plaintiff") on the ground that Plaintiff's Amended Complaint fails to state a claim upon which relief can be granted. In support of their Motion, SCBE states as follows:

[1] SCBE notes that Plaintiff's naming of Dr. Joris M. Ray in his official capacity as Superintendent of Shelby County Schools is unnecessarily cumulative because "official-capacity suits 'generally represent only another way of pleading an action against an entity of which an officer is an agent.'" *Hafer v. Melo*, 502 U.S. 21, 23 (1991).

RELEVANT FACTS AS ALLEGED

Plaintiff is a career educator and currently serves as principal of Cordova High School for Shelby County Schools, the school district operated by Defendant Shelby County Board of Education and led by Superintendent Dr. Joris M. Ray. [Am. Compl., ¶¶ 1,6, 8, and 11.] Plaintiff's position as principal and corresponding duties are pursuant to an employment relationship between him and SCBE. [Am. Compl., ¶ 12.] In his role as principal, Plaintiff delivers a weekly principal's message to his students. [*Id*., ¶¶ 1, 27.] Plaintiff delivers the "principal's message" "via a recorded video that is played each Monday during the 'homeroom' session of the school day." [*Id*., ¶¶ 27, 28.]

On January 11, 2021, Plaintiff used his "principal's address" as a platform to express his concerns about the removal of content by various media platforms. [*Id*. at ¶¶ 29; Ex. B to Am. Compl.] According to Plaintiff, the message was "in line with" Tennessee's standards for teaching social studies to high school students and "generally accepted civics curriculum." [*Id*. at ¶¶ 3, 30.] The message was played in each homeroom for all students within Cordova High School. [*Id*. at ¶ 15.]

SCBE received complaints against Plaintiff about the content of his January 11 "principal's address" from its employees, parents, and/or students. [*Id*. at ¶ 37.] In response to such complaints, Plaintiff was placed on administrative leave pending an investigation. [*Id*. at ¶¶ 38, 56, 61.] Plaintiff was ultimately taken off administrative leave, and no discipline was issued. [*Id*. at ¶ 60.] Plaintiff does not allege that he was dismissed or otherwise subject to any adverse employment action. [*See* Am. Compl.]

STANDARD OF REVIEW

Federal Rule of Civil Procedure 12(b)(6) permits dismissal of a complaint "for failure to state a claim for which relief can be granted." Fed. R. Civ. P. 12(b)(6). A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) requires an assessment of whether the party asserting a claim has set forth a claim upon which the Court may grant relief. *Doe v. Dublin City Sch. Dist.*, No. 2:09-CV-738, 2010 WL 1434318, at *2 (S.D. Ohio Apr. 8, 2010), aff'd sub nom. *Doe ex rel. Doe v. Dublin City Sch. Dist*., 453 F. App'x 606 (6th Cir. 2011). This Court must construe the pleading in favor of the party asserting a claim, accept the factual allegations contained in that party's pleading as true, and determine whether the factual allegations present a plausible claim. *See Bell Atlantic Corp. v. Twombly*, 550 U.S. 554, 570 (2007). The Supreme Court has explained, however, that "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions." *Ashcroft v. Iqbal*, 556 U.S. 662, 677 (2009). Thus, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.* Accordingly, "[d]etermining whether a complaint states a plausible claim for relief will ... be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id.* at 679.

To be considered plausible, a claim must be more than merely conceivable. *Bell Atlantic Corp*., 550 U.S. at 556; *Ass'n of Cleveland Fire Fighters v. City of Cleveland, Ohio*, 502 F.3d 545, 548 (6th Cir. 2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678. The factual allegations of a pleading "must be enough to raise a right to relief above the speculative level ...." *Twombly*, 550 U.S. at 555; *see also Sensations, Inc. v. City of Grand Rapids*, 526 F.3d 291, 295 (6th Cir. 2008).

ARGUMENT AND AUTHORITY

In his initial Complaint, Plaintiff alleged two causes of action: (1) violation of the First Amendment; and (2) breach of contract under Tennessee law. As explained in SCBE's first Motion to Dismiss [Doc. 8], Plaintiff's initial Complaint failed to state a claim upon which relief can be granted. In an attempt to avoid dismissal of his meritless and frivolous Complaint, Plaintiff filed his Amended Complaint.

Plaintiff's Amended Complaint purports to state three causes of action: (1) violation of the Fourteenth Amendment's due process clause arising from policies allegedly "void for vagueness;" (2) a violation of the First Amendment arising from alleged "viewpoint discrimination in a nonpublic forum, . . . policies that are void for vagueness," and violation of Plaintiff's "academic freedom;" and (3) a breach of contract claim brought under Tennessee law. Plaintiff's Amended Complaint should be dismissed in its entirety because it fails to state a claim for which relief can be granted under each cause of action.

I. PLAINTIFF DOES NOT STATE A PLAUSIBLE CLAIM FOR RELIEF UNDER SECTION 1983.

Plaintiff presumably brings his First and Fourteenth Amendment claims pursuant to 42 U.S.C. § 1983.[2] "To survive a motion to dismiss a claim under 42 U.S.C. § 1983, the plaintiff must properly allege two elements: (1) the defendant was acting under color of state law, and (2) the offending conduct deprived the plaintiff of rights secured under federal law." *Mezibov v. Allen*, 411 F.3d 712 (6th Cir. 2005) (citing *Bloch v. Ribar*, 156 F.3d 673, 677 (6th Cir. 1998)). Local government units can be liable under Section 1983 only where "the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision

[2] Plaintiff does not refer to 42 U.S.C. § 1983 under his Causes of Action but cites the statute in support of his jurisdictional statement. [Am. Compl., ¶ 9.]

officially adopted and promulgated by that body's officers." *Monell v. Dep't of Social Services of City of New York*, 436 U.S. 658, 689 (1978).

Plaintiff alleges violations of both the First and Fourteenth Amendments but does not state a claim under Section 1983 under either theory. Among other deficiencies, Plaintiff does not identify any unconstitutional policy or custom that allegedly caused injury. *See Monell*, 436 U.S. 658. A plaintiff can demonstrate the requisite policy or custom in one of four ways: "(1) the existence of an illegal official policy or legislative enactment; (2) that an official with final decision making authority ratified illegal actions; (3) the existence of a policy of inadequate training or supervision; or (4) the existence of a custom of tolerance or acquiescence of federal rights violations." *Burgess v. Fischer*, 735 F.3d 462, 478 (6th Cir.2013).

Plaintiff does not plead facts to establish liability under any of these theories but presumably attempts at the first approach – the existence of an illegal official policy. Though the basis of his Fourteenth Amendment due process claim is policies that are allegedly "void for vagueness," Plaintiff does not identify any policy Plaintiff claims to be illegal or that he claims to be the basis for an action taken by SCBE. *See Boulton v. Swanson* 795 F.3d 526, 537 (6th Cir. 2015) (finding plaintiff suspended without pay and demoted from his position in part for "creating a 'hostile' and 'unprofessional' environment failed to establish *Monell* liability because there was no causal link between a purported unconstitutional action and an illegal policy of the governmental entity)). In fact, Plaintiff alleges SCBE "does not have or enforce any general policy that prevents teachers or other employees from speaking about matters that are political or otherwise of public concern." [Am. Compl. ¶ 48]. Further, as explained in more detail in Section II below, Plaintiff does not assert facts to establish any rights secured under federal law that were adversely affected by SCBE. Because Plaintiff fails to plead any plausible claim for relief under

Section 1983, Counts I and II of Plaintiff's Amended Complaint should therefore be dismissed with prejudice.

II. PLAINTIFF FAILS TO PLEAD A PLAUSIBLE CLAIM FOR RELIEF UNDER EITHER THE FIRST OR FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

A. Plaintiff Has Not Presented the Court with an SCBE Policy to Assess for Vagueness.

In an effort to avoid dismissal of his meritless First Amendment and breach of contract claims, Plaintiff added a "due process" claim to his Amended Complaint. Specifically, he alleges "SCS's suspension of Principal Thorne violates the Fourteenth Amendment's due process clause because it is based on policies that are void for vagueness." [Am. Compl., ¶ 17.] Despite Plaintiff's contentions, the facts alleged do not support his claim. In order for this Court to address a void for vagueness claim, Plaintiff would first need to be subject to discipline based on a policy of his government employer. Here, Plaintiff admits that he was simply placed on administrative leave after complaints were made against him. [Am. Compl. ¶ 37, 38.] While on administrative leave, he was investigated and ultimately permitted to return to work. [Am. Compl. ¶¶ 59, 61.] In the letter he was given authorizing his return, he was informed that no discipline was warranted. [Am. Compl. 60.] This Court can draw from these facts the inference that if no discipline was warranted, no policy was violated. These facts, though entangled in Plaintiff's Amended Complaint, are inconsistent with Plaintiff's claim that there is an SCBE policy that should be "void for vagueness." Simply put, no such policy exists. Otherwise, Plaintiff would have pled the contents of it or attached it to his Amended Complaint.

"[T]he Due Process Clause prohibits the government from depriving 'any person of life, liberty, or property, without due process of law.'" *West v. Kentucky Horse Racing Commission*, 425 F. Supp. 3d 793, 805 (E.D. Kent. 2019) (quoting U.S. Const. amend. XIV, § 1). Individuals have the right to "notice and an opportunity to be heard" before the government can deprive them

of the "life, liberty, or property" interests protected by the clause. *Id.* (quoting *Boddie v. Connecticut*, 401 U.S. 371, 378, (1971)). "The notice requirement of the due process clause also means that the government cannot take away someone's life, liberty, or property under a law 'so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement.'" *Id.* (quoting *Johnson v. United States*, 576 U.S. 591, 594 (2015)).

To succeed on this type of due process claim, a plaintiff "must establish that a 'life, liberty, or property' interest is implicated by the government's conduct." *Id.* (quoting *Thomas v. Cohen*, 304 F.3d 563, 576 (6th Cir. 2002). Plaintiff's Amended Complaint fails to state a claim for violation of due process rights because Plaintiff does not plead facts which could establish an interest in life, liberty, or property that was adversely affected by SCBE. In response to one or more complaints filed against Plaintiff regarding his principal's message, SCBE simply placed him on administrative leave. [Am. Compl. ¶¶ 37, 38.] Plaintiff does not allege that he was dismissed from his employment, suffered loss of pay or benefits, or was otherwise subject to an action by SCBE that amounts to an adverse employment action. [*See generally* Am. Compl.]

As noted above, Plaintiff does not identify or provide to this Court the policy or policies that he claims to be "void for vagueness." He also does not allege that he was disciplined for or accused of violating any policy. To the contrary, Plaintiff alleges that "[t]he Director of SCS's Office of Professional Standards communicated to [Plaintiff] that he anticipated prompt dismissal of the complaint because nothing in Principal Thorne's comments violated professional standards or contractual obligations." [Am. Compl. ¶ 44.] Plaintiff further alleges that he received a "reinstatement letter" from SCBE stating that "discipline was not warranted." [Am. Compl. ¶ 60.] It is clear from the face of Plaintiff's Amended Complaint that he was not dismissed or disciplined

because of a policy violation but was placed on "administrative leave" for purposes of an "internal disciplinary investigation" resulting from a complaint lodged against Plaintiff. [Am. Compl. ¶ 4.]

A close review of the allegations set forth by Plaintiff easily reveals that his contention that SCBE's "policies" should be void for vagueness is nothing more than a legal conclusion unsupported by facts. *See Ashcroft v. Iqbal*, 556 U.S. 662, 677 (2009) ("[T]he tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions.") These "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements" are insufficient to plead a due process violation under the Fourteenth Amendment. *Id*.

B. Plaintiff Has No First Amendment Rights as to Statements Made by Him Pursuant to His Official Duties as Principal of Cordova High School.

Accepting Plaintiff's allegations as true and viewing them in the light most favorable to him, Plaintiff's claim for violation of the First Amendment fails as a matter of law. The Supreme Court of the United States has unequivocally held that First Amendment protections do not extend to statements made by a public employee while performing his official duties. In *Garcetti v. Ceballos*, the Supreme Court declared:

> We hold that when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.

Garcetti v. Ceballos, 547 U.S. 410, 421 (2006).

The *Garcetti* Court considered a First Amendment claim brought by Richard Ceballos, a deputy district attorney. *Id*. at 413. Mr. Ceballos determined that an affidavit used to obtain a critical search warrant "contained serious misrepresentations" and prepared two memorandums to his supervisors addressing the perceived inaccuracies. *Id.* at 414. Mr. Ceballos claimed that he "was subjected to a series of retaliatory employment actions" as a result of statements contained

in his memos, including reassignment to a different position, transfer to another work location, and denial of a promotion. *Id.* at 415. The district court found that Mr. Ceballos was not entitled to First Amendment protection for the contents of his memos because they were written pursuant to his official duties. *Id.* The Ninth Circuit of Appeals overruled the decision, and the Supreme Court granted certiorari. *Id*. at 417.

The *Garcetti* Court examined its prior employee-speech jurisprudence, including *Pickering v. Board of Ed. of Township High School Dist. 205, Will Cty*., 391 U.S. 563 (1968) (applying First Amendment protections to a teacher's letter to a local newspaper addressing the funding policies of the school board) and *Connick v. Myers*, 461 U.S. 438 (1983) (finding no First Amendment protection for employee speech not made as a citizen on a matter of public concern). The Court observed that those opinions "sought both to promote the individual and societal interests that are served when employees speak as citizens on matters of public concern and to respect the needs of government employers attempting to perform their important public functions." *Garcetti*, 547 U.S. at 420 (citing *Rankin v. McPherson*, 483 U.S. 378 (1987)). The Court stated: "Underlying our cases has been the premise that while the First Amendment invests public employees with certain rights, it does not empower them to 'constitutionalize the employee grievance.'" *Id.* at 420 (quoting *Connick*, 461 U.S. at 154).

The "controlling factor in Ceballos' case is that his expressions were made pursuant to his duties as a calendar deputy." *Id.* at 421. The Court held: "**[W]hen employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline**." *Id.* (emphasis added). In fact, "[e]mployers have heightened interests in controlling speech made by an employee in his or her professional capacity." *Id*. at 422. "Official

communications have official consequences, creating a need for substantive consistency and clarity." *Id*. "Restricting speech that owes its existence to a public employee's professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen." *Id*. at 421.

Like Ceballos, Plaintiff admits his statements were made pursuant to his official duties as an employee of SCBE. *See id.* at 421. In Paragraph 1 of his Amended Complaint, Plaintiff states: "In his role as principal, he delivers a 'principal's message' to his students as part of the weekly announcements' videos." [Am. Compl., ¶ 1.] The messages are "delivered via a recorded video that is played each Monday during the 'homeroom' session of the school day." [Am. Compl., ¶ 28.] Plaintiff states "[t]he messages inspire, educate, inform, and challenge his high school students." [Am. Compl., ¶ 1] "Previous topics have included [T]hanksgiving, career and professional advice, and talks on character." [Am. Compl., ¶ 28.] Plaintiff's purported First Amendment claim arises from one of the "principal's messages" Plaintiff delivers to students regularly pursuant to his official duties as Principal. [Am. Compl., ¶¶ 1, 27, 29.]

Plaintiff's statements were unquestionably made pursuant to his official duties as an employee of SCBE. "Government employers, like private employers, need a significant degree of control over their employees' words and actions; without it, there would be little chance for the efficient provision of public services." *Garcetti*, 547 U.S. at 418 (citing *Pickering v. Board of Ed. of Township High School Dist. 205, Will Cty*., 391 U.S. 563, 568). Put differently, government employees like Plaintiff cannot perform their jobs however they see fit. *Id.* at 422. The Constitution does not insulate his statements from employer action, including discipline. *Id.* at 421. Again, assuming SCBE had taken adverse action against Plaintiff as a result of his principal's message, it did not violate any constitutional right of Plaintiff, particularly the First Amendment.

1. Garcetti *is a Barrier to Plaintiff's First Amendment Claim, Despite His Best Efforts to Plead Otherwise.*

The Supreme Court's opinion in *Garcetti* is fatal to Plaintiff's First Amendment claim. In a dubious effort to escape dismissal, Plaintiff purports to rely upon the Sixth Circuit's recent opinion in *Meriwether v. Hartop*, No. 20-3289, 2021 WL 1149377 (6th Cir. Mar. 26, 2021). Nicholas Meriwether is a philosophy professor at a small public university in Ohio. *Id*. at *1. Professor Meriwether was disciplined by written reprimand for refusing to comply with the university's nondiscrimination policies requiring professors to refer to students by their "preferred pronouns." *Id.* The *Meriwether* court acknowledged *Garcetti's* "general rule regarding government employees' speech" but noted that the *Garcetti* Court "expressly declined to address whether its analysis would apply 'to a case involving speech related to scholarship or teaching.'" *Id*. at *6 (citing *Garcetti*, 547 U.S. at 425; *Adams v. Trs. Of the Univ. of N.C.-Wilmington*, 640 F.3d 550, 563 (4th Cir. 2011)). Because *Garcetti* "declined to address the question[,]" the Sixth Circuit "turn[ed] to the Supreme Court's prior decisions for guidance." *Id.* "Those decisions have 'long recognized that, given the important purpose of public education and the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition.'" *Id*. (quoting *Grutter v. Bollinger*, 539 U.S. 306, 329 (2003)). Based upon this precedent recognizing the "essentiality of freedom in the community of American universities[,]" *see id.* at *7 (quoting *Sweezy v. New Hampshire*, 354 U.S. 234, 257 (1957), the Sixth Circuit found *Garcetti* did not bar Professor Meriwether's claims.

2. *Plaintiff's First Amendment Claim Fails Under Sixth Circuit Precedent.*

While *Meriwether v. Hartop* recognizes the possibility of an "academic-freedom exception" to *Garcetti*, the Sixth Circuit Court of Appeals has made clear that such exception applies only to the college and university context, and not to primary or secondary public schools.

In fact, the court expressly acknowledges this distinction, reiterating its prior holding that "the First Amendment does not extend to the in-class curricular speech of teachers in primary and secondary schools." *Id*. at *7 n. 1 (quoting *Evans-Marshall v. Board of Education of Tipp City*, 624 F.3d 332 (6th Cir. 2010) (emphasis added)). Contrary to Plaintiff's suggestion, *Meriwether* does not govern Plaintiff's First Amendment claim; rather, *Evans-Marshall v. Board of Education of Tipp City* is determinative. 624 F.3d 332 (6th Cir. 2010).

Shelly Evans-Marshall was a high school English teacher at Tippecanoe High School. *Id.* at 335. Following her class's study of *Fahrenheit 451*, Ms. Evans-Marshall distributed the American Library Association's list of "100 Most Frequently Challenged Books" and asked students to investigate one book from the list and lead a class debate regarding the challenges to that book. *Id.* at 334-335. Two groups of students selected a book called "*Heather Has Two Mommies*." *Id*. at 335. A parent complained about that book, and the principal asked Ms. Evans-Marshall to tell the students to choose a different book. *Id*. She "complied, explaining to her class that 'they were in a unique position to use this experience as source material for their debate because they were in the position of having actually experienced censorship in preparing to debate censorship.'" *Id*. Ms. Evans-Marshall continued to assign books that drew criticism from parents and to engage in other teaching methods not supported by her school principal. *Id*. at 335-336. The principal submitted evaluations that "criticized Evans-Marshall's attitude and demeanor as well as her 'use of material that is pushing the limits of community standards.'" *Id*. at 336. Ms. Evans-Marshall filed objections to the principal's evaluations and a grievance with the superintendent. *Id*.

The school board subsequently voted unanimously not to renew Ms. Evans-Marshall's contract. *Id*. She filed a Section 1983 action against the school board, the principal, and the

superintendent, claiming "the school board and other defendants had retaliated against her 'curricular and pedagogical choices,' infringing her First Amendment right 'to select books and methods of instruction for use in the classroom without interference from public officials.'" *Id.* While the case was pending, the Supreme Court of the United States decided *Garcetti v. Ceballos* several months later. *Id.* Relying on *Garcetti*, the defendants moved for summary judgment. *Id.* The District Court declined to apply *Garcetti* but granted the defendants' motion for summary judgment on other grounds.

On appeal, the Sixth Circuit found Ms. Evans-Marshall could "not overcome *Garcetti*." *Id.* "When government employees speak 'pursuant to their official duties,' *Garcetti* teaches that they are 'not speaking as citizens for First Amendment purposes.'" *Id.* (quoting *Garcetti*, 547 U.S. at 421). The court found that "[a]ny dispute over the board's motivations, *Pickering* balancing or the public concerns of her speech under *Connick*" was "beside the point" if the plaintiff's speech was "in connection with her official duties as a teacher." *Id.*

The court easily concluded that Ms. Evans-Marshall spoke pursuant to her official duties:

> When Evans-Marshall taught 9th grade English, she did something she was hired (and paid) to do, something she could not have done but for the Board's decision to hire her as a public school teacher. As with any other individual in the community, she had no more free-speech right to dictate the school's curriculum than she had to obtain a platform—a teaching position—in the first instance for communicating her preferred list of books and teaching methods. "No relevant analogue exists between her in-class curricular speech and speech by private citizens."

Id. at 340 (quoting *Garcetti*, 547 U.S. at 424).

The *Evans-Marshall* Court expressly rejected the exact argument Plaintiff asserts in his Amended Complaint—*Garcetti* does not apply due to a teacher's interest in "academic freedom." *Id.* [*see also* Am. Compl. ¶¶ 77-79.] The court held that *Garcetti's* "caveat" regarding the

applicability of its holding to interests of academic freedom "offers no refuge to Evans-Marshall" because she "is not a teacher at a public college or university and thus falls outside of the group the [*Garcetti*] dissent wished to protect." *Id.* at 343. The court further held that "[t]he concept of 'academic freedom' . . . does not readily apply to in-class curricular speech at the high school level." *Id.* "As a cultural and a legal principle, academic freedom 'was conceived and implemented in the university'" out of concern for scholarship and research. *Id*. at 343-344 (quoting J. Peter Byrne, *Academic Freedom: A "Special Concern of the First Amendment*", 99 Yale L.J. 251, 288 n. 137 (1989)). "'[U]niversities occupy a special niche in our constitutional tradition' and the constitutional rules applicable in higher education do not necessarily apply in primary and secondary schools, where students generally do not choose whether or where they will attend school." *Id*. (quoting *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 724–25 (2007)).

Plaintiff is similarly situated to Ms. Evans-Marshall, and his First Amendment claim must suffer the same fate as hers. Plaintiff admittedly made his principal's message to his students pursuant to his official duties as principal. [Am. Compl. ¶¶ 1, 27.] Plaintiff is a career educator, and in providing the routine principal's message to "educate" and "challenge" the students of Cordova High School, Plaintiff did something he was hired and paid to do. Had he not been hired as a principal by SCBE, he would not have had the opportunity to express his ideas to a captive class of high school students. No relevant analogue exists between Plaintiff's principal's message to his students and speech by private citizens. *See Evans-Marshall*, 624 F.3d at 340 (quoting *Garcetti*, 547 U.S. at 424).

In an apparent effort to avoid dismissal of his meritless First Amendment claim, Plaintiff references several inapplicable legal theories. Plaintiff's allusions to "viewpoint discrimination"

and "void for vagueness" standards are nothing more than pretense, as those theories do not affect *Garcetti's* application to this case. Indeed, none of the cases Plaintiff cites offers any support for his First Amendment claim.[3] *See American Freedom Defense Initiative v. Suburban Mobility Authority for Regional Transportation*, 498 F.3d 481 (6th Cir. 2020) (considering Michigan's Suburban Mobility Authority For Regional Transportation's rejection of an advertisement submitted by the American Freedom Defense Initiative for placement on its buses); *United Food & Commercial Workers Union, Local 1099 v. Southwest Ohio Regional Transit Authority*, 163 F.3d 341 (6th Cir. 1998) (considering the decision of the Southwest Ohio Regional Transit Authority's rejection of a Union's "proposed wrap-around bus advertisement on the grounds that the ad was too controversial and not aesthetically pleasing."); *Ward v. Hickey*, 996 F.2d 448 (1st Cir. 1993) (First Circuit case relying upon Supreme Court opinion issued eighteen (18) years before *Garcetti*).

Like his Fourteenth Amendment due process claim, Plaintiff's First Amendment claim is ripe for dismissal, and Count II of Plaintiff's Amended Complaint should be dismissed with prejudice.

III. PLAINTIFF'S SINGLE STATE LAW CLAIM MUST BE DISMISSED, AS HE FAILS TO ARTICULATE A CLAIM FOR BREACH OF CONTRACT UNDER TENNESSEE LAW.

Count III of Plaintiff's Amended Complaint also fails to state a claim upon which relief can be granted because Plaintiff fails to plead facts to establish a plausible claim for breach of contract under Tennessee law. "In order to make a prima facie case for a breach of contract claim,

[3] Several of the cases cited by Plaintiff in support of Count II of the Amended Complaint do not relate to speech by a government employee pursuant to that employment. *See American Freedom Defense Initiative v. Suburban Mobility Authority for Regional Transportation*, 498 F.3d 481 (6th Cir. 2020) (considering SMART's rejection of an advertisement submitted for placement on its busses); *United Food & Commercial Workers Union, Local 1099 v. Southwest Ohio Regional Transit Authority*, 163 F.3d 341 (6th Cir. 1998) (same). The remaining cases were decided more than a decade before *Garcetti*. [Am. Compl. ¶¶ 71, 79.]

a plaintiff must allege: "(1) the existence of an enforceable contract, (2) nonperformance amounting to a breach of the contract, and (3) damages caused by the breach of the contract." *Tolliver v. Tellico Village Property Owners Association, Inc.*, 579 S.W.3d 8, 25 (Tenn. Ct. App. 2019) (quoting *C & W Asset Acquisition, LLC v. Oggs*, 230 S.W.3d 671, 676-77 (Tenn. Ct. App. 2007)).

Plaintiff does not plead facts to establish any of the required elements of a claim for breach of contract under Tennessee law. First, Plaintiff has not sufficiently pleaded the existence of an enforceable contract. As in his first Complaint [Doc. 1], Plaintiff claims SCBE's actions in placing Plaintiff on administrative leave "breaches his contract with SCS." [Am. Compl., p. 5.] Plaintiff failed to attach any alleged contract to his first Complaint [Doc.1] or to identify the alleged contract or its terms. [*See generally* Complaint.] In an effort to rectify this deficiency,[4] Plaintiff attaches to his Amended Complaint "a standard contract" used for "all principal-level employees." [Am. Compl., ¶ 12.; Doc. 10-2.] The attached document contains no signatures and does not identify Plaintiff as a party. [Doc. 10-2.] Though Plaintiff claims his employment "is governed by a contract between him and SCS" [Am. Compl., ¶ 12], he does not allege that he signed any agreement or that the attached document reflects the actual terms of an agreement between Plaintiff and SCBE. Consequently, Plaintiff fails to plead facts which could establish the existence of an enforceable agreement between Plaintiff and SCBE.

[4] "It is a basic tenet of contract law that a party can only advance a claim of breach of written contract by identifying and presenting the actual terms of the contract allegedly breached." *Northampton Restaurant Groupe, Inc. v. FirstMerit Bank, N.A.*, 492 Fed. Appx. 518, 522 (6th Cir. July 5, 2012) (upholding the District Court's dismissal of the plaintiff's breach of contract claim because the plaintiff "did not attach any contracts to its complaint and did not include the language of any specific contractual provisions that had been breached by the [defendant].") (quoting *Harris v. Am. Postal Workers Union*, 198 F.3d 245, 1999 WL 993882, at *4–5 (6th Cir. Oct. 19, 1999)).

Secondly, even if Plaintiff's Amended Complaint did sufficiently identify the terms of an enforceable contract between Plaintiff and SCBE (which it does not), Plaintiff still fails to identify the specific terms of the alleged contract he claims were breached. Plaintiff relies upon various provisions in the alleged contract related to performance, evaluation, discipline, and harassment and discrimination. [Am. Compl. ¶¶ 13-18; Doc. 10-2.] None of these provisions relates to placement of an employee on paid administrative leave pending an investigation, and Plaintiff does not allege any conduct by SCBE that would be in violation of any of these terms.

Instead of alleging violations of the contract, Plaintiff relies almost exclusively upon provisions of an "employee handbook" that is not referenced in the alleged contract. [Am. Compl. ¶¶ 19-24, 26; Doc. 10-2.] It is well established in Tennessee that an employee handbook becomes a part of an employment contract only if the handbook "contain[s] specific language showing the employer's intent to be bound by the handbook's provisions." *Rose v. Tipton County Public Works Dept.*, 953 S.W.2d 690, 692 (Tenn. Ct. App. 1997) (citing *Smith v. Morris*, 778 S.W.2d 857, 858 (Tenn. Ct. App. 1988)). Plaintiff does not cite to any such language in the alleged employee handbook and does not allege that it includes such language. To the contrary, the document referenced in the Amended Complaint specifically states:

> This handbook does not confer any contractual right, either expressed or implied, to remain in the District's employment, nor does it guarantee any fixed terms and conditions of employment.
>
> The procedures, practices, policies and benefits described here may be modified or discontinued without prior notice. Shelby County Schools retains the right to handle any particular situation in the manner it deems most appropriate and in the best overall interest of the District. The exercise of this discretion may result in departing from some of the items outlined in this handbook as dictated by the circumstances.

Employee Handbook, http://www.scsk12.org/employee/files/2020/SCS%20Handbook%202020

%20Color%20Revised.pdf.[5] The "Employee Handbook" referenced by Plaintiff does not constitute a contract between the parties, and an alleged violation of its provisions cannot establish a plausible claim for breach of contract under Tennessee law.

Plaintiff refers to "rules and regulations and policies of the Board" referenced in the agreement but only identifies one Board Policy—Policy 4050, which "authorizes the principal to make management decisions within the school unit that are consistent with law and SCS Board Policy." [Am. Compl. ¶ 25.] Policy 4050 does not relate to placement of an employee on administrative leave pending an investigation, and Plaintiff does not identify any conduct by SCBE that could have violated this policy.

Finally, Plaintiff does not plead facts that could establish damages resulting from an alleged breach of contract. Plaintiff does not allege he lost any salary or other benefits related to his employment. *See Hampton v. Macon County Bd. of Educ*., No. M2013-00864-COA-R3-CV, 2014 WL 107971, (Tenn. Ct. App. Jan. 10, 2014) ("When a contract of employment is breached, the proper measure of damages is the salary that would have been earned had the contract not been breached, less any amount the employee earned or should have earned in the exercise of reasonable diligence in some other employment during the unexpired contract term." (quoting *Cantrell v. Knox County Bd. of Educ*., 53 S.W.3d 659, 662 (Tenn. 2001))). "[E]motional distress" and "harm

[5] The "Employee Handbook" cited in this Motion was accessed using the web addressed cited by Plaintiff in his Amended Complaint. [Am. Compl. n. 3.] Because this document is referred to in the Amended Complaint and is presented by Plaintiff as central to Plaintiff's claims, the Court may consider it for purposes of Defendants' Rule 12(b)(6) Motion to Dismiss. *Greenberg v. Life Ins. Co. of Virginia*, 177 F.3d 507, 545 (6th Cir. 1999). For the Court's convenience, that document is linked here:

http://www.scsk12.org/employee/files/2020/SCS%20Handbook%202020%20Color%20Revised.pdf

to reputation" are not compensable categories of damages for a breach of employment contract under Tennessee law.

As a matter of law, Plaintiff fails to plead a claim for breach of contract under Tennessee law, and Count III of Plaintiff's Amended Complaint should be dismissed with prejudice pursuant to Fed. R. Civ. P. 12(b)(6).

Alternatively, Plaintiff's state law breach of contract claim should be dismissed pursuant to Fed. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction. For the reasons stated above, Plaintiff's Amended Complaint fails to state a claim upon which relief can be granted pursuant to the First and Fourteenth Amendment or any other federal right. With no plausible federal claims at issue, Plaintiff's purported state law claim should be dismissed as well. *See United Mine Workers of America v. Gibbs*, 383 U.S. 715, 727 (1966) ("Certainly, if the federal claims are dismissed before trial, even though not insubstantial in a jurisdictional sense, the state claims should be dismissed as well.").

CONCLUSION

For the reasons explained above, Plaintiff's Amended Complaint fails to state a claim upon which relief can be granted and should be dismissed with prejudice pursuant to Fed. R. Civ. P. 12(b)(6).

Respectfully Submitted,

s/ Kenneth M. Walker II
KENNETH M. WALKER II (#032422)
Shelby County Board of Education
Office of the General Counsel
160 S. Hollywood St., Room 218
Memphis, Tennessee 38112
901.416.6370
walkerkm2@scsk12.org

s/ Jamie L. Morton
JAMIE L. MORTON (#031243)
Shelby County Board of Education
Office of the General Counsel
160 S. Hollywood St., Room 218
Memphis, Tennessee 38112
901.416.6370
mortonj2@scsk12.org

CERTIFICATE OF SERVICE

This certifies that a copy of the foregoing has been forwarded pursuant to the Court's electronic filing system to the following:

Cameron M. Watson
SPICER RUDSTROM, PLLC
119 S. Main Street, Suite 700
Memphis, Tennessee 38103

Counsel for Plaintiff

Daniel R. Suhr
Liberty Justice Center
209 S. LaSalle Street, Suite 1690
Chicago, Illinois 60604

Counsel for Plaintiff
Admitted Pro Hac Vice

/s/Jamie L. Morton
Jamie L. Morton