APPEAL NO. 21-2475

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

JOHN M. KLUGE,
Plaintiff-Appellant,

v.

BROWNSBURG COMMUNITY SCHOOL CORPORATION,
Defendant-Appellee.

On Appeal from the United States District Court
for the Southern District of Indiana, Indianapolis Division
Case No. 1:19-cv-02462-JMS-DLP
The Honorable Jane Magnus-Stinson

APPELLEE'S RESPONSE BRIEF

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Appellate Court No: 21-2475

Short Caption: John M. Kluge v. Brownsburg Community School Corporation

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party, amicus curiae, intervenor or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statements be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in the front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

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BROWNSBURG COMMUNITY SCHOOL CORPORATION

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:
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(3) If the party, amicus or intervenor is a corporation:

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

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(5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

N/A

Attorney's Signature: s/ Brent R. Borg Date: August 17, 2021

Attorney's Printed Name: Brent R. Borg

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). Yes ☑ No ☐

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N/A

Attorney's Signature: s/ Alexandar P. Pinegar Date: August 17, 2021

Attorney's Printed Name: Alexandar P. Pinegar

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Jurisdictional Statement

As required by Circuit Rule 28(b), Appellee states that the jurisdictional summary in Appellant's Opening Brief is complete and correct.

Statement of Issues Presented for Review

During the 2017-2018 school year, Appellee Brownsburg Community School Corporation ("Brownsburg") required its high school teachers to address students by the first and last names in its student database. On the first day of classes for that school year, Appellant John M. Kluge ("Kluge"), a teacher at the high school, told administrators that he would not address students in this manner because some of his students had "transgender" first names, and doing so would violate his alleged sincerely-held religious belief that prohibited him from promoting gender dysphoria.

Brownsburg and Kluge reached an accommodation that let Kluge address students by last name only. But the accommodation made members of the high school community complain, including most prominently Kluge's students, some of whom reported that his use of only last names negatively impacted their learning, among other classroom-related concerns. When Brownsburg told Kluge about the complaints, he thought nothing was wrong and told the administration that he intended to continue using the last-name-only accommodation. When Brownsburg told Kluge that it would not continue the accommodation past the 2017-2018 school year, Kluge resigned.

Kluge argues that Brownsburg's actions create liability under Title VII for failure to accommodate and for retaliation.

This appeal raises two issues:

1. Did the District Court properly conclude that the last-name-only accommodation caused undue hardship as a matter of law, either because it would

continue to interfere unreasonably with Brownsburg's ability to educate students or because it would expose Brownsburg to an unreasonable risk of litigation?

2. Did the District Court properly conclude that Kluge waived his retaliation claim and, if not, did the District Court properly conclude the retaliation claim was foreclosed as a matter of law, either because Kluge could not establish causation for his prima facie case or show that a reasonable jury could infer pretext?

Statement of the Case[1]

I. Overview of the parties.

Kluge is a former employee of Brownsburg, having worked in the performing arts department at Brownsburg High School from August 2014 to June 2018. [Doc. 71 at 8; 120-2 at 3.] During his employment, Kluge taught orchestra, beginning music theory, and advanced music theory. [Doc. 120-2 at 3.] Kluge was the only teacher at Brownsburg High School who taught these classes. [*Id.*]

The facts relevant to Kluge's appeal occurred during the 2017-2018 school year and preceding months. [Doc. 15 at 6-16.] During that time, Dr. Bret Daghe was Brownsburg High School's principal and Kluge's supervisor. [Doc. 120-5 at 4 (Daghe Depo. 11:22-13:7).] Dr. Daghe reported to the Superintendent, Dr. Jim Snapp. [*Id.* at 4 (Daghe Depo. 12:7-14).] Dr. Kathryn Jessup served as the Assistant Superintendent, and Jodi Gordon was the Human Resources Director. [Docs. 120-6 at 4 (Jessup Depo. 15:8-15); 120-7 at 4 (Gordon Depo. 10:13-18).]

II. Kluge's alleged sincerely-held religious belief.

Kluge is a Christian and a member of an Indianapolis church that is under the Evangel Presbytery denomination. [Doc. 120-3 at 3, 5 (Plaintiff Depo. 9:11-15, 15:4-12).] Besides the Bible, the Evangel Presbytery Book of Church Order governs how Kluge and fellow members conduct themselves on many aspects of life,

[1] All references to "Doc." refer to documents filed with the District Court and are identified by ECF number. All references to "App. Doc." refer to documents filed with this Court and are identified by ECF number. All references to "RSA" refer to documents filed with Kluge's Required Short Appendix.

including discipline, church participation, and sexuality. [*Id.* at 4, 7 (Plaintiff Depo. 13:7-23, 24:19-25:25).]

Kluge's alleged sincerely-held religious beliefs include a belief that it is sinful to promote gender dysphoria. [Docs. 15 at 5; 120-3 at 6-7 (Plaintiff Depo. 21:12-23:5.] According to Kluge, gender dysphoria "is what scripture refers to as effeminacy which is for a man to play the part of a woman or a woman to play the part of a man and so that would include acting like/dressing like the opposite sex." [Doc. 120-3 at 6 (Plaintiff Depo. 18:2-10).] Kluge believes it is sinful for a person to act effeminate and also sinful to encourage someone to act effeminate. [*Id.* at 10 (Plaintiff Depo. 35:11-37:12).] These beliefs form the basis for Kluge's request to address students by last name only. [*Id.* (Plaintiff Depo. 36:18-37:11).]

Kluge's denomination recognizes that there are circumstances where effeminacy might warrant tolerance, notwithstanding its sinful nature. [Doc. 120-3 at 8-9 (Plaintiff Depo. 26:11-30:11).] For example, the Evangel Presbytery Book of Church Order instructs that

> if a female has transitioned to a male in appearance, it may be best that she not use the bathroom of her birth sex until she has been presented with pastoral counsel concerning God's calling of manhood and womanhood and she begins to learn of Jesus' Lordship over her sexuality and the implications it has for her sexual identity and its public expression. In this case, the female would be asked not to use the men's restroom, but instead a single-stall restroom available to either sex.

[Doc. 120-4 at 12.] Consistent with this instruction, according to Kluge there might be instances where it is appropriate and consistent with his religious beliefs to address a transgender student by the student's first name, even if the first name

differs from the student's biological sex. [Doc. 120-3 at 8-9 (Plaintiff Depo. 29:11-30:11).]

III. Brownsburg's organizational structure, policies, and practices.

a. Board-level policies.

During the 2017-2018 school year, Brownsburg maintained two board-level policies relevant to this appeal; the first, 3122—Nondiscrimination and Equal Employment Opportunity, prohibited discrimination in employment based on religion. [Doc. 113-4 at 14.] The policy also prohibited retaliation against any "person in the exercise or enjoyment of any right granted or protected by" certain antidiscrimination laws, including Title VII. [*Id.* at 16-17.] The policy included informal and formal complaint processes, which allowed employees to make such complaints according to the procedures specified in the policy. [*Id.* at 16-18.]

The second policy, 3140—Resignation, applied to teacher resignations and stated in relevant part that "[p]ursuant to State law, following submission of a resignation to the Superintendent, the employee may not withdraw or otherwise rescind that resignation" and "[a] resignation, once submitted, may not then be rescinded unless the Board agrees." [Doc. 120-8 at 2.]. Another board-level policy, 0100—Definitions, defined "Superintendent" to include "a delegate unless the law, policy or guideline specifically prohibits the delegation." [Doc. 120-9 at 4.]

b. Practices related to transgender high school students.

Before the start of 2017-2018 school year, Brownsburg's high school community was experiencing a growing awareness of the needs of transgender

students. [Doc. 120-1 at 3.]. In the opinion of Brownsburg's administration, transgender students face significant challenges at school, including diminished self-esteem and heightened exposure to bullying. [*Id.*] Brownsburg's administration also thought that these challenges threaten transgender students' classroom experience, academic performance, and overall well-being. [*Id.*] Brownsburg's administration had heightened attention to these issues before the start of the 2017-2018 school year because several transgender students had enrolled as high school freshmen. [*Id.*]

A very practical and important question that arose for the Brownsburg administration was how high school staff should address transgender students in class. [Doc. 120-1 at 3.] A high school classroom cannot function without teachers addressing students directly. [*Id.*] The practice Brownsburg's administration developed to help transgender students, teachers, and other members of the high school community was to allow any student to change the name listed in the high school's "PowerSchool" database, but only if the student provided letters from a parent and a healthcare professional regarding the need for the name change. [*Id.*] Staff were then required to use the name in PowerSchool. [*Id.*]

Brownsburg's administration thought this practice furthered two primary goals. First, it provided high school staff with a straightforward, easy-to-follow rule when addressing students—that is, staff need only call students by the name in PowerSchool. [Docs. 120-1 at 4.] Second, and more important in the administration's view, the practice afforded dignity and showed empathy toward transgender

students, as well as those considering or in the process of gender transition. [Doc. 120-1 at 4.] As Dr. Jessup explained, Brownsburg's "administration considered it important for transgender students to receive, *like any other student*, respect and affirmation of their preferred identity, provided they go through reasonable channels such as receiving parent permission and a healthcare professional's approval." [*Id.* (emphasis added).]

IV. Brownsburg's efforts to accommodate Kluge.

a. Initial accommodation efforts in May 2017.

In a May 2017 letter to Dr. Daghe signed by Kluge and three other high school teachers, Kluge expressed concern over his perception of the administration's approach to transgender students at recent high school faculty meetings. [Doc. 120-3 at 11-12 (Plaintiff Depo. 39:7-42:18).] Kluge stated in the letter that "encouraging gender dysphoria is harmful to the individual" and "dangerous to the rest of the community." [Doc. 113-1 at 28.]. Kluge cited "research documents" that he claimed demonstrated the "devastating effects of transgenderism" and quoted several Bible passages. [*Id.* at 26-30.]. Kluge concluded the letter with twelve points, including an observation that "we should provide our students with a safe learning environment" and that the administration not "suggest that teachers encourage transgender students in their folly by playing along with their psychiatric disorder in referring to [transgender students] by their preferred pronoun." [Docs. 113-1 at 30-31; 120-3 at 12-13 (Plaintiff Depo. 44:24-46:1).]

When Dr. Daghe met with Kluge and the three other teachers who signed the letter, he perceived that their main concern was they wanted an easy-to-follow rule when addressing students. [Doc. 120-5 at 7 (Daghe Depo. 34:8-35:4; 36:7-14).] Dr. Daghe proposed that the teachers use the name in PowerSchool, and the other three teachers agreed. [Doc. 120-3 at 12 (Plaintiff Depo. 42:12-43).] Kluge said nothing in response, but was "shocked" the other teachers agreed to Dr. Daghe's proposal and concluded they had done an "about-face." [*Id.* (Plaintiff Depo. 42:19-43:22)]

Minutes after the meeting concluded, Kluge spoke alone with Dr. Daghe and encouraged him to resist changing the PowerSchool database from "legal names" to "transgender names."[2] [Docs. 120-3 at 12, 15 (Plaintiff Depo. 42:19-43:22; 54:24-55:6).] Based on this conversation, Kluge thought that the administration "would continue to use legal names and that we would not be promoting transgenderism in our schools, we would stop teaching it in our faculty meetings, and that [Dr. Daghe] had heeded our urging." [*Id.* at 12, 14 (Plaintiff Depo. 44:14-23, 50:4-23).]

b. Accommodation efforts around the start of the 2017-2018 school year.

Nine days before the 2017-2018 school year began, a guidance counselor emailed Kluge to inform him that two transgender students had enrolled in his class and that those students' first names had been changed in PowerSchool. [Docs.

[2] Kluge explained that by "legal names," he meant "[t]he name that's on their birth certificate, the one that was stored on their birth records." [Doc. 120-3 at 15 (Plaintiff Depo. 54:24-55:2).] By "transgender names," Kluge meant "[t]he opposite sex name that they had switched to that was not their legal name." [*Id.* (Plaintiff Depo. 55:3-6).] At least two transgender students who were in Kluge's classes legally changed their birth name to their "transgender name," albeit after they were enrolled in Kluge's class. [Docs. 22-3 at 2; 58-1 at 2.]

120-3 at 13 (Plaintiff Depo. 47:24-49); 120-10 at 2; 120-11 at 2.] Because the guidance counselor stated that Kluge should "feel free" to use the students' preferred first name and pronoun, Kluge did not consider this a directive. [Doc. 120-3 at 13 (Plaintiff Depo. 48:17-49:22).]

On the first day of classes for the 2017-2018 school year, Kluge met with Dr. Daghe and told him that because the guidance counselor's email was not a directive, his plan was to use "legal names when I start teaching later in the day." [Doc. 120-3 at 14 (Plaintiff Depo. 50:23-52:13).] Dr. Daghe contacted Dr. Snapp and, in a meeting later that day, Kluge told them that his sincerely-held religious belief prohibited him from using a "transgender" first name when addressing students. [*Id.* at 14 (Plaintiff Depo. 52:14-53:2).] Dr. Snapp provided three options—address students by the name in PowerSchool, resign, or face suspension pending termination. [*Id.* (Plaintiff Depo. 53:3-8).] After a separate telephone conversation between Dr. Snapp and Kluge's pastor, the administration agreed to the pastor's request that Kluge have the weekend to consider his options. [*Id.* at 15-16 (Plaintiff Depo. 56:20-57:18, 58:2-16).]

c. The agreed-upon accommodations.

The following Monday, Kluge met with Dr. Snapp and Gordon and proposed that Brownsburg allow him to address students by the last name in PowerSchool. [Doc. 120-3 at 17 (Plaintiff Depo. 63:11-65:10).] The administration agreed to Kluge's proposal as an accommodation, as well as another that Kluge proposed. [*Id.*

at 17-18 (Plaintiff Depo. 65:11-66:23).] Both accommodations are memorialized in a memorandum from Dr. Daghe to Kluge dated July 28, 2017:

- First, the administration agreed that Kluge "may use last name only to address students."
- Second, the administration relieved Kluge from passing out orchestra uniforms to students.

[Doc. 15-1.] Kluge signed the memorandum on July 31, 2017, agreeing to comply with these accommodations. [*Id.*]

Regarding the first accommodation, Kluge understood that he would address all of his students by last name, as opposed to only transgender students. [Doc. 120-3 at 18 (Plaintiff Depo. 68:14-69:18).] To illustrate, Kluge would address Heather Williams as "Williams" or Lucas Jones as "Jones." [Doc. 120-2 at 4.] In addition, Kluge understood that he would not use honorifics when addressing students (*e.g.,* "Mr." or "Ms."). [Doc. 120-3 at 18 (Plaintiff Depo. 68:14-69:18).]

The second accommodation addressed Kluge's concern that he not be "directly responsible for giving a man's clothing item to a female student" or vice-versa. [Doc. 120-3 at 17-18 (Plaintiff Depo. 65:11-67:1).]

After his meeting with Dr. Snapp and Gordon, Kluge began teaching. [Doc. 120-3 at 18-19 (Plaintiff Depo. 69:19-70:2).]

V. Students, parents, and teachers complain about the last-name-only accommodation.

During the Fall 2017 semester, Brownsburg's administration received complaints about Kluge's use of last names from members of the high school community, including parents and students. [*See infra* at 12-15.]

a. Complaints from parents.

In a letter to the administration dated September 1, 2017, the parents of a transgender student wrote that "[o]ur medical providers agree that it is in our child's best interest to socially transition as a male. We fully support and love our child, and want to help him live the best life that he can live." [Doc. 120-12 at 2.] Although the parents noted that "most of the staff at Brownsburg High School have been very supportive and have willingly made the transition to using [our child's] male name and pronouns," they were concerned about a teacher who called their child "Miss." routinely. [*Id.*] In the parents' view, this "causes understandable confusion for other students, and leads to students reverting to using female pronouns." [*Id.*] Several weeks later, the mother emailed the school counselor stating that Kluge was continuing to call her child "Miss [ ]" and that it was causing her child "a lot of distress." [Doc. 120-13 at 2.]

b. Complaints from Equality Alliance Club students.

The main source of complaints about Kluge's use of last names came from the Equality Alliance Club, a high school extracurricular club that met weekly to discuss issues impacting the LGBTQ community. [Docs. 120-14 at 32 (Lee Depo. 32:18-33:9); 58-2 at 2.] Craig Lee, a teacher at the high school, was the club's sponsor. [Docs. 120-14 at 4 (Lee Depo. 22:20-23:3); 58-2 at 1-2.] Lee's duties as sponsor consisted of serving as a resource for the students and supervising the meetings. [Doc. 120-14 at 4 (Lee Depo. 23:17-25).] Attendance at the club's weekly meetings ranged from twelve to forty students, and at least four of its regular

participants were transgender. [Docs. 120-14 at 6-7 (Lee Depo. 33:19-35:1); 58-2 at 2.]

Students who attended the meetings complained weekly about Kluge's use of last names. [Docs. 120-14 at 7-8, 13-14; (Lee Depo. 36:20-38:3, 73:9-23, 76:19-77:10); 58-2 at 7-8.] Sam Willis and Aidyn Sucec, two transgender students in Kluge's orchestra class during the 2017-2018 school year, were among the students who complained. [Docs. 22-3 at 3-4; 58-1 at 2-3, 7-10.] Based on Lee's observations, "It was just very, very clear at the meetings to see how much emotional harm was being caused towards Sam and Aidyn. It was clear for everyone at the meetings just to see how much of an impact it was having on them." [Docs. 120-14 at 8, 11 (Lee Depo. 39:2-6, 51:12-52:6).] According to Lee, students felt hurt because Kluge would not use their preferred first names. [Doc. 58-2 at 2-3.]. Lee also reported that transgender students felt "isolated and targeted" because they understood that their presence in class was why Kluge changed the way he addressed students. [*Id.*]

Sucec explained that "Kluge's behavior made me feel alienated, upset, and dehumanized. It made me dread going to orchestra class each day, and I felt uncomfortable every time I had to talk to him one-on-one." [Doc. 22-3 at 4.] Sucec's experience in Kluge's class influenced his decision not to enroll in orchestra after the 2017-2018 school year and, ultimately, to stop attending Brownsburg High School. [*Id.* at 4-5.]

Willis observed that "Kluge's use of last names in class made the classroom environment very awkward" and led him to conclude "that I was being targeted

because of my transgender identity." [Filing No. 58-1 at 3-4.] Willis further explained, "Even now, it hurts to think about how Mr. Kluge treated me that year." [*Id.* at 4.] Willis opined that "if everyone in my life had refused, like Mr. Kluge, to use my corrected name, I would not be here today." [*Id.* at 5.]

In the Fall of 2017, Dr. Jessup attended an Equality Alliance Club meeting based on concerns she received from counselors. [Doc. 120-6 at 7 (Jessup Depo. 44:9-24).] Approximately forty students attended. [Doc. 120-1 at 4.] Approximately four or five students complained specifically about a teacher using only last names to address students and, in Jessup's view, the other students in attendance appeared to agree. [*Id.*] Although students did not identify Kluge by name, Jessup had no doubt he was the teacher, for he was the only Brownsburg teacher permitted to use last names only instead of the names in PowerSchool. [*Id.*]

Lee shared the Equality Alliance Club's student complaints with Dr. Daghe and Jessup. [Doc. 58-2 at 2-3.] For example, in an email to Dr. Daghe dated August 29, 2017, Lee reported that there was a teacher who refused to call a student by the student's new name in PowerSchool and that "this is a serious issue and the student/parents are not exactly happy about it." [Doc. 120-15 at 2.] Although Lee did not identify Kluge by name in this email, Dr. Daghe knew it was Kluge, as Kluge was the only teacher who had received an accommodation regarding using last names only and, in any event, Lee later confirmed to Daghe that the teacher was Kluge. [Doc. 120-2 at 4.] At faculty advisory meetings that occurred twice per month during the Fall 2017 semester, Lee continued to share with Dr. Daghe the

complaints and concerns he was hearing. [*Id.*] Lee also shared the complaints with Jessup during a mid-Spring 2018 meeting. [Doc. 120-14 at 14-15 (Lee Depo. 74:22-79:17).]

c. Complaints from others in the high school community.

Beyond parents and students in the Equality Alliance Club, others in the high school community complained about Kluge using last names:

One of Lee's students, who was also in one of Kluge's classes but did not attend Equality Alliance Club meetings, complained to Lee that Kluge's use of last names made the student feel "very uncomfortable" and that the student "felt really bad for those transgender students because of how [Kluge] . . . was conducting himself in class." [Doc. 120-14 at 15-16 (Lee Depo. 79:4-84:12).]

Three of Lee's teaching colleagues told Lee that they had received complaints from students and that based on those complaints, they thought Kluge's use of last names was harming students. [Doc. 120-14 at 16-17 (Lee Depo. 85:4-86:15).]

During monthly meetings in Fall 2017, the two performing arts department heads shared their perception that Kluge was making students uncomfortable by using last names only "and that the tension this was causing was affecting the overall functioning of the performing arts department." [Doc. 120-2 at 4.] Dr. Daghe received more complaints from these department heads than the complaints Lee shared from students at the Equality Alliance Club meetings. [Doc. 120-5 at 9 (Daghe Depo. 57:15-24).]

VI. Brownsburg's efforts to work with Kluge in light of the complaints.

As Dr. Daghe heard these concerns throughout the Fall of 2017, he wanted to be fair to Kluge, give the situation some time, and see if the problems and student concerns resolved themselves. [Doc. 120-2 at 4.] When they did not, by December 2017, Dr. Daghe realized he needed to address these issues directly with Kluge. [*Id.*]

On December 13, 2017, Dr. Daghe met with Kluge to tell him about the complaints he received regarding Kluge's use of last names. [Doc. 120-3 at 22 (Plaintiff Depo. 83:6-84:8).] Kluge asserts this was the first time he heard such complaints. [*Id.* (Plaintiff Depo. 84:9-18).] According to Kluge,

> Daghe scheduled a meeting with me to ask how the year was going and to tell me that my last-name-only [a]ccommodation was creating tension in the students and faculty. He said the transgender students reported feeling "dehumanized" by my calling all students last-name-only. He said that the transgender students' friends feel bad for the transgender students when I call the transgender students, along with everyone else, by their last-name-only. He said that I am a topic of much discussion in the Equality Alliance Club meetings. He said that a number of faculty avoid me and don't hang out with me or include me as much because of my stance on the issue.

[Docs. 120-3 at 22 (Plaintiff Depo. 83:20-84:3); 15-3 at 4.]

Kluge responded to the complaints as follows:

> I explained to Daghe that this persecution and unfair treatment I was undergoing was a sign that my faith as witnessed by my using last-names-only to remain neutral was not coming back void, but was being effective. He didn't seem to understand why I was encouraged. He told me he didn't like things being tense and didn't think things were working out. He said he thought it might be good for me to resign at the end of the year. I told Daghe that I was now encouraged all the more to stay.

[Docs. 120-3 at 24 (Plaintiff Depo. 90:5-22); 15-3 at 5.]

According to Kluge, after learning about the complaints from Dr. Daghe at the December 13, 2017, meeting, Kluge still believed that the last-name-only accommodation was working, that it should continue, and that there was no reason to consider an alternative. [Doc. 120-3 at 24 (Plaintiff Depo. 92:5-93:24).]. Kluge also thought the complaints did not demonstrate undue hardship and instead were a "heckler's veto." [*Id.* at 24-25 (Plaintiff Depo. 93:25-94:6).] As Kluge put it, "[W]hy would I change?" [*Id.* at 25 (Plaintiff Depo. 94:4-95:15).] Further, Kluge suspected that Dr. Daghe was lying about student and teacher complaints because Kluge had not experienced animosity with co-workers, Dr. Daghe did not identify by name any students or teachers who complained, Kluge perceived no tension in his classes, and his students performed "better than ever" at orchestra competitions. [*Id.* at 23 (Plaintiff Depo. 88:5-90:4).]

VII. Kluge refuses to stop using the last-name-only accommodation and resigns effective at the end of the school year.

During their next meeting on January 17, 2018, Dr. Daghe told Kluge that he wanted him to resign at the end of the school year. [Docs. 120-3 at 25 (Plaintiff Depo. 95:8-12); 15-3 at 5.] Dr. Daghe cited the student and teacher complaints about the last-name-only accommodation as the reason for his request. [Doc. 120-3 at 25 (Plaintiff Depo. 95:13-17).] Kluge responded that "if there is tension and conflict, well, that's encouragement that I shouldn't quit but I should continue to pursue neutrality," by which he meant using last names when addressing students. [*Id.*]

In an email to Dr. Snapp and Dr. Daghe dated February 4, 2018, Kluge referenced an FAQ from a recent faculty meeting indicating that next school year,

Brownsburg expected teachers to address students by the first name in PowerSchool. [Doc. 120-16 at 2.] Kluge concluded the email by asking if it was "correct that I would be allowed to continue to use last-names-only when addressing students next school year and beyond?" [*Id.*]

Dr. Daghe and Gordon met with Kluge on February 6, 2018, to respond to Kluge's question. [Docs. 120-3 at 25 (Plaintiff Depo. 96:10-21); 15-3 at 6.] They told Kluge that although Brownsburg would continue the last-name-only accommodation for the remainder of the 2017-2018 school year, it would not be available for the next school year. [Docs. 120-3 at 26 (Plaintiff Depo. 99:9-24); 113-4 at 24 (Gordon Depo. 5:4-12).] They reiterated to Kluge that students were offended by being called by their last names only. [Doc. 113-4 at 26 (Gordon Depo. 7:16-19).] Kluge acknowledged in this conversation that he understood that an employer is not obligated to accommodate all religious beliefs. [*Id.* at 27 (Gordon Depo. 8:9-11).] Dr. Daghe also stated that the last-name-only accommodation was not reasonable because it was detrimental to students. [*Id.* at 28 (Gordon Depo. 9:8-13).] They gave Kluge three options: resign, continue to use the last-name-only accommodation and face termination procedures, or stop using the last-name-only accommodation. [Doc. 120-3 at 26-27 (Plaintiff Depo. 100:3-102:12).]

On April 30, 2018, Kluge tendered his resignation, effective at the end of the 2017-2018 school year. [Doc. 120-17 at 2.] Kluge concluded his resignation with these requests: "Please do not process this letter nor notify anyone, including any administration, about its contents before May 29, 2018. Please email me to

acknowledge that you have received this message and that you will grant this request." [*Id.*] In response, Gordon stated, "I will honor your request and not process this letter or share with the BHS administration until May 29." [*Id.*] Kluge did not follow up with Gordon to clarify what she meant by the term "BHS administration." [Doc. 120-3 at 28 (Plaintiff Depo. 108:9-109-4).]

VIII. Despite Brownsburg allowing the last-name-only accommodation to continue until the end of the school year, Kluge abandons it during an orchestra awards ceremony.

In May 2018, Kluge participated in an orchestra awards ceremony that honored graduating students and others for their achievements during the school year. [Doc. 120-3 at 32 (Plaintiff Depo. 125:2-17).] The ceremony was part of the curriculum, and Kluge was participating as a Brownsburg employee. [*Id.* at 32-33 (Plaintiff Depo. 125:22-126:6).] According to Kluge, the following is an accurate report of the ceremony:

> During classes, Kluge addressed students by last names, as a reasonable accommodation for his sincerely held Christian beliefs. But during the orchestra awards ceremony, because of its formal nature, he used the full names for students as listed in PowerSchool to address all students as they were receiving their awards—including transgender students—because he was trying to work with the school in only requesting what was reasonable. Kluge thought it unreasonable and conspicuous to address students in such an informal manner at such a formal event, as opposed to the classroom setting where teachers refer to students by last names as a normal form of address. Kluge's Christian faith required that he do no harm to his students, and this acquiescence to the administration's position was done solely out of sincerely-held beliefs, and not in agreement with the policy. Otherwise, Kluge would have created a scene that would bring into doubt his stated rationale for usage of last names only.

[Docs. 120-3 at 32 (Plaintiff Depo. 125:18-21); 120-19 at 7.] Kluge did not tell Brownsburg before the ceremony that he intended to address all students by the first and last names in PowerSchool. [Doc. 120-3 at 34 (Plaintiff Depo. 130:10-131:4).] Kluge thought that he was promoting a transgender lifestyle when he addressed students by their "transgender names" during class, but not when he did so during the ceremony. [*Id.* at 33-34 (Plaintiff Depo. 128:6-130:9).]

Kluge justified a different approach in each setting because addressing students in the classroom occurs more frequently and is less formal. [Doc. 120-3 at 33-34 (Plaintiff Depo. 128:6-130:9).] Further, Kluge analogized the classroom setting to a high school coach addressing student-athletes by last names, but he lacked personal knowledge whether this actually occurred at the high school during the 2017-2018 school year or whether any student-athlete complained about a coach using last names. [*Id.* at 33, 35-36 (Plaintiff Depo. 127:7-12, 129:2-12, 137:7-138:12).]. Other than his classroom experience, the only instance where Kluge claims that he observed teachers addressing students by last name was during work on the school musical. [*Id.* at 35 (Plaintiff Depo. 134:17-136:25).] Kluge did not know whether any musical student complained about being addressed by last name. [*Id.* Plaintiff Depo. 137:1-6).]

IX. Brownsburg's board accepts Kluge's resignation.

At its regular monthly meeting on June 11, 2018, Brownsburg's board unanimously approved Kluge's resignation, effective at the end of the 2017-2018

school year. [Doc. 120-18 at 2, 8.] Kluge's resignation was one of ten teacher resignations that the board approved during that meeting. [*Id.*]

X. Relevant proceedings below.

Kluge's Amended Complaint is the operative pleading for this appeal. [Doc. 15.] In his Amended Complaint, Kluge attempted to raise thirteen claims, naming Brownsburg as a defendant along with several employees and a board member. [*Id.* at 17-31.]

a. The District Court dismisses most of Kluge's Amended Complaint.

The original defendants moved to dismiss Kluge's Amended Complaint. [Doc. 44.] Kluge conceded that dismissal was appropriate for one of his claims and for those against the individual defendants. [Doc. 56 at 10-11, 31.] The District Court accepted these concessions and further concluded that all but two of Kluge's claims survived the pleading stage, specifically Kluge's Title VII failure-to-accommodate claim and his Title VII retaliation claim. [Doc. 70 at 50-51.]

b. The District Court resolves Kluge's remaining claims in Brownsburg's favor.

Kluge sought partial summary judgment as to Brownsburg's liability for his failure-to-accommodate claim. [Doc. 112 at 3-4.] Brownsburg filed a cross-motion for summary judgment, seeking final judgment in its favor on Kluge's two remaining claims. [Doc. 120.] Brownsburg also argued that if the District Court declined to grant summary judgment in its favor on the failure-to-accommodate claim, it should decline summary judgment in Kluge's favor regarding the sincerity of his religious belief. [Doc. 121 at 47-49.]

The District Court denied Kluge partial summary judgment and granted summary judgment in Brownsburg's favor on Kluge's remaining claims. [RSA at 52-53.]

Regarding the failure-to-accommodate claim, the District Court concluded that Kluge had established a prima facie case, emphasizing that although Brownsburg "has shown that there are issues of fact as to whether Mr. Kluge's religious beliefs are sincerely held," it nevertheless assumed without deciding that Kluge's "religious beliefs against referring to transgender students by their preferred names and pronouns are sincerely held." [RSA at 39-40.] However, the District Court concluded that as a matter of law, Brownsburg had established two separate bases for undue hardship, specifically that continuing the last-name-only accommodation would have unduly interfered with Brownsburg's ability to educate students and that it would have unduly exposed Brownsburg to legal liability. [*Id.* at 42-48.]

Regarding the retaliation claim, the District Court concluded that Kluge had waived it on two separate grounds. [RSA at 50-51.] First, the District Court reasoned that Kluge's "briefing on his retaliation is meager, totaling less than three pages and merely reiterating his version of the facts he believes to be relevant without discussion of how those facts meet the requirements of a retaliation claim." [*Id.* at 50 (footnote omitted).] Second, the District Court noted that Kluge failed to address Brownsburg's lack-of-pretext argument. [*Id.* at 50.] Kluge's waivers aside, the District Court further concluded that the retaliation claim failed on the merits

because there was no causal connection between Kluge's protected activity and his resignation and, even if there was, there was no evidence from which a reasonable factfinder could infer pretext. [*Id.* at 51-52.]

Based on the foregoing, the District Court entered final judgment. [Doc. 160.]

Summary of the Argument

The District Court properly granted summary judgment in Brownsburg's favor on Kluge's failure-to-accommodate claim. Recognizing that the affirmative defense of undue hardship requires the employer to demonstrate a de minimis or slight burden, and recognizing that Brownsburg's mission is to educate all students who come through its doors, the District Court properly concluded that Kluge's use of only last names imposed an undue hardship on Brownsburg's mission and conflicted with its philosophy of creating a safe and supportive environment for all students. Kluge's arguments for reversal misconstrue the case law and mischaracterize the nature and quality of the designated evidence supporting the District's Court's decision.

The District Court also properly concluded as a matter of law that Brownsburg established a separate basis for undue hardship, namely, that continuing the last-name-only accommodation would have subjected Brownsburg to an unreasonable risk of liability under Title IX. Kluge's arguments to the contrary are meritless. Brownsburg was not required to mention litigation concerns when telling Kluge that it planned to withdraw the accommodation. Nor is the exposure-to-litigation defense limited only to instances where an accommodation exposes an

employer to an unreasonable risk of a workplace harassment suit. The law interpreting Title IX, most prominently *Whitaker ex. rel. Whitaker v. Kenosha Unified School District*, 858 F.3d 1034 (7th Cir. 2017), recognized that discrimination on the basis of a student's transgender status was actionable under Title IX, and Kluge's use of only last names exposed Brownsburg to an unreasonable risk of such a discrimination suit.

The District Court also properly granted summary judgment in Brownsburg's favor on Kluge's retaliation claim. The District Court found for two separate reasons that Kluge waived this claim, specifically that Kluge had not developed his argument for a prima facie case and that he failed to address Brownsburg's lack-of-pretext argument. Kluge's attempts on appeal to overcome waiver are sparse and as deficient as the argument he made to the District Court. Waiver aside, the District Court should be affirmed on the merits. Brownsburg established as a matter of law that there was no causal connection between Kluge's request for an accommodation and his resignation. To the contrary, Brownsburg provided Kluge two accommodations, withdrew one when it became apparent that it was frustrating Brownsburg's educational mission, and never withdrew the other accommodation. Moreover, Kluge's retaliation claim also fails because complaints from the high school community are a legitimate, nondiscriminatory reason for withdrawing the accommodation, and Kluge has never argued that such reason was a pretext.

Finally, as an alternative, if this Court reverses on Kluge's failure-to-accommodate claim, then Brownsburg submits that the sincerity of Kluge's religious

belief is a jury question. The District Court thought the same, but assumed Kluge's sincerity for purposes of deciding summary judgment. Kluge acted inconsistently with his alleged sincerely-held religious belief that it is sinful to promote gender dysphoria. Kluge's inconsistency is apparent from the undisputed fact that he unilaterally decided to address students, some of whom were transgender, by their first and last names during an awards ceremony. Kluge's attempts to reconcile this inconsistency are unconvincing, or at least a reasonable jury could so conclude.

Argument

I. Standard of review.

Per Federal Appellate Rule 28(b)(4), Brownsburg agrees with Kluge's statement of the standard of review as far as this Court's review of the District Court's summary judgment rulings are concerned. [App. Doc. 13 at 23.]

Brownsburg further asserts, however, that the following standard of review applies to the District Court's finding that Kluge waived his retaliation claim: "We review the factual determinations upon which a district court predicates a finding of waiver for clear error and the legal question of whether the conduct amounts to waiver de novo." *E360 Insight v. The Spamhaus Project*, 500 F.3d 594, 599 (7th Cir. 2007).

II. The District Court properly granted summary judgment in Brownsburg's favor on Kluge's failure-to-accommodate claim.

Title VII prohibits an employer from discriminating in the terms, conditions, or privileges of employment because of an employee's religion and also requires an employer to provide reasonable accommodation for an employee's religious belief

unless it would cause "undue hardship on the conduct of the employer's business." 42 U.S.C. §§ 2000e-2(a), 2000e(j).

To state a prima facie case of religious discrimination based on failure to accommodate, an employee must show that his sincerely-held religious belief conflicted with an employment requirement and that the employee's need for an accommodation of that religious belief was the basis for the employer's adverse employment action. *Porter v. City of Chicago*, 700 F.3d 944, 951 (7th Cir. 2012), *as modified by E.E.O.C. v. Abercrombie & Fitch, Inc.*, 135 S. Ct. 2028, 2032-33 (2015). If the employee establishes a prima facie case, then the burden shifts to the employer to show that the reasonable accommodation would have caused undue hardship. *Porter*, 700 F.3d at 951.

a. The District Court's treatment of Kluge's prima facie case.

The District Court determined that Kluge had established a prima facie case for failure to accommodate. [RSA at 36-39.] Its reasoning is worth detailing here:

Regarding the adverse employment action requirement, of the three Kluge advanced, the District Court rejected as "wholly without merit" that Brownsburg coerced his resignation through misrepresentation. [RSA at 36-37.] The District Court also rejected Kluge's assertion that Brownsburg's alleged failure to offer other potential accommodations was an adverse employment action, characterizing it as "both legally unsupported and inconsistent with the evidence of record." [*Id.* at 38 (footnote omitted).] What the District Court did find, and what Brownsburg did not dispute, was that requiring Kluge to choose between foregoing the last-name-only

accommodation, resigning, or facing termination procedures was an adverse employment action. [*Id.* at 38-39.]

Having concluded that Kluge established an adverse employment action, the District Court noted that although "there are issues of fact as to whether Mr. Kluge's religious beliefs are sincerely held . . . for purposes of this Order, the Court will assume without deciding that Mr. Kluge's religious beliefs against referring to transgender students by their preferred names and pronouns are sincerely held." [RSA at 40-41.]

On appeal, Kluge does not challenge the District Court's rejection of the two purported adverse employment actions mentioned above. [App. Doc. 13 at 27-32.] Kluge appears to challenge the District Court's reasoning regarding the sincerity of his religious belief [*id.* 17-18], for his concluding request is that this Court enter summary judgment in his favor on the failure-to-accommodate claim. [*Id.* at 43.] We explain in Part IV. below why the District Court properly concluded that the alleged sincerity of Kluge's religious belief remains a fact issue. [*See infra* at 47-50.]

For purposes of this appeal only, and subject to Part IV. below, Brownsburg does not challenge the District Court's conclusion that Kluge established a prima facie case for failure to accommodate. As such, Brownsburg's argument turns to its affirmative defense of undue hardship.

b. As a matter of law, Brownsburg established two separate bases for undue hardship.

The District Court concluded that as a matter of law, Brownsburg had established two separate bases for undue hardship. [RSA at 42-48.] In his Opening

Brief, Kluge argues that this Court not only reverse that conclusion, but also grant him summary judgment on the failure-to-accommodate claim. [App. Doc. 13 at 32-40.] The following explains why Kluge's argument lacks merit.

1. The "de minimis" or "slight burden" requirement.

Title VII relieves an employer of the obligation to provide reasonable religious accommodation if the employer cannot do so "without undue hardship on the conduct of the employer's business." 42 U.S.C. § 2000e(j).

"The Supreme Court has construed the term 'undue hardship' in 42 U.S.C. § 2000e(j) to mean a cost to the employer that is anything more than de minimis." *E.E.O.C. v. Ilona of Hungary, Inc.*, 108 F.3d 1569, 1576 (7th Cir. 1997) (citing *Trans World Airlines v. Hardison*, 432 U.S. 63, 84 (1977)); *see also Nottelson v. Smith Steel Workers D.A.L.U. 19806, AFL-CIO*, 643 F.2d 445, 451 (7th Cir. 1981). The Seventh Circuit further instructs that undue hardship analysis must descend into the particulars of the employer, the employee, and the accommodation in question: "The issue of undue hardship will depend on close attention to the specific circumstances of the job and the [accommodation] the employee believes is needed." *Adeyeye v. Heartland Sweeteners, LLC*, 721 F.3d 444, 455 (7th Cir. 2013).

Characterizing *Hardison*'s de minimis language as a "gloss," Kluge suggests that this Circuit's opinions analyzing undue hardship are inconsistent because some have invoked *Hardison* while others have not. [App. Doc. 13 at 26-27.] Kluge offers *Adeyeye v. Heartland Sweeteners, LLC*, 721 F.3d 444 (7th Cir. 2013), as a means to

reconcile this perceived inconsistency. [*Id.*] Kluge's offer, however, should be declined for several reasons:

First, Kluge invites the Court to compare two opinions that invoked *Hardison*'s language with two others that did not. [App. Doc. 26.] The problem for Kluge, however, is that the two cases that did not invoke *Hardison*'s language did so because neither reached the undue hardship question. The panel in *Porter v. City of Chicago*, 700 F.3d 944, 953 (7th 2012), concluded that "the City discharged its obligation under Title VII by offering Porter an accommodation that would have eliminated the conflict between her work schedule and her religious practice," thus obviating any discussion of undue hardship. Similarly, the panel in *Reed v. Great Lakes Companies, Inc.*, 330 F.3d 931, 935 (7th Cir. 2003), affirmed the district court's grant of summary judgment in favor of the employer because the employee could not assert "an unqualified right to disobey orders that he deems inconsistent with his faith though he refuses to indicate at what points that faith intersects with the requirements of his job." *Porter* and *Reed* create no inconsistency in this Circuit's undue hardship analysis because those opinions never even undertook such analysis.

Second, Kluge's reliance on *Adeyeye* as reconciling his perceived inconsistency is misplaced. In *Adeyeye*, a line worker requested one week of vacation followed by three weeks of unpaid leave to travel to Nigeria to participate in his father's burial rights. 721 F.3d at 455. The panel initially noted that "[t]he Supreme Court has recognized unpaid leave as a reasonable and generally satisfactory form of

accommodation for religious faith and practice . . . ." *Id.* Based on the specific facts of the case, the panel rejected the employer's argument that undue hardship applied as a matter of law. Instead, the panel concluded that undue hardship was a jury question in part because there was an abundance of temporary workers to fill the permanent workers' spots and, because the employer dealt with a high turnover rate ordinarily, it would not be an undue hardship for the employer to address the plaintiff's particular absence. *Id.* The panel addressed *Hardison*'s language in the context of the employer's argument "that *any* inconvenience or disruption, no matter how small, excuses its failure to accommodate," *id.* (emphasis in original), reasoning that "*Hardison* is most instructive when the particular situation involves a seniority system or collective bargaining agreement, as in *Hardison* itself." *Id.* at 456. But the *Adeyeye* panel's statement that *Hardison* is "most instructive" in a particular context is not a command to disregard it in all other contexts, which is what Kluge is implying the Court should do.

Third, and perhaps most importantly, whatever concern the *Adeyeye* panel may have had with *Hardison* was dispelled this March by *E.E.O.C. v. Walmart Stores East, L.P.*, 992 F.3d 656, 659-60 (7th Cir. 2021), which applied *Hardison* to an employee's request for relief from working between sundown Friday and sundown Sunday. In affirming the district court's grant of summary judgment in the employer's favor, the panel concluded that this request imposed more than a de minimis cost or "slight burden" because relieving the employee of weekend work obligations "would thrust on *other workers* the need to accommodate [the

employee's] religious beliefs." *Id.* at 695 (emphasis in original). The panel also emphasized "that the burden of accommodation is supposed to fall on the employer, not on other workers." *Id.* Regarding *Hardison*, the panel disavowed any perception that it should not be followed: "Three Justices believe that *Hardison*'s definition of undue hardship as a slight burden should be changed. Our task, however, is to apply *Hardison* unless the Justices themselves discard it." *Id.* at 660 (citations omitted). Kluge offers no legitimate reason for the Court to depart from this straightforward rule.[3]

2. The significance of Brownsburg's educational mission in analyzing undue hardship.

The District Court observed that Brownsburg's "business" for purposes of analyzing undue hardship was to provide public education. [RSA at 43.] That type of business is not voluntary in the same sense that a for-profit corporation is. Rather, a school corporation such as Brownsburg is required to provide this "business" as a matter of Indiana constitutional and statutory law. [*Id.*] Specifically, the Indiana Constitution obligates the State's legislative body "to provide, by law, for a general and uniform system of Common Schools, wherein tuition shall be without charge, and equally open to all." [*Id.* (quoting IND. CONST. art. VIII, § 1).] The District Court also noted that Indiana "public schools play a 'custodial and protective role,' which has been codified by the legislature in passing compulsory

[3] Although the District Court applied *Hardison* in granting Brownsburg summary judgment [RSA at 46], Brownsburg submits that the last-name-only accommodation is an undue hardship under any reasonable definition of that term, including *Hardison*'s de minimis or slight burden formulation.

education laws that mandate the availability of public education." [*Id.* (quoting *Linke v. Nw. Sch. Corp.*, 763 N.E.2d 972, 979 (Ind. 2002)).]

Given the constitutional and statutory mandate for Brownsburg's educational mission, the District Court thought it prudent to analogize that mission to the employer's mission in *Baz v. Walters*, 782 F.2d 701 (7th Cir. 1986). [RSA at 43-44.] *Baz* involved a Veterans Administration chaplain whose proselytizing contradicted the employer's view of a chaplain's role "as a quiescent, passive listener and cautious counselor." [*Id.* at 43 (quoting *Baz*, 782 F.2d at 704).] The District Court reasoned that *Baz* provided an appropriate comparison for analyzing how an employee's accommodation request might conflict with an employer's overall mission: "Just as the chaplain's philosophy of patient care was directly at odds with the philosophy of his employer, Mr. Kluge's religious opposition to transgenderism is directly at odds with [Brownsburg's] policy of respect for transgender students." [*Id.* at 43.]

In contrast, many other garden-variety religious accommodations are not directly at odds with an employer's mission. It is hard to see a contradiction with an employer's overall mission, for example, when an employee seeks time off for religious reasons, as in *Adeyeye*, for employers commonly provide some amount of time off as a benefit to employees. But *Baz* underscores that an employer's mission is vitally important to undue hardship analysis, and in this case Kluge's use of only last names plainly imposed upon Brownsburg's mission to educate all students.

In his Opening Brief, Kluge completely misses the point on how the District Court treated *Baz*. [App. Doc. 13 at 39.] Again, the relevant constitutional and statutory obligations require Brownsburg to educate all students who come through its doors. Brownsburg cannot discharge those obligations if, as the District Court noted, it accommodates an employee whose religious views are "directly at odds with [Brownsburg's] policy of respect for transgender students" or, to paraphrase Dr. Jessup, it failed to fulfill a goal of allowing "transgender students to receive, like any other student, respect and affirmation of their preferred identity, provided they go through reasonable channels such as receiving parent permission and a healthcare professional's approval." [Doc. 120-1 at 4.] As such, the common thread running through the accommodation in *Baz* and the one here is not, as Kluge put it, that Brownsburg's "'philosophy of' public education mandates transgender affirmation" [app. doc. 13 at 39], but rather that Brownsburg's teachers treat transgender students on par with any other student, thus fostering the classroom learning environment required by its mission—education for all students.

With this context in mind, we turn to the two bases for undue hardship that the District Court concluded were established as a matter of law, as well as Kluge's challenges to each.

3. Undue hardship based on interference with Brownsburg's ability to educate students.

As a matter of law, the District Court concluded that Kluge's "use of the last names only accommodation burdened [Brownsburg's] ability to provide an education to all students and conflicted with its philosophy of creating a safe and

supportive environment for all students." [RSA at 44-45 (footnote omitted).] Supporting this conclusion was "undisputed evidence" that Kluge's use of only last names made two transgender students "feel targeted and uncomfortable," that one of those students "dreaded going to orchestra class and did not feel comfortable speaking to Mr. Kluge directly" and "quit orchestra entirely," and that other students and teachers "complained that Mr. Kluge's behavior was insulting or offensive and made his classroom environment unwelcoming and uncomfortable." [*Id.* at 44.]

Kluge attacks the foregoing undisputed evidence and the District Court's conclusion on three grounds, but none has merit.

A. The complaints are more than mere "third-party grumblings."

Characterizing the foregoing undisputed evidence as "modest grumbling based on ideological disagreement," Kluge invites the Court to follow rulings from the Sixth and Ninth Circuits, which he claims stand for the proposition that mere third-party grumblings about an employee's religious accommodation do not constitute undue hardship. [App. Doc. 33-35.] Kluge's invitation should be declined for several reasons:

First, the cases Kluge relies on do not support the proposition he advances. *Cummins v. Parker Seal Company*, 516 F.2d 544, 549-50 (6th Cir. 1975), involved an employee's request to not work on Saturdays. The employer argued that resentment among the employee's fellow supervisors created undue hardship, including that those supervisors would have to pick up the slack for Saturday shifts.

Id. In reversing the district court's decision in favor of the employer following an administrative hearing, the panel characterized the supervisors' complaints as "mild and infrequent" and thus undue hardship was lacking, though the panel also acknowledged "that employee morale problems could become so acute that they would constitute an undue hardship." *Id.* at 550.

Anderson v. General Dynamics Convair Aerospace Division, 589 F.2d 397, 399 (9th Cir. 1978), concerned an employee's termination after he refused to join a mandatory union and pay related dues, unless those dues instead went to charity. The panel concluded there was no undue hardship because the employer never even attempted an accommodation. *Id.* at 401. As such, the panel rejected the employer's argument that accommodating the employee would create a "free rider" problem—that is, the benefits of union membership without paying dues—characterizing the problem as "hypothetical." *Id.* at 402. In this respect, *Anderson* is perhaps best understood as the inverse of the Sixth Circuit's observation that "[t]he employer is on stronger ground when he has attempted various methods of accommodation and can point to hardships that actually resulted," *Draper v. U.S. Pipe & Foundry Co.*, 527 F.2d 515, 520 (6th Cir. 1975), which is an on-point characterization of Brownsburg's efforts toward Kluge.

Neither *Cummins* nor *Anderson* purports to establish a bright-line rule regarding so-called third-party grumblings. Rather, each case represents resolution of undue hardship on the particular facts and circumstances presented. It should not be surprising that sometimes co-worker complaints fall short, or at least create

a jury question on whether they constitute undue hardship, particularly because those complaints often are directed toward a variety of ends, some of which may go to the heart of the employer's mission and some of which may not.[4]

Second, not all so-called third-party complaints should be treated the same when determining undue hardship. Here, the interests of students in a public school should count far more toward undue hardship than the interests of the co-workers in *Cummins* or *Anderson*, or any co-workers for that matter. Brownsburg's obligated mission to educate all students is critical to this analysis. Unlike a corporation seeking to maximize shareholder returns or a non-profit raising money for a cause, Brownsburg exists to educate all students that come through its doors. It cannot pick and choose which students receive an education and which do not. As such, where, as here, a teacher's accommodation burdens a school's efforts to educate students and foster an appropriate learning environment, and complaints from students and others support that burden, the former should give way to the latter.

That raises a final point. So-called third-party grumblings in and of themselves do not create undue hardship. Rather, a reviewing court should look at the ends to which those complaints are directed. Here, the complaints established, as the District Court again put it, that Kluge's use of last names only "burdened

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[4] *Cummins* also is not good law. The Supreme Court initially affirmed the Sixth Circuit's judgment by an equally divided Court, *Cummins*, 429 U.S. 65 (1976), but later vacated that decision and remanded to the Sixth Circuit in light of *Hardison*. *Cummins*, 433 U.S. 903 (1977). On remand the Sixth Circuit concluded "that the decision of the Supreme Court in Hardison requires affirmance of the judgment of the district court in the present case." *Cummins*, 516 F.2d 658 (6th Cir. 1977).

[Brownsburg's] ability to provide an education to all students and conflicted with its philosophy of creating a safe and supportive environment for all students." [RSA at 44-45 (footnote omitted).] Although research has not disclosed a decision from any circuit endorsing such an interest explicitly, this Court has stated in the context of a Title VII disparate treatment claim that a school employer's legitimate, non-discriminatory reason for its action can include concern about student learning and the classroom environment: "It is not unreasonable for Columbia to expect that its instructors will teach classes in a professional manner that does not distress students." *Smiley v. Columbia College Chicago*, 714 F.3d 998, 1002 (7th Cir. 2013); *cf.* RSA at 45 ("[I]nterference with students' learning need not be undertaken because it constitutes 'undue hardship' for the employer[.]" (quoting *Erlach v. New York City Bd. of Educ.*, 1996 WL 705282, at *11 (E.D.N.Y. Nov. 26, 1996), *aff'd* 129 F.3d 113 (2d Cir. 1997))).

The same result should obtain here.

B. Kluge's "universal affirmation" argument is meritless.

Next, Kluge argues that Brownsburg's decision to withdraw the last-name-only accommodation based on complaints was invalid because it was grounded "in the illegitimate expectation that students are entitled to require others to signal agreement with their beliefs." [App. Doc 13 at 35.] To support this argument, Kluge cites several cases that do not apply to Title VII undue hardship analysis at all.

Kluge quotes from the Fifth Circuit's observation that "no authority supports the proposition that [the district] may require [teachers, students], or anyone else to

refer to gender-dysphoric [students] with pronouns matching their subjective gender identify." [App. Doc. 13 at 36 (*quoting United States v. Varner*, 948 F.3d 250, 254-55 (5th Cir. 2020)).] As suggested by Kluge's liberal use of brackets, this quote is stripped of its context. The appeal in *Varner* concerned a convicted sex offender's request to have the offender's name changed on the judgment of committal, as well a request by separate motion that the Court "use female pronouns when addressing Appellant." 948 F.3d at 252-53. The panel concluded that it lacked jurisdiction to change the judgment of committal because no federal rule or statute authorized such a change. *Id.* at 253. Regarding the separate motion, the panel reasoned that although "[f]ederal courts sometimes choose to refer to gender-dysphoric parties by their preferred pronouns," no binding precedent or other authority obligated the panel to do so. *Id.* at 255. Nowhere did the *Varner* panel remotely suggest that its decision applied to Title VII undue hardship analysis—and particularly not to a case concerning a public school—and there is no legitimate reason for the Court to apply *Varner* here.

Likewise inapt is Kluge's reliance on First Amendment free speech cases, in particular *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), and *Zamecnik v. Indian Prairie School District No. 204*, 636 F.3d 874 (7th Cir. 2011). Those cases upheld certain First Amendment rights of students; they did not concern the rights of public school employees like Kluge. Although Brownsburg does not concede that these First Amendment cases apply to Title VII undue hardship analysis, to the extent the Court disagrees, then Brownsburg

asserts that *Mayer v. Monroe County Community School Corporation*, 474 F.3d 477, 480 (7th Cir. 2007), is a more appropriate characterization of the interests of a public school employee such as Kluge, including the panel's observation that "[i]t is enough to hold that the first amendment does not entitle primary and secondary teachers, when conducting the education of captive audiences, to cover topics, or advocate viewpoints, that depart from the curriculum adopted by the school system." The District Court rejected a similar argument by Kluge—specifically, that complaints by students and others were impermissible "heckler's vetoes"—observing that Kluge "has not provided any legal authority in support of his belief that the heckler's veto doctrine applies in the Title VII context." [RSA at 46 n.11.] Kluge's argument to this Court suffers from the same shortcomings and should be rejected for the same reasons.

Finally, Kluge intersperses quotes from a Second Circuit case to advance the following argument: "'[T]he morale of employees [and students] who did not suffer discrimination' cannot establish undue hardship when 'their hopes arise from an illegal system' of denying reasonable accommodations." [App. Doc. 13 at 36 (quoting *United States v. Bethlehem Steel Corporation*, 446 F.2d 652, 663 (2d Cir. 1971)).] *Bethlehem Steel* addressed the propriety of certain Title VII injunctive remedies based on specific discriminatory practices to which the employer admitted, including practices related to hiring and job assignment. 446 F.2d at 654. The language Kluge quotes concerns the employer's argument that one aspect of injunctive relief—relaxing the job transfer system—should not be implemented

because it would disadvantage employees who were not discriminated against. In rejecting the employer's argument, the court was observing the unremarkable proposition that the remedies available under Title VII should not take a backseat to the interests of other employees, particularly where the employer admitted to discriminatory practices. That is a far cry from Kluge's situation and, like the other cases he relies on, *Bethlehem Steel* has nothing to do with Title VII undue hardship analysis.

In sum, none of the cases that Kluge cites applies to Title VII undue hardship analysis, and Kluge offers no further authority suggesting that they do. Kluge closes his argument by suggesting that a ruling in Brownsburg's favor might allow students who are "anti-Semites to expel Jews who wear yarmulkes, or conspiracy theorists to banish Muslims who pray five times a day." [App. Doc. 36.] These extreme hypotheticals only expose the weakness of Kluge's arguments, for in neither is the employee's conduct actively harming students or disrupting the learning environment. The Court need not engage in them any further.

C. The District Court did not rely on so-called "after-created evidence."

Kluge's final challenge is that the District Court erred when it relied on so-called "after-created evidence" to support its conclusion. [App. Doc. 13 at 37.] The District Court did not.

Most of the evidence that Kluge characterizes as "after-created" is no such thing. Kluge claims, for example, that the District Court should not have considered affidavits from two transgender students because they postdated Kluge's

resignation. [App. Doc. 13 at 37-38.] Those affidavits describe the students' concerns, including that Kluge's use of only last names made one student "dread going to orchestra class each day" and feel "uncomfortable every time I had to talk to [Kluge] one-on-one." [Doc. 22-3 at 4.] The other student observed that "Kluge's use of last names in class made the classroom environment very awkward" and led him to conclude "that I was being targeted because of my transgender identity." [Doc. 58-1 at 3-4.] Critically, both students reported their concerns during Equality Alliance Club meetings [doc. 22-3 at 4; 58-2 at 2], and the adult sponsor for those meetings, Craig Lee, in turn reported their concerns and those of other students to Dr. Daghe for eventual discussion with Kluge. [Doc. 58-2 at 2-3, 120-2 at 4.] Far from serving as after-the-fact justification for Brownsburg's action, the students' affidavits instead recap their negative experiences in Kluge's classroom and their efforts to make teachers and administrators aware of those negative experiences. There is nothing untoward or improper about the District Court considering this evidence.[5]

4. Undue hardship based on Brownsburg's unreasonable exposure to liability.

The District Court correctly recognized that an employer is not required to provide a religious accommodation that would subject it to an unreasonable risk of

[5] Granted, one student withdrew from Brownsburg after Kluge resigned. But putting to the side that the District Court did not rely on that fact exclusively, it is hard to see how it helps Kluge, for it further demonstrates that Brownsburg's administration had valid concerns about how the last-name-only accommodation was affecting Kluge's students.

liability. [RSA at 46.] The District Court noted that, at the time of Kluge's accommodation, the law "recognized that discrimination on the basis of transgender status is actionable under Title IX." [RSA at 47 (*citing Whitaker ex rel. Whitaker v. Kenosha Unified School District*, 858 F.3d 1034, 1047-50 (7th Cir. 2017)).] As such, "continuing to allow Mr. Kluge an accommodation that resulted in complaints that transgender students felt targeted and dehumanized could potentially have subjected [Brownsburg] to a Title IX discrimination lawsuit brought by a transgender student," which in turn served as an additional basis for undue hardship. [RSA at 47-48.]

Kluge opposes the District Court's reasoning with three arguments, but none has merit.

First, Kluge argues this defense is invalid because Brownsburg "never cited litigation concerns when it revoked [his] accommodation and forced him to resign." [App. Doc. 13 at 38.] The District Court rejected the same argument in the context of complaints from students and others, noting that Kluge "has identified no legal authority for his apparent belief that complaints must be relayed to an employee before they can be considered relevant to an employer's decision as to whether an undue hardship exists." [RSA at 35 n.6.] Kluge's failure to cite any authority on appeal should require the same result.

Second, Kluge suggests that the Seventh Circuit has limited the exposure-to-litigation defense to instances where the accommodation results in the employer having to tolerate workplace harassment. [App. Doc. 13 at 38 (citing *Matthews v.*

Wal-Mart Stores, Inc., 417 F. App'x 552, 554 (7th Cir. 2011)).] However, there is no indication from the *Matthews* opinion or elsewhere that the Seventh Circuit applies the defense only to harassment cases. If anything, the authority is to the contrary. *See Bhatia v. Chevron U.S.A., Inc.*, 734 F.2d 1382, 1384 (9th Cir. 1984) (concluding undue hardship existed as a matter of law where accommodation "would risk liability for violating California Occupational Safety and Health Administration standards").

Third, Kluge asserts that a Title IX lawsuit would have been "frivolous" because the last-name-only accommodation followed existing law, specifically that "calling all students (of either sex) by their last names is not discriminatory or stereotypical: it is equal treatment for everyone." [App. Doc. 13 at 38-39.] The *Whitaker* court rejected a similar "equal treatment" or "neutrality" argument in the context of providing a gender-neutral bathroom for a transgender student: "Providing a gender-neutral alternative is not sufficient to relieve the School District from liability, as it is the policy itself which violates [Title IX]." 858 F.3d at 1050. The same logic should apply here, for even though Kluge called all students in a class with a transgender student by their last names, it was obvious that he was doing so because of the transgender student's presence. [Doc. 58-1 at 3-4.] And that in turn caused the hostile atmosphere that could have led to Title IX litigation.

In sum, courts analyzing undue hardship have sensibly recognized that Title VII does not require an employer to accommodate an employee's sincerely-held religious belief where doing so creates an unreasonable risk of liability. The District

Court appropriately recognized that doing so here would have subjected Brownsburg to such a risk, and Kluge's attempt to categorize a Title IX lawsuit as frivolous is unconvincing given the state of the law during his accommodation.

III. The District Court properly granted summary judgment in Brownsburg's favor on Kluge's retaliation claim.

The District Court concluded there were several independent reasons to grant summary judgment in Brownsburg's favor on Kluge's retaliation claim. [RSA at 48-52.]

The District Court first concluded that there were two separate bases for waiver, specifically that Kluge's briefing on the retaliation claim was "meager" and consisted of "merely reiterating his version of the facts he believes to be relevant without discussion of how those facts meet the requirements of a retaliation claim." [RSA at 50.] The District Court also found that Kluge's failure to address Brownsburg's lack-of-pretext argument foreclosed his claim. Regarding the merits, the District Court concluded that no reasonable juror could find "a causal connection exists between Mr. Kluge's protected activity and his ultimate resignation, that any of [Brownsburg's] reasons for the actions it took against Mr. Kluge were pretextual, or that any of [Brownsburg's] action[s] [was] motivated by retaliatory animus." [*Id.* at 51.] Kluge challenges the District Court's waiver findings and its conclusion on the merits, but none has merit.

Regarding the District Court's first waiver finding, the sum total of Kluge's challenge is to characterize the finding as "baseless" and quote a sentence from his briefing to the District Court where he asserts in conclusory fashion that genuine

issues of material fact preclude summary judgment. [App. Doc. 13 at 40.] One strains to see how such an assertion coupled with a reiteration of facts resolves the District Court's concern over the absence of any "discussion of how those facts meet the requirements of a retaliation claim." [RSA at 50.] The District Court was not required to bridge this gap for Kluge: "Neither the district court nor this court are obliged to research and construct legal arguments for parties, especially when they are represented by counsel." *Nelson v. Napolitano*, 657 F.3d 586, 590 (7th Cir. 2011). As such, it was hardly error, let alone "baseless," for the District Court to find waiver based on Kluge's undeveloped argument.

Regarding the second waiver finding, Kluge makes a remarkable claim: "[Brownsburg] had *no legitimate basis* for revoking his accommodation and forcing him to resign" and therefore Kluge was not required to counter Brownsburg's lack-of-pretext argument. [App. Doc 13 at 40 (emphasis in original).] Brownsburg argued in its briefing to the District Court that "[c]omplaints from the high school community are a legitimate, nondiscriminatory reason for Brownsburg's decision to withdraw the last-name-only accommodation," particularly when the complaints indicated that "the accommodation was not conducive to a well-run classroom and negatively impacted students." [Doc. 121 at 45.] Brownsburg supported this argument by quoting Seventh Circuit precedent that addressed a college's legitimate, nondiscriminatory reason for terminating a part-time instructor based on what the college perceived as inappropriate treatment toward one student. [*Id.*] The panel's reasoning was straightforward: "[i]t is not unreasonable for Columbia to

expect that its instructors will teach in a professional manner that does not distress students." *Smiley*, 714 F.3d 998, 1002 (7th Cir. 2013). This contradicts Kluge's bald assertion that Brownsburg had no legitimate basis for its actions. This Court should not disturb the District Court's finding of waiver.

In his challenge to the merits, Kluge makes another remarkable claim: "Indeed, Mr. Kluge's evidence of causation is so strong that the Court could direct the entry of summary judgment in his favor . . . ." [App. Doc. 13 at 42.] To support this claim, Kluge asserts that the events leading to his resignation are "inextricably intertwined" and that Brownsburg's administration "subjected him to 'a pattern of criticism and animosity'" after he refused to comply with "transgender-affirmation rules." [*Id.*] This assertion is inaccurate on several fronts, including that there is no evidence Brownsburg criticized Kluge or harbored animosity. If anything, the evidence is to the contrary; as the District Court noted, Kluge was allowed to finish the school year with the last-name-only accommodation in place, Dr. Daghe offered to write Kluge a letter of recommendation, and Brownsburg never withdrew Kluge's uniform accommodation. [RSA at 52.] Nor does Kluge address the remaining undisputed facts that the District Court thought were fatal to causation, specifically that Kluge initially received the accommodations he asked for and that Brownsburg sought to withdraw the last-name-only accommodation in response to complaints. [*Id.*] In reviewing the District Court's decision, this Court need only indulge reasonable inferences in Kluge's favor, not "every conceivable inference from the record." *Spring v. Sheboygan Area School Dist.*, 865 F.2d 883, 886 (7th Cir. 1989).

In sum, Kluge has failed to demonstrate that the District Court's waiver findings are reversible error or that there are genuine issues of material fact regarding causation. Accordingly, the Court should affirm the District Court's grant of summary judgment in Brownsburg's favor on Kluge's retaliation claim.

IV. If the Court reverses on Kluge's failure-to-accommodate claim, then it should remand for trial because there are genuine issues of material fact regarding the sincerity of Kluge's religious belief.

The District Court concluded that there were genuine issues of material fact regarding the sincerity of Kluge's religious belief, but for purposes of its ruling assumed such belief was sincere. [RSA at 39-40.] In his Opening Brief, Kluge argues that "[n]o factfinder could reasonably doubt the sincerity of [his] beliefs." [App. Doc. 13 at 29.] To support this argument, Kluge cites the leadership roles he has filled with his church and the general rule that courts should "tread lightly" when examining a challenge to a plaintiff's alleged sincerely-held religious beliefs. [*Id.* at 29-30 (quoting *Adeyeye*, 721 F.3d at 452-53).] Kluge's argument, however, fails in one critical respect, and that failure creates a jury question on the sincerity of his religious belief.

Kluge cannot legitimately reconcile his use of last names in class with his decision to abandon that accommodation during the May 2018 orchestra awards ceremony. Kluge used the full names for students in PowerSchool to address all students as they received their awards, including transgender students. [Doc. 120-9 at 7.] Kluge thought that addressing students by their "transgender names" promoted a transgender lifestyle and was therefore sinful, yet he thought it

appropriate to use such names during the ceremony but not in class because the latter occurs more frequently and is less formal. [Doc. 120-3 at 33-34 (Plaintiff Depo. 128:6-130:9).]

Ironically, Kluge acknowledged that by addressing students by their "transgender names" during the ceremony, he was seeking to avoid the same type of negative consequences that resulted from his use of only last names in class. [Doc. 120-19 at 7.] Kluge stated his "Christian faith required that he do no harm to students" [*id.*], yet it is undisputed that Kluge's use of only last names harmed some students, including one transgender student "dread[ing] going to orchestra class each day," and another feeling "very awkward" and "targeted" in Kluge's class. [Doc. 22-3 at 4.] Kluge also sought to avoid appearing "unreasonable and conspicuous" and "creat[ing] a scene" during the ceremony [doc. 120-19 at 7], but at the same time, according to one transgender student, his "behavior was noticeable to other students in the class" [doc. 22-3 at 4] and, as Kluge acknowledged when he first learned of the complaints from Dr. Daghe, by December 2017 he had become "a topic of much discussion in the Equality Alliance Club meetings." [Doc. 15-3 at 4.] In short, everything Kluge was trying to avoid by using "transgender names" during the ceremony *actually resulted* when he did the opposite in class.

Reasonable religious accommodation should not be based on an employee's arbitrary say-so regarding when the accommodation applies. To that end, "[I]f the religious beliefs that apparently prompted a request are not sincerely held, there has been no showing of a religious observance or practice that conflicts with an

employment requirement." *E.E.O.C. v. Ilona of Hungary, Inc.*, 108 F.3d 1569, 1575 (7th Cir. 1997). Moreover, "Evidence tending to show that an employee acted in a manner inconsistent with his professed religious belief is, of course, relevant to the factfinder's evaluation of sincerity." *E.E.O.C. v. Union Independiente de la Autoridad de Acueductos y Alcantarilladoes de Puerto Rico*, 279 F.3d 49, 57 (1st Cir. 2002).

There is more. Kluge testified at his deposition that there are instances where it is appropriate and consistent with his religious beliefs to address a transgender student by the student's first name, even if the first name differs from the student's biological sex. [Doc. 120-3 at 8-9 (Plaintiff Depo. 29:11-30:11).] Although he did not provide an example [*id.*], it is apparent that the orchestra awards ceremony was one of them. Moreover, Kluge's denomination does not take a hardline approach when it comes to restroom use for a transgender child, instructing instead that "it may be best that she not use the bathroom of her birth sex until she has been presented with pastoral counsel concerning God's calling of manhood and womanhood . . . ." [Doc. 120-4 at 12.] It would seem, then, that the same principle that allows a child to deviate from her biological sex when using a bathroom might also apply to the child's name. And that calls into question the sincerity of Kluge's belief, or at least a reasonable juror could so conclude.

Kluge's sole attempt to reconcile these conflicts is a single sentence in the Argument section of his brief: "Mr. Kluge 'drew a line' between using transgender names daily in the classroom and a single time at a formal awards ceremony." [App.

Doc. 13 at 31 (citation omitted).] That may be the case, but in light of the foregoing evidence it should be up to a jury to decide whether Kluge did so sincerely.

Conclusion

For reasons stated, the Court should affirm the District Court's grant of summary judgment in Brownsburg's favor on Kluge's failure-to-accommodate claim and his retaliation claim.

Alternatively, if the Court disagrees that summary judgment is appropriate on Kluge's failure-to-accommodate claim, then Brownsburg respectfully submits that the Court should remand for trial, as genuine issues of material fact preclude summary judgment in Kluge's favor on that claim.

Statement for Oral Argument

Per Federal Rule of Appellate Procedure 34(a)(1), Brownsburg states that oral argument should be permitted because this appeal raises interesting and important issues regarding the competing rights of teachers, students, and public schools under Title VII, specifically as those rights are applied to undue hardship analysis.

Dated: November 1, 2021

Respectfully submitted,

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Certificate of Compliance

1. This Response Brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B), as modified by Circuit Rule 32(c), because it contains 12,440 words, excluding the parts exempted by Federal Rule of Appellate Procedure 32(f).

2. This Response Brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5), as modified by Circuit Rule 32(b), and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6), because it has been prepared in a proportionally spaced typeface using Microsoft Office Standard 2016 in 12-point Century Schoolbook font.

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Certificate of Service

I certify that on November 1, 2021, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system, which will accomplish service on counsel for all parties through the Court's electronic filing system.

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