STATE OF SOUTH CAROLINA COUNTY OF BEAUFORT	IN THE COURT OF COMMON PLEAS NINTH JUDICIAL CIRCUIT
MARDY A. BURLESON, Plaintiff, *v.* THOMAS E. BEACH, DAVID L. COOK, MICHAEL E. COVERT, ELIZABETH I. SZALAI, AND COREY A. WHITTINGTON, Defendants.	Civil Action No. 2024-CP-07-01902 **DEFENDANT THOMAS E. BEACH'S MOTION TO DISMISS AND MEMORANDUM IN SUPPORT**

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INTRODUCTION

This case involves a defamation claim against Representative Thomas Beach for posting a link to a third party's blog post that contained a word the Plaintiff dislikes. The Plaintiff does not allege that Beach endorsed that word. And the underlying blog post disclosed the accurate facts underlying its opinion. If this activity—posting a link on social media to a third party's unprovable statement of opinion—sufficed for liability, defamation law would shut down the free exchange of ideas on the Internet and elsewhere. Because the Plaintiff's claim against Representative Beach contradicts many legal rules, that claim should be dismissed under Rule 12(b)(6), SCRCP.

Underlying Representative Beach's social media post was an issue of substantial public concern: parental rights over their children's upbringing and education, including about gender and sexuality issues. The Plaintiff, a middle school multimedia teacher, gave students an online survey asking for "preferred pronouns" and whether the student wanted those pronouns used "in messages home or is it private between you and me." Compl. Ex. A. The Plaintiff asked students "to be open and honest," pledging: "I promise to keep these just between you and me :)." *Id.*

Unsurprisingly, controversy ensued. After all, government-sponsored instruction "that the child's parents' beliefs about gender identity may be wrong and the teacher's beliefs are correct directly repudiates parental authority"—implicating parents' "constitutional rights." *Tatel v. Mt. Lebanon Sch. Dist.*, 637 F. Supp. 3d 295, 321 (W.D. Pa. 2022). Parents complained, and a blogger published an opinion post on the controversy. According to the post, "multiple children in the class had expressed their discomfort with the hidden nature of the survey, as well as the private & suggestive content it asked, amongst themselves, but those children also said they were afraid to confront the teacher about it for fear of being targeted, or, of 'offending the teacher,'" particularly given the teacher's decoration of the classroom with "trans-

pride flag stickers." Declaration of Christopher Mills, Exhibit 1 ("Ex. 1").[1] Further, "the survey was not approved by the district or school," and parents were not informed in advance—despite district "policy requir[ing] 'opt outs'" for such surveys. *Id.* Yet, according to the blog post, the school administration blew off parental concerns, which prompted the author to "to write this piece." *Id.*

Much of the post focused not on the Plaintiff, but on a former Beaufort public school teacher who had worked with the Plaintiff and had made news for forcing "students refer to her as 'they/them' and eventually 'he/him.'" *Id.* The post noted and linked to a Fox News article quoting the former teacher as saying, "I can't imagine breaking a single trans or non-binary student's trust by sharing details about their gender identity with anyone, especially their parents, their counselors and their administrators." *Id.*[2] The teacher said that "when meeting new students during the beginning of the year[,] 'I introduce and explain my identity'":

> "I identify as non-binary, meaning I don't identify as a man or a woman. I identify with the terms genderfluid and genderqueer because I'm somewhat masculine and somewhat feminine," the teacher said.
>
> "The pronouns th[at] mostly affirm me are ze/zir or they/them or he/him. My title is Mx. Cogdill – Mx. – rather than Ms. or Mr. And I ask my students to use Mx. instead of ma'am or sir. I changed my name to Lane because it's gender-neutral. I also go by Theo, which is affirming because my masculinity is not always recognized by other people. . . . But my gender is definitely queer."[3]

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[1] The blog post is referenced in the complaint, and a selectively edited version is attached to the complaint. Compl. ¶ 26(c) & Ex. A. Representative Beach attaches the full post as Exhibit 1 to this motion, and the blog post is properly considered by this Court. *See Brazell v. Windsor*, 384 S.C. 512, 516, 682 S.E.2d 824, 826 (2009) ("[A]llowing a trial court to consider documents that are incorporated by reference in the complaint but not actually attached thereto prevents a plaintiff from benefiting from his own oversight or from surviving a motion to dismiss by intentionally omitting documents upon which their claims are based.").

[2] Hannah Grossman, *Maryland Teacher with Multiple Non-Binary Identities Admits Hiding Students' Gender Transitions from Parents*, Fox News (Dec. 21, 2022), https://perma.cc/ARR5-8EG2 (cleaned up).

[3] *Id.* (cleaned up).

After linking to this article and noting that this former teacher "was close with" the Plaintiff, who conducted the pronoun survey that pledged to keep responses from parents, the blog post opines: "It seems there is more than one teacher in Hilton Head Middle School grooming pre-teen students into an overtly sexualized lifestyle." Ex. 1.

The Plaintiff identifies a portion of this sentence—"grooming pre-teen students into an overtly sexualized lifestyle"—as the only allegedly defamatory material in this blog post. Compl. ¶ 26(c). And the *only* activity alleged against Representative Beach is that he posted a link on his state representative campaign Facebook page to the blog post with the caption, "Great reporting Corey Allen." *Id.* ¶ 30. (Corey Allen is listed as the blog post's author, Ex. 1, and the Plaintiff identifies him as Corey Whittington, Compl. ¶ 6.)

The Plaintiff fails to state a claim against Representative Beach, for at least four reasons.

First, Representative Beach's link to another author's blog post is not a defamatory republication of that post. Universally, courts have rejected imposing defamation liability for simply linking to another's content. Any other rule—including that posting an unadorned link on social media subjects the poster to liability for anything that might be contained in that link—would practically destroy free speech on the Internet. Because the Plaintiff's claim against Representative Beach is premised solely on this link, it fails as a matter of law.

Second, the federal Communications Decency Act immunizes from defamation liability Internet users like Representative Beach who merely link to content provided elsewhere on the Internet. Again, courts have routinely rejected similar defamation claims as precluded by the CDA.

Third, even considering the underlying blog post, its only statement challenged against Representative Beach—that "It seems there is more than one teacher in Hilton Head Middle School grooming pre-teen students into an overtly sexualized

lifestyle"—is a non-actionable opinion. Liability premised on this statement fails twice over. Not only can the statement not be proved false, but it is an opinion that discloses its underlying facts. And those facts—centrally, the Plaintiff's imposition of a pronoun survey on middle schoolers accompanied by a pledge to keep their pronoun choices from their parents—are uncontested as substantially true.

Fourth, because the statement concerns an issue of public concern and Representative Beach's post is protected under the fair comment privilege, the Plaintiff was required to prove facts showing malice and actual damages. But the complaint provides only conclusory recitations of the standard—*e.g.*, "All of the above statements were published with actual or implied malice," Compl. ¶ 39—rather than *facts* that would tend to prove malice, falsity, and damages. For this reason too, the Plaintiff fails to state a claim against Representative Beach.

For any of these reasons, the Plaintiff's claim against Representative Beach should be dismissed.

STATEMENT OF THE CASE

According to the complaint, the Plaintiff "is a teacher in the Beaufort County School District" who, "[d]uring the 2022/2023 school year," "was a computer sciences teacher at Hilton Head Island Middle School." Compl. ¶ 9. Another Defendant, David Cook, had a daughter in the Plaintiff's class in January 2023. *Id.* ¶ 10. At the start of the semester, "the Plaintiff gave her students a survey" that "asked for the student's preferred name and pronouns, and whether the preferred pronouns could be used in class and messages home or solely between the Plaintiff and the student." *Id.* ¶ 11. The relevant questions included "What are your preferred pronouns? (Example: He, She, Them, etc.)" and "Do you want me to use your pronouns in class and im messages home or is it private between you and me?" Compl. Ex. A. Options for this latter question included: "Public is ok," "Just between us," and "In class but not to

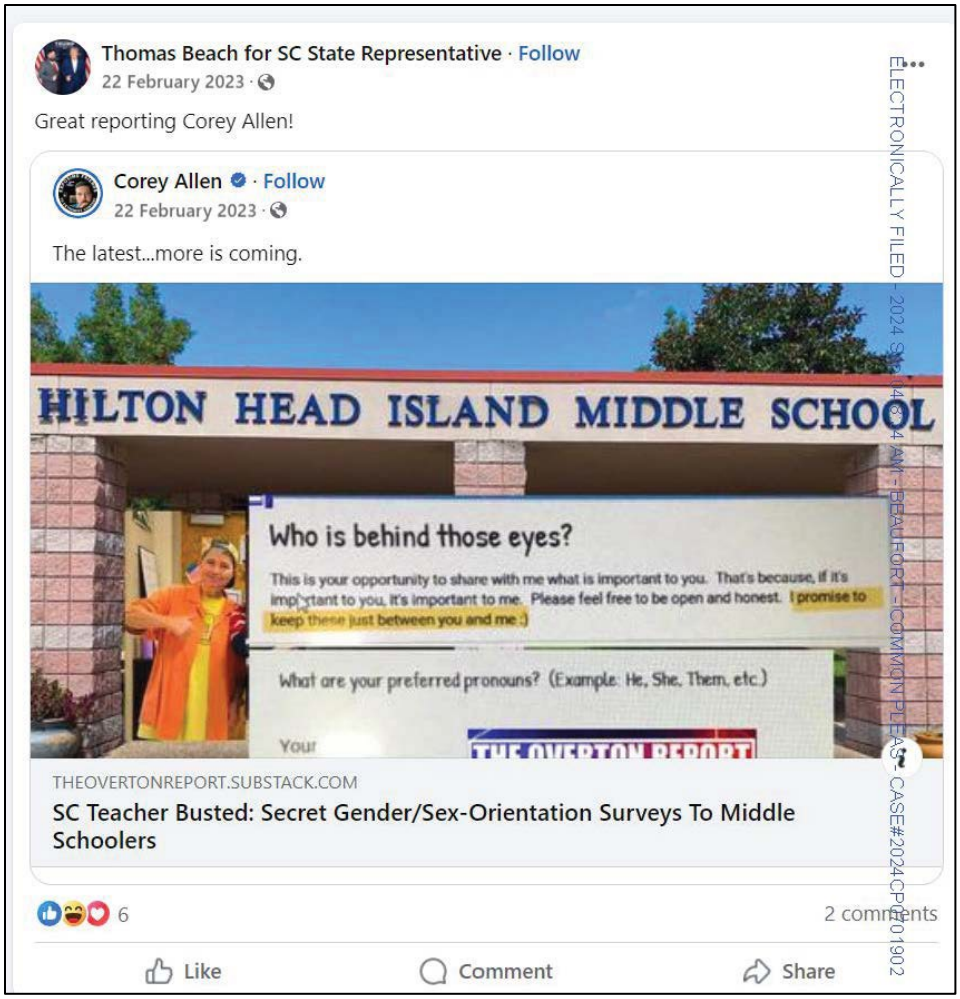
guardians." *Id.* The survey said: "Please feel free to be open and honest. I promise to keep these just between you and me :)." *Id.*

After Mr. Cook's daughter "shared the survey" with Mr. and Mrs. Cook, they allegedly contacted the school principal, reporters including a blogger Corey A. Whittington aka "Corey Allen," and other members of the community with their concerns about the survey. Compl. ¶¶ 6, 13, 18, 21. After the principal "approached the Plaintiff," the Plaintiff "changed some of the questions." *Id.* ¶ 15. The Plaintiff alleges that "[s]ubsequent to learning about the Plaintiff's survey, Defendants Beach, Cook, Covert, Szalai, and Whittington engaged in a relentless attack against the Plaintiff, publishing numerous false and defamatory comments on Facebook and other social media and online platforms." *Id.* ¶ 25. According to the Plaintiff, "the Defendants are engaging in this smear campaign to impugn Plaintiff's professional status to prevent her from teaching what they call the 'leftist' or 'woke' agenda to South Carolina students." *Id.* ¶ 33.

The only allegation against Representative Beach is as follows:

> On or about February 22, 2023, Defendant Beach published a false and defamatory comment on his "Thomas Beach for SC State Representative" Facebook page by republishing Defendant Whittington's substack article in which Defendant Whittington accused the Plaintiff of "grooming" and being a "groomer." Defendant Beach posted this with the caption, "Great reporting Corey Allen."

Id. ¶ 30. The underlying substack article is discussed above and attached as Exhibit 1. The complaint includes a copy of what it alleges to be Representative Beach's defamatory republication, which involves a Facebook repost of a link preview to Whittington's underlying article with the post's title, images used in that post, and a clickable link:



Compl. Ex. S.

The complaint alleges that the challenged "statements were published with actual or implied malice" and "are false." Compl. ¶¶ 39–40. The Plaintiff demands "actual and special damages" and "punitive damages in a sum sufficient to impress upon the Defendants the seriousness of their conduct and to deter such similar conduct in the future." *Id.* ¶ 44.

LEGAL STANDARDS

"Under Rule 12(b)(6), SCRCP, a defendant may move for dismissal based on a failure to state facts sufficient to constitute a cause of action." *Santos v. Harris Inv. Holdings, LLC*, 439 S.C. 214, 219, 886 S.E.2d 483, 485 (Ct. App. 2023). Dismissal is warranted "if the facts alleged and the inferences reasonably deducible from the

pleadings" would not "entitle the plaintiff to relief on any theory of the case." *Williams v. Condon*, 347 S.C. 227, 233, 553 S.E.2d 496, 499 (Ct. App. 2001). On a motion to dismiss, the court "admits the facts well pleaded in the complaint but does not admit the inferences drawn by the plaintiff from the facts, nor does it admit conclusions of law." *Charleston Cnty. Sch. Dist. v. Laidlaw Transit, Inc.*, 348 S.C. 420, 426, 559 S.E.2d 362, 365 (Ct. App. 2001) (quoting *Charleston Cnty. Sch. Dist. v. S.C. State Ports Auth.*, 283 S.C. 48, 50, 320 S.E.2d 727, 729 (Ct. App. 1984)). In other words, "[a] pleading that offers labels and conclusions or a formulaic recitation of the elements of a cause of action will not do." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (cleaned up). "[W]hen considering a Rule 12(b)(6) motion, a court may consider documents referenced in or attached to the complaint." *Santos*, 439 S.C. at 221 n.1, 886 S.E.2d at 486 n.1 (describing the holding of *Brazell*, 384 S.C. at 516, 682 S.E.2d at 826).

"In order to prove defamation, the plaintiff must show (1) a false and defamatory statement was made; (2) the unprivileged publication was made to a third party; (3) the publisher was at fault; and (4) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication." *Erickson v. Jones St. Publishers, LLC*, 368 S.C. 444, 629 S.E.2d 653, 664 (2006). On a motion to dismiss assessing "whether plaintiffs have sufficiently alleged facts upon which they could sustain a successful defamation action," courts "balanc[e] principles from both South Carolina common law and the United States Constitution." *Leask v. Robertson*, 589 F. Supp. 3d 506, 517 (D.S.C. 2022). "[I]n many respects, the issues boil down to one, as South Carolina courts have shaped South Carolina's common law to accord with the Supreme Court's jurisprudence." *Id.* (citing *Erickson*, 368 S.C. at 467, 629 S.E.2d at 665).

Defamation actions are properly susceptible to early dismissal, because the "central event— the communication about which suit has been brought—is ordinarily before the judge at the pleading stage." Robert D. Sack, Sack on Defamation § 16.2.1

(5th ed. 2017 & Supp. 2022). And as then-Judge Kavanaugh explained, "[t]he First Amendment guarantees freedom of speech and freedom of the press. Costly and time-consuming defamation litigation can threaten those essential freedoms." *Kahl v. Bureau of Nat'l Affs., Inc.*, 856 F.3d 106, 109 (D.C. Cir. 2017). "To preserve First Amendment freedoms and give reporters, commentators, bloggers, and tweeters (among others) the breathing room they need to pursue the truth, the Supreme Court has directed courts to expeditiously weed out unmeritorious defamation suits." *Id.*; *see Peeler v. Spartanburg Herald-J. Div. of The New York Times Co.*, 681 F. Supp. 1144, 1146 (D.S.C. 1988) (emphasizing "the possible chilling effect which can result from the defense of defamation claims").

ARGUMENT

The Plaintiff's claim against Representative Beach for providing a link to an allegedly defamatory blog post fails for at least four reasons. First, the unadorned link posted by Beach was not a defamatory republication. Second, Representative Beach's link is immune from liability under the Communications Decency Act of 1996. Third, even considering the underlying blog post that Representative Beach linked to, the single challenged sentence—"It seems there is more than one teacher in Hilton Head Middle School grooming pre-teen students into an overtly sexualized lifestyle"—is not actionable: it is not provably false, and it is an opinion that discloses its underlying facts. Fourth and independently, the statement is a matter of public concern, and Representative Beach's link is privileged as a fair comment—both require the Plaintiff to allege facts showing malice, which she failed to do. The Plaintiff's claim against Representative Beach should be dismissed.

I. Representative Beach's link was not a defamatory republication.

Publication is a required element of defamation. *Erickson*, 368 S.C. at 465, 629 S.E.2d at 664. But the Plaintiff does not allege that Representative Beach's only writing—"Great reporting Corey Allen"—was defamatory. Compl. ¶ 30. Rather, the

Plaintiff alleges that Beach committed defamation by "republishing Defendant Whittington's substack article." *Id.* But as shown by the Plaintiff's own exhibit, Compl. Ex. S, Beach merely provided a hyperlink to that article by sharing Whittington's Facebook post containing a link, which included a photo in the blog post and the post's title. And "courts have consistently agreed that merely linking to an article should not amount to republication." *Lokhova v. Halper*, 995 F.3d 134, 143 (4th Cir. 2021) (cleaned up).

Indeed, as the U.S. Court of Appeals for the Fourth Circuit recently explained in a thorough opinion, "although creating hypertext links to previously published statements' may technically direct audiences' attention to the prior dissemination of those statements, such links do not constitute republication." *Id.* at 142 (cleaned up). Quoting a Third Circuit decision from 2012, the court said that "all" "courts [that] specifically have considered whether linking to previously published material is republication" "hold that it is not." *Id.* (quoting *In re Phila. Newspapers*, 690 F.3d 161, 174 (3d Cir. 2012)). That Third Circuit decision likewise held that "[u]nder traditional principles of republications, a mere reference to an article does not republish the material." *Id.* at 143 (ellipsis omitted) (quoting *Phila. Newspapers*, 690 F.3d at 175). And according to the Fourth Circuit, "[s]ubsequent to *In re Philadelphia Newspapers*, courts have" continued to "consistently agree[] that 'merely linking to an article should not amount to republication, whereas making changes to material already published on a website, or adding substantive material to allegedly defamatory content on a website, could constitute republication, depending on the facts of the case.'" *Id.* (brackets omitted) (quoting 4 E-Commerce and Internet Law § 37.08 (2020)).

Here, Representative Beach neither "ma[de] changes to material already published on a website" nor "add[ed] substantive material to allegedly defamatory content," *id.*, but only provided a hyperlink with the caption, "Great reporting Corey

Allen." Compl. ¶ 30. "Clearly th[is] text" "bears no relationship to" the Plaintiff, *Lokhova*, 995 F.3d at 143, and the Plaintiff does not allege it is defamatory, *see* Compl. ¶ 30. Though the hyperlink is in the form of a picture from the blog post and its title, courts have held that such "previews" do not republish defamatory material in the underlying post. *See Penrose Hill, Ltd. v. Mabray,* 479 F. Supp. 3d 840, 853 (N.D. Cal. 2020) (holding that a tweet with a link and a preview with "the title of the article," "a picture," "and a text quote" did not republish "the rest of the statements in the Blog Post").

Thus, as many decisions agree—including federal cases in South Carolina—the mere provision of a link as alleged here is insufficient to impose defamation liability. For instance, in a similar recent case, a defendant "posted on his Facebook page a link to [a] Washington Post Article, including the statement 'a little something the Island Packet overlooked.'" *McGlothlin v. Hennelly*, 370 F. Supp. 3d 603, 612–13 (D.S.C. 2019). The plaintiff alleged that "this was done 'in an effort to imply that [he] is corrupt or may have committed crimes that constitute a felony, and in order to impugn [his] character publicly.'" *Id.* at 613. But Judge Norton held that the plaintiff could not "base his defamation claims on the May 12 Facebook Post" because even assuming "the falsity of the Washington Post Article, [the defendant] could not be held liable for reposting an article that was not even published by him but by a newspaper." *Id.* at 613. The same logic applies here.

Likewise, in *Leask v. Robertson*, the court rejected a defamation claim to the extent it was premised on a LinkedIn post with a link to an allegedly defamatory writing. 589 F. Supp. 3d 506 (D.S.C. 2022). The court reasoned that the plaintiffs did not "assert that there is any new defamatory language in the substance of the" post with the hyperlink, and merely providing a hyperlink did not amount to a "claim of defamation." *Id.* at 525–26. Again, the same logic applies here: the Plaintiff does not

allege that Representative Beach's caption in the Facebook post was defamatory, and a link preview is not enough for publication liability.

Another recent decision addressed defamation claims arising out of an online report and subsequent tweet with a link to the report. *Crosswhite v. Reuters News & Media, Inc.*, No. 6:21-CV-00015, 2021 WL 6125750, at *2 (W.D. Va. Dec. 28, 2021). Much as here, included with the link in the tweet was the comment, "Other great reporting." *Id.* The court held that hyperlinks in tweets do not "save [a] claim[] under the republication doctrine" when the tweet "does not contain the" allegedly defamatory material or "add or alter the original publication." *Id.*

An avalanche of treatises and cases are in accord: online links to articles allegedly containing defamatory material do not republish that material. *See Lokhova*, 995 F.3d at 143 ("[A] mere hyperlink, without more, cannot constitute republication."); *Phila. Newspapers*, 690 F.3d at 175 ("[T]hough a link and reference may bring readers' attention to the existence of an article, they do not republish the article."); *Jankovic v. Int'l Crisis Grp.*, 494 F.3d 1080, 1087 (D.C. Cir. 2007) (explaining that "[i]n the print media world, the copying of an article by a reader—even for wide distribution—does not constitute a new publication," and "[t]he equivalent occurrence should be treated no differently on the Internet" (citing Restatement (Second) of Torts § 577A cmt. d & illus. 6 (1977))); *Clark v. Viacom Int'l Inc.*, 617 F. App'x 495, 507 (6th Cir. 2015) ("Simply alerting a new audience to the existence of a preexisting statement does not republish it."); 50 Am. Jur. 2d Libel and Slander § 244 (Oct. 2024 update) ("[C]ontinuous access to an allegedly defamatory article posted via hyperlinks to a website is not a republication."); *Barbuto v. Miami Herald Media Co.*, No. 21-CV-20608, 2022 WL 123906, at *4 (S.D. Fla. Jan. 13, 2022) (holding that a link was not republication and dismissing the claim because the plaintiff did not "allege that the hyperlinked text . . . is itself defamatory"); *Lindberg v. Dow Jones & Co.*, No. 20-CV-8231 (LAK), 2021 WL 3605621, at *5 (S.D.N.Y. Aug.

11, 2021) ("[C]ourts consistently agree that the publication of a hyperlink that references an article but does not restate the defamatory material is not a republication of the material." (cleaned up)); *Mirage Ent., Inc. v. FEG Entretenimientos S.A.*, 326 F. Supp. 3d 26, 39 (S.D.N.Y. 2018) ("The fact that Carey linked her Tweet to the E! News article does not constitute a republication of that article."); *Doctor's Data, Inc. v. Barrett*, 170 F. Supp. 3d 1087, 1137 (N.D. Ill. 2016) (holding that a hyperlink is not a republication because it "does not duplicate the content of a prior publication; rather, it identifies the location of an existing publication and, if selected, instructs a search engine to retrieve that publication"); *Klayman v. City Pages*, No. 5:13-CV-143-OC-22PRL, 2015 WL 1546173, at *12 (M.D. Fla. Apr. 3, 2015) (rejecting the uncited argument "that a hyperlink to a previously published statement constitutes republication"), *aff'd*, 650 F. App'x 744 (11th Cir. 2016), and *aff'd*, 650 F. App'x 744 (11th Cir. 2016); *U.S. ex rel. Klein v. Omeros Corp.*, 897 F. Supp. 2d 1058, 1074 (W.D. Wash. 2012) ("[A] mere reference or URL is not a publication of the contents of the materials referred to."); *Salyer v. S. Poverty L. Ctr., Inc.*, 701 F. Supp. 2d 912, 918 (W.D. Ky. 2009) (no republication because the links "did not restate the allegedly defamatory statements and did not alter the substance of that article in any manner"); *Penrose Hill,* 479 F. Supp. 3d at 851 (explaining that "courts have generally held that merely linking to or referring to a defamatory article [online] does not constitute republication"); *Sundance Image Tech., Inc. v. Cone Editions Press, Ltd.*, No. 02 CV 2258 JM (AJB), 2007 WL 935703, at *7 (S.D. Cal. Mar. 7, 2007) (holding "that such linking is more reasonably akin to the publication of additional copies of the same edition of a book, which is a situation that does not trigger the republication rule"); *Life Designs Ranch, Inc. v. Sommer*, 191 Wash. App. 320, 336, 364 P.3d 129, 138 (2015) (similar);

If the rule were otherwise, and "each link or technical change were an act of republication," severe negative consequences would result. *Lokhova*, 995 F.3d at 143

(quoting *Phila. Newspapers*, 690 F.3d at 175). First, "[i]f each third party tweet" or other hyperlink to an "article were to constitute a republication, the multiplicity of lawsuits assuredly would be beyond overwhelming." *Id.* at 144. In the Internet age, vast and unpredictable liability would result, for potentially *everyone* who linked to an article that later was alleged to be defamatory. The effect on free speech—especially on the Internet—would be destructive, "discourag[ing] the placement of information on the Internet," "slow[ing] the exchange of such information," and generally "reducing the Internet's unique advantages." *Firth v. State*, 98 N.Y.2d 365, 372, 775 N.E.2d 463, 467 (2002); *see also Yeager v. Bowlin*, 693 F.3d 1076, 1083 (9th Cir. 2012) (explaining that such liability "would have a serious inhibitory effect on the open, pervasive dissemination of information and ideas over the Internet, which is, of course, its greatest beneficial promise" (cleaned up)); *Jankovic*, 494 F.3d at 1087 (emphasizing the need to "avoid[] multiplicity of suits, as well as harassment of defendants and possible hardship upon the plaintiff himself" (quoting Restatement (Second) of Torts § 577A cmt. d)).

What's more, if every hyperlink were a republication, "the statute of limitations would be retriggered endlessly and its effectiveness essentially eliminated." *Lokhova*, 995 F.3d at 143 (quoting *Phila. Newspapers*, 690 F.3d at 175). South Carolina has a two-year statute of limitations for defamation. S.C. Code Ann. § 15-3-550(1). "By enacting a statute of limitations, the legislature clearly demonstrates a desire to require lawsuits be brought within a specified time of initial publication." *Salyer*, 701 F. Supp. 2d at 918. But "to find that a new link to an unchanged article . . . republishes that article would result in a continual retriggering of the limitations period." *Id.*

In sum, courts broadly agree that the only act alleged against Representative Beach here—posting a social media link to an allegedly defamatory article—is not enough to impose defamation liability. Ruling otherwise would threaten the viability

of online communications writ large. The Court should adhere to this judicial consensus and dismiss the Plaintiff's sole claim against Beach.

II. The link is immune under the Communications Decency Act.

Representative Beach is also immune from liability under the Communications Decency Act, 47 U.S.C. § 230. The CDA protects internet service providers and users from liability for defamatory content published by others online. Under the CDA, "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." 47 U.S.C. § 230(c)(1). And "[n]o cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with" section 230. *Id.* § 230(e)(3).

"The purpose of this statutory immunity is not difficult to discern": to combat "the threat that tort-based lawsuits pose to freedom of speech in the new and burgeoning Internet medium." *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997). "The specter of tort liability in an area of such prolific speech would have an obvious chilling effect." *Id.* at 331. So "[t]he intent of the CDA is" "to promote rather than chill internet speech." *Bennett v. Google, LLC*, 882 F.3d 1163, 1166 (D.C. Cir. 2018); *accord* 47 U.S.C. § 230(b) ("It is the policy of the United States (1) to promote the continued development of the Internet and other interactive computer services and other interactive media" and "(2) to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services.").

The CDA confers immunity on Representative Beach here. "Separated into its elements, section 230(c)(1)" "protects from liability (1) a provider or user of an interactive computer service (2) whom a plaintiff seeks to treat, under a State law cause of action, as a publisher or speaker (3) of information provided by another

information content provider." *Banaian v. Bascom*, 175 N.H. 151, 155, 281 A.3d 975, 978 (2022) (internal quotation marks omitted).

First, "Facebook qualifies as an interactive computer service because it is a service that provides information to 'multiple users' by giving them 'computer access . . . to a computer server,' 47 U.S.C. § 230(f)(2), namely the servers that host its social networking website." *Klayman v. Zuckerberg*, 753 F.3d 1354, 1357 (D.C. Cir. 2014); *see, e.g.*, *Fed. Agency of News LLC v. Facebook, Inc.*, 432 F. Supp. 3d 1107, 1117 (N.D. Cal. 2020) (holding that "Facebook is unquestionably an interactive computer service"); *Winter v. Facebook, Inc.*, No. 4:21-CV-01046 JAR, 2021 WL 5446733, at *4 (E.D. Mo. Nov. 22, 2021) (same, and collecting more cases agreeing); *accord* Compl. ¶ 25 (characterizing Facebook as an "online platform[]").

Next, Beach was a "user" of Facebook's service. "'[U]ser' plainly refers to someone who uses something, and the statutory context makes it clear that Congress simply meant someone who uses an interactive computer service." *Banaian*, 175 N.H. at 156, 281 A.3d at 979 (quoting *Barrett v. Rosenthal*, 40 Cal. 4th 33, 59, 146 P.3d 510, 526 (2006)); *see also Directory Assistants, Inc. v. Supermedia, LLC*, 884 F. Supp. 2d 446, 452 (E.D. Va. 2012) ("[I]t is clear to the Court that Defendants were users in that they put RipOffReport and other websites into action or service, and availed themselves of and utilized these websites by compiling their posts by copying links to commentary posted on them.").

On the second and third statutory elements, the Plaintiff seeks to treat Representative Beach as a publisher of information provided by another "information content provider," which "means any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service." 47 U.S.C. § 230(f)(3). According to the complaint, the only basis for imposing liability on Representative Beach is his

supposed "republishing" of a post from "Defendant Whittington's online blog." Compl. ¶¶ 26(c), 30.

Thus, Representative Beach "is clearly protected by § 230's immunity." *Zeran*, 129 F.3d at 332. Courts have widely agreed in similar cases, both interpreting the CDA's immunity provision broadly and applying it to individuals who share links to allegedly defamatory articles. For instance, in *Barrett v. Rosenthal*, the California Supreme Court held that § 230 grants Internet users blanket immunity "from defamation liability for republication." 40 Cal. 4th 33, 63, 146 P.3d 510, 529 (2006). According to the court, this "statutory immunity serves to protect online freedom of expression and to encourage self-regulation, as Congress intended." *Id.* The defendant in *Barrett*, an individual Internet user who posted another's article online, was therefore immune from defamation liability for republication. *Id.*, 40 Cal. 4th at 41, 59–62, 146 P.3d at 514, 526–29.

Likewise, in *Banaian v. Bascom*, the New Hampshire Supreme Court explained that "[t]here has been near-universal agreement that [§] 230 should not be construed grudgingly, but rather should be given broad construction." 175 N.H. 151, 155, 281 A.3d 975, 978 (2022) (internal quotation marks omitted). The court agreed that § 230 entitled the individual defendants to immunity from defamation liability for retweeting another individual's tweet. *Id.*, 175 N.H. at 153, 157–58, 281 A.3d at 976–77, 980. "That individual users are immunized from claims of defamation for retweeting content that they did not create is evident from the statutory language." *Id.*, 175 N.H. at 58, 281 A.3d at 980.

Like the defendants in these cases, Representative Beach is also immune from claims of defamation under § 230 of the CDA because he, as an individual user, posted a link on Facebook to separate Internet content that he did not create. Many cases agree that the CDA precludes liability in these circumstances. *See Coomer v. Donald J. Trump for President, Inc.*, 552 P.3d 562, 599–600 (Colo. App. 2024) (holding that

"neither Eric Trump's nor President Trump's tweet" could give rise to liability because they did not include "any statement beyond the information in the article and video they shared" and "therefore conveyed only 'information provided by another information content provider'" under the CDA); *Monge v. Univ. of Pennsylvania*, No. 22-2942, 2023 WL 2471181, at *3–4 (E.D. Pa. March 10, 2023) ("The CDA provides immunity to" the defendant who "did not add anything new to the articles, or materially modify them, when she shared them via email, so she did not materially contribute to the alleged defamation."); *Internet Brands, Inc. v. Jape*, 328 Ga. App. 272, 277, 760 S.E.2d 1, 4 (2014)("[T]he test is not whether the objectionable content was endorsed, but instead whether the content was independently created or developed by third-party users." (internal quotation marks omitted)); *Vazquez v. Buhl*, No. FSTCV126012693S, 2012 WL 3641581, at *2 (Conn. Super. Ct. July 17, 2012) ("Although NBCUniversal added an introduction leading readers to the defamatory statements [in its online post], [the company] did not materially create or develop any of the allegedly defamatory statements" so "is protected by immunity under the CDA."), *aff'd*, 150 Conn. App. 117, 139, 90 A.3d 331, 344 (2014) (agreeing and explaining that "[i]t is immaterial whether the defendant amplified, endorsed, or adopted the defamatory statements, because the defendant played no role in their composition").

Because Representative Beach was not the originator of the allegedly defamatory blog post, but merely linked to it from his Facebook page, he is immune from liability for defamation under the CDA. For this reason too, the Plaintiff's sole claim against Representative Beach should be dismissed.

III. The single blog statement at issue is non-actionable opinion.

Even putting aside the above defects, the complaint still fails to state a claim against Representative Beach. The complaint's only allegation against Representative Beach mentions three statements: references in Whittington's blog

post to "grooming" and a "groomer," and Representative Beach's caption on Facebook, "Great reporting Corey Allen." Compl. ¶ 30. The last statement about "[g]reat reporting" is a statement of opinion that is not directed at the Plaintiff and is not defamatory. The second term, a "groomer," appears nowhere in Whittington's article, much less Representative Beach's post. *See* Ex. 1; Compl. ¶ 26(c); Compl. Exs. C, S. Thus, the Court should disregard the claim against Representative Beach to the extent it is based on a non-existent use of the word "groomer"—though the same analysis that follows would apply even if the materials relevant to the claim against Representative Beach had used that term. *See Goines v. Valley Cmty. Servs. Bd.*, 822 F.3d 159, 167 (4th Cir. 2016) ("When the plaintiff attaches or incorporates a document upon which his claim is based, or when the complaint otherwise shows that the plaintiff has adopted the contents of the document, crediting the document over conflicting allegations in the complaint is proper.").

That leaves only the underlying blog post's statement about "grooming." That sentence in full says: "It seems there is more than one teacher in Hilton Head Middle School grooming pre-teen students into an overtly sexualized lifestyle." Ex. 1. "When a speaker plainly expresses a subjective view, an interpretation, a theory, conjecture or surmise, rather than a claim to be in possession of objectively verifiable false facts, the statement is not actionable." *Biospherics, Inc. v. Forbes*, Inc., 151 F.3d 180, 186 (4th Cir. 1998) (cleaned up). In other words, "an opinion may constitute actionable defamation" "only if the opinion can be reasonably interpreted to declare or imply untrue facts." *Id.* at 184.

Here, this statement from Whittington's blog post is not provably false. And it is an opinion that discloses the underlying facts. As explained more in Part IV *infra*, the allegedly defamatory statement involves matters of substantial public concern—public education and parental rights to direct their children's upbringing—so the Plaintiff has the burden of pleading and proving falsity, and the statement is

generally protected by the First Amendment. *See Snyder v. Phelps*, 580 F.3d 206, 220 & n.13 (4th Cir. 2009), *aff'd*, 562 U.S. 443 (2011). Because the Plaintiff cannot prove that this statement is false, and because the statement is one of opinion that discloses the underlying facts, it is not actionable. *See CACI Premier Tech., Inc. v. Rhodes*, 536 F.3d 280, 294 (4th Cir. 2008) (noting that this "is a question of law to be decided by the court" (cleaned up)); *see also Biospherics*, 151 F.3d at 186 (affirming grant of motion to dismiss on this basis); *Chapin v. Knight-Ridder, Inc.*, 993 F.2d 1087, 1093–99 (4th Cir. 1993) (same).

A. The statement is not provably false.

"An alleged defamatory statement 'must be provable as false before there can be liability under state defamation law.'" *BidZirk, LLC v. Smith*, No. CIV.A. 6:06-109-HMH, 2007 WL 3119445, at *3 (D.S.C. Oct. 22, 2007) (quoting *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 19 (1990)); *see Boone v. Sunbelt Newspapers, Inc.*, 347 S.C. 571, 580, 556 S.E.2d 732, 737 (Ct. App. 2001) ("[T]he statement must be false."). "[O]pinion statements, defamatory or otherwise, are not actionable unless they contain provably true or false factual connotations." *BidZirk*, 2007 WL 3119445, at *3 (quoting *Woodward v. Weiss*, 932 F. Supp. 723, 726 (D.S.C. 1996)). And again, it is the role of "the court [to] inquire[] whether the statement itself is sufficiently factual to be susceptible of being proved true or false." 50 Am. Jur. 2d Libel and Slander § 115. The "meaning of an alleged defamatory statement must be gathered not only from the words singled out as libelous, but from the context; all of the parts of the publication must be considered in order to ascertain the true meaning, and words are not to be given a meaning other than that which the context would show them to have." *Jones v. Garner*, 250 S.C. 479, 485, 158 S.E.2d 909, 912 (1968) (citation omitted).

Here, the challenged statement in Whittington's post is a non-verifiable opinion. "First, the context and general tenor of the article indicate that the piece

contains constitutionally protected subjective views," *Biospherics*, 151 F.3d at 184, as the article was published on a personal blog that introduces the article as a "critique" related to broader issues of educational "indoctrinat[ion]." Ex. 1. Such blogs (and social media pages like Facebook) are "place[s] usually devoted to, or in a manner usually thought of as representing, personal viewpoints," making their statements more "likely to be understood—and deemed by a court—to be nonactionable opinion." Robert D. Sack, Sack on Defamation § 4.3.1 (5th ed. 2017 & Supp. 2023); *see id.* § 4.3.1[D] ("[O]nline blogs and message boards are places where readers expect to see strongly worded opinions rather than objective facts." (quoting *Summit Bank v. Rogers*, 206 Cal. App. 4th 669, 697, 142 Cal. Rptr. 3d 40, 60 (2012)).

Next, the article's headline ("SC Teacher Busted: Secret Gender/Sex-Orientation Surveys To Middle Schoolers") and tone ("I believe there is a bit of truth in all of those assessments") reflect a prevalence of "rhetorical hyperbole," "vigorous epithet" and "loose, figurative, or hyperbolic language." *CACI*, 536 F.3d at 293 (cleaned up); *see Biospherics*, 151 F.3d at 186 (emphasizing "imprecise, casual language"). In sum, the "general tenor" of the statement "in the context of a [substack] post and a long, emotive comment" about issues of public controversy "negates any impression that the speaker is asserting actual facts in regards to th[is] particular statement[]." *McGlothlin*, 370 F. Supp. 3d at 618 (cleaned up).

Turning to the challenged statement itself, it begins with "It seems"—language of apparency signaling that an opinion follows. The statement "does not speak in certainties; it describes appearances, and contributes to the general question the article asks"—is there a "systemic" "issue" (Ex. 1) in the Beaufort County schools? *Chapin*, 993 F.2d at 1096. The statement's "words cannot be perverted to make that certain which is in fact uncertain," *id.* (cleaned up), and courts broadly agree that the qualifier "it seems" signals a non-actionable opinion statement. *See Stebbins v. Garcia Baz*, No. 24-CV-00398-LJC, 2024 WL 3379667, at *2 (N.D. Cal. May 21, 2024), *report*

and recommendation adopted sub nom., 2024 WL 3379661 (N.D. Cal. June 7, 2024) (agreeing with other decisions that "statements couched with the phrase 'it seems' were not actionable"); *Jevremovic v. Courville*, No. CV 22-4969 (ZNQ) (RLS), 2023 WL 5127332, at *7 (D.N.J. Aug. 10, 2023) (dismissing claim because "Defendant signals that these statements are her opinion by using words such as 'I think' and 'it seems'"); *Schmitt v. Artforum Int'l Mag., Inc.*, 178 A.D.3d 578, 588, 115 N.Y.S.3d 291, 301 (2019) ("[H]ow something 'appears' and what it 'seems' to be are innately subjective."); *Roulo v. Keystone Shipping Co.*, No. CV 17-5538 (JRT/LIB), 2018 WL 5619723, at *8 (D. Minn. Oct. 30, 2018) (holding that because the opinion was "hedged" with "it seems that," it "was not made with the specificity or definitiveness required of a statement of fact"); *Yeager v. Nat'l Pub. Radio*, No. 18-4019-SAC-GEB, 2018 WL 5884596, at *5 (D. Kan. Nov. 9, 2018) (emphasizing use of "seems" to find that "[t]he article presents an opinion"); *Small Bus. Bodyguard Inc. v. House of Moxie, Inc.*, 230 F. Supp. 3d 290, 315 (S.D.N.Y. 2017) (emphasizing use of "it seems" in holding that "[s]tatements of opinion, unlike statements of fact, cannot be defamatory").

After "it seems," Whittington's statement makes a comparison between teachers—without directly referencing the Plaintiff—and suggests that "more than one teacher" is "grooming pre-teen students into an overtly sexualized lifestyle." Ex. 1. What constitutes an "overtly sexualized lifestyle" is a matter of opinion: it is "just too subjective . . . to be proved false." *Chapin*, 993 F.2d at 1093. Whether a person is "grooming" students into such a lifestyle is an opinion stacked on an opinion. And whether "[i]t seems" to any person that this is occurring is an opinion thrice-over. "There is no standard which could be used to render an objective, verifiable, factual answer to" what an overtly sexualized lifestyle is, whether one is groomed into this lifestyle, or how to assess whether this "seems" to be happening. *Woodward*, 932 F. Supp. at 726. Thus, the only supposedly defamatory statement derivatively alleged against Representative Beach is not provably false and cannot give rise to liability.

The Plaintiff alleges that the generalized term "grooming" can carry an alternative, criminal meaning. *See* Compl. ¶ 36. But in the context of *this* challenged statement—the only one alleged against Representative Beach—the only suggestion is that it "seems" some teachers may be "grooming pre-teen students into an overtly sexualized lifestyle." Ex. 1. Defamation law commonly rejects imposing liability based on terms that "mean[] different things to different people" even if "some connotations of the word may encompass criminal behavior": "The lack of precision makes the assertion" "incapable of being proven true or false." *BidZirk*, 2007 WL 3119445, at *3 (quoting *McCabe v. Rattiner*, 814 F.2d 839, 842 (1st Cir. 1987) (rejecting liability for the term "scam")).

Here, "grooming" can mean "to make (someone) ready for a specific objective: prepare" or "to build a trusting relationship with (a minor) in order to exploit them especially for nonconsensual sexual activity," leaving multiple meanings not tied to a specific criminal activity. *Merriam-Webster.com Dictionary*, https://perma.cc/EW3A-BBSY. Indeed, federal courts have used the term "groom" as Whittington did here, rather than to connote criminal activity. *See Tatel v. Mt. Lebanon Sch. Dist.*, 675 F. Supp. 3d 551, 564 (W.D. Pa. 2023) (noting the allegation that "one boy was secretly groomed to change his identity to be like the teacher's transgender child" "implicates the heart of parental decision-making on matters of the greatest importance"); *see also Tatel*, 637 F. Supp. 3d at 335 ("grooming a student to become a transgender child"). Similar cases reject liability for the use of such imprecise terms. *See, e.g.*, *CACI*, 536 F.3d at 300 (no liability for the defendant's statements that plaintiffs were "mercenaries" and "killers"); *Horsley v. Rivera*, 292 F.3d 695, 701 (11th Cir. 2002) (no liability for "an accomplice to homicide"); *Lauderback v. Am. Broad. Cos., Inc.*, 741 F.2d 193, 196 (8th Cir. 1984) (referring to an insurance agent as a "crook" not actionable because "this portrayal indicated ABC's opinion of Lauderback's dealings and not a bald accusation of criminal activity"); *Greenbelt Coop. Publishing Ass'n v.*

Bresler, 398 U.S. 6, 13–14 (1970) (use of the term "blackmail" protected expression); *cf.* 50 Am. Jur. 2d Libel and Slander § 114 ("[T]he more vituperative and abusive a statement is, the more likely it is to be protected as an expression of opinion.").

As one court explained, "[w]hen, as here, an author writing about a controversial occurrence fairly describes the general events involved and offers his personal perspective about some of its ambiguities and disputed facts, his statements should generally be protected by the First Amendment." *Partington v. Bugliosi*, 56 F.3d 1147, 1154 (9th Cir. 1995). That rule should apply here to protect Whittington's non-verifiable opinion statement. Because the only statement by Whittington challenged against Representative Beach is not provably false, the Plaintiff fails to state a claim against Representative Beach.

B. The statement is an opinion that discloses its underlying facts.

"[E]ven assuming that [the] statement[] could be verified" as true or false, "no fact finder could reasonably interpret [it] as stating or implying actual facts" that were not disclosed and are false. *Biospherics*, 151 F.3d at 184 (cleaned up). The blog's statement that "[i]t seems there is more than one teacher in Hilton Head Middle School grooming pre-teen students into an overtly sexualized lifestyle" is an opinion that discloses its underlying facts. The First Amendment protects such opinions because "[w]hen the bases for the conclusion are fully disclosed, no reasonable reader would consider the term anything but the opinion of the author drawn from the circumstances related." *Id.* at 185 (cleaned up) (quoting *Chapin*, 993 F.2d at 1093 and collecting cases). "Because the reader understands that such supported opinions represent the writer's interpretation of the facts presented, and because the reader is free to draw his or her own conclusions based upon those facts, this type of statement is not actionable in defamation." *Id.* (quoting *Moldea v. N.Y. Times Co.*, 15 F.3d 1137, 1144–45 (D.C. Cir. 1994)). And because "[i]t is the function of the court to determine" reasonable understandings as a matter of law, Restatement (Second) of Torts § 566

cmt. c, dismissals on this basis are commonplace. *See, e.g.*, *Farah v. Esquire Mag.*, 736 F.3d 528, 535 (D.C. Cir. 2013)*; Law Offs. of David Freydin, P.C. v. Chamara*, 24 F.4th 1122 (7th Cir. 2022); *McCafferty v. Newsweek Media Grp., Ltd.*, 955 F.3d 352 (3d Cir. 2020).

Here, Whittington discloses the facts underlying his opinion that "[i]t seems there is more than one teacher in Hilton Head Middle School grooming pre-teen students into an overtly sexualized lifestyle." Ex. 1. As discussed above and as shown in Exhibit 1, Whittington's article extensively discusses the former teacher, noting that the teacher "has been in the news recently for admitting to hiding children['s] gender identities from their parents"—and linking to news stories corroborating that summary. Whittington also discusses the Plaintiff, noting accurate factual details about the Plaintiff's pronoun survey with screen shots from the survey. That survey is the focus of the article—and Whittington's statement about "grooming"—and even the Plaintiff acknowledges that it was true that she provided students a survey that "asked for the student's preferred name and pronouns, and whether the preferred pronouns could be used in class and messages home or solely between the Plaintiff and the student." Compl. ¶ 11.[4] Whittington also noted that the Plaintiff had "trans-pride flag stickers all over the room." Ex. 1. In the course of relaying all these underlying facts, Whittington provides his opinion that "[i]t seems" teachers in the school are "grooming pre-teen students into an overtly sexualized lifestyle." *Id.*

The challenged statement does nothing more. It does not imply the existence of undisclosed facts. And it discloses the facts on which it is based—most of all, facts

[4] Though unnecessary to this motion, the Plaintiff doubled down on her position in interviews, explaining that "[a] trusted adult is not always the family." Mary Dimitrov, *'He was Dangerous'*, Island Packet (Aug. 2, 2023), https://perma.cc/4BLP-WGMD. The Plaintiff "said that if a parent came to her asking about their child's pronouns and it seemed like an unsafe situation she would call in district administrators and professionals before telling the parents." *Id.* She continued: "this is a bullet that I will jump in front of." *Id.*

about the survey that the Plaintiff appears to concede are true. "[W]here the alleged defamatory 'sting' arises from substantially true facts, the plaintiff may not rely on minor or irrelevant inaccuracies to state a claim for libel." *Chapin*, 993 F.2d at 1092. It is blackletter law that "[i]f all that the communication does is to express a harsh judgment upon known or assumed facts, there is no more than an expression of opinion of the pure type, and an action of defamation cannot be maintained." Restatement (Second) of Torts § 566 cmt. d; *see* 53 C.J.S. Libel and Slander; Injurious Falsehood § 23 (Sept. 2024 update) ("[T]here is no defamation if the speaker discloses truthful facts underlying the speaker's opinion.").[5] "Under the First Amendment, opinions based on disclosed facts are absolutely privileged, no matter how derogatory they are." *McCafferty*, 955 F.3d at 357. This rule "provides assurance that public debate will not suffer for lack of imaginative expression or the rhetorical hyperbole which has traditionally added much to the discourse of our Nation." *Milkovich*, 497 U.S. at 20.

Thus, "[t]he facts upon which the [statement] is based are stated" in Whittington's article "itself sufficiently full that the reader can draw his own conclusions." *Oswalt v. State-Rec. Co.*, 250 S.C. 429, 434, 158 S.E.2d 204, 206 (1967). The Plaintiff fails to state any claim based on the article's opinion statement about whether "it seems" some teachers are "grooming" students into an "overtly sexualized lifestyle." Ex. 1. Because the Plaintiff's claim against Representative Beach is founded on nothing else, that claim must be dismissed.

* * *

[5] The example provided by the Restatement is analogous: "A writes to B about his neighbor C: 'He moved in six months ago. He works downtown, and I have seen him during that time only twice, in his backyard around 5:30 seated in a deck chair with a portable radio listening to a news broadcast, and with a drink in his hand. I think he must be an alcoholic.' The statement indicates the facts on which the expression of opinion was based and does not imply others. These facts are not defamatory and A is not liable for defamation." Restatement (Second) of Torts § 566 cmt. c.

"'[I]t is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public issues, and this opportunity is to be afforded for vigorous advocacy' that may be caustic and even exaggerated." *CACI*, 536 F.3d at 304 (brackets omitted) (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964)). "This essential privilege minimizes the danger of self-censorship on the part of those who would criticize, thus allowing robust debate about the actions of public" schools that are educating the nation's youth. *Id.*

Representative Beach did nothing more than share a link to a blog post that conveyed the author's own opinion about a matter of substantial public interest. The Plaintiff's apparent "goal" of bringing this suit to silence "these conservatives and these extremists"[6] contradicts the First Amendment. As one treatise explains, "[m]any libel and slander cases are begun because a publication is derogatory, not defamatory, and the plaintiff is angry," "but his or her reputation is largely unharmed. It is frequently in this setting that cases are dismissed." Robert D. Sack, Sack on Defamation § 16:2.1 n.5.1 (5th ed. 2017 & Supp. 2024); *see supra* note 4 (the Plaintiff publicly reiterating her position about withholding gender identity from parents). Again, "[t]here is particular value in resolving defamation claims at the pleading stage, so as not to protract litigation through discovery and trial and thereby chill the exercise of constitutionally protected freedoms." *Kesner v. Dow Jones & Co.*, 515 F. Supp. 3d 149, 166–67 (S.D.N.Y. 2021) (cleaned up). The Plaintiff's claim against Representative Beach should be dismissed.

IV. The Plaintiff fails to plead required elements of her claim.

Yet another basis for dismissal is that the single statement challenged against Representative Beach relates to a matter of public concern. Accordingly, the Plaintiff

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[6] Daniel Villarreal, *She Asked Students Their Pronouns*, LGBTQNation (Sept. 20, 2024), https://perma.cc/MJ47-6X49 (statement by counsel); *see also* Compl. ¶ 33 (the Plaintiff alleging that the Defendants want to "prevent her from teaching what they call the 'leftist' or 'woke' agenda to South Carolina students").

was required to—but did not—plead facts showing malice and actual damages. She was also required to plead (and eventually prove) facts showing malice because Representative Beach's post is privileged as a fair comment on public issues, but again, she failed to do so. Her claim against Representative Beach is also subject to dismissal on these bases.

A. The statement is a matter of public concern, and the Plaintiff fails to plead facts showing malice or actual damages.

When "the alleged defamatory statement [i]s of public concern, the First Amendment requires the plaintiff 'to plead and prove common law malice, demonstrate the falsity of the statements, and show actual injury in the form of general or special damages.'" *Floyd v. WBTW*, No. CIV.A. 4:06CV3120-RB, 2007 WL 4458924, at *3 (D.S.C. Dec. 17, 2007) (quoting *Erickson*, 368 S.C. at 475, 629 S.E.2d at 670); *see Parker v. Evening Post Pub. Co.*, 317 S.C. 236, 243, 452 S.E.2d 640, 644 (Ct. App. 1994) ("[I]n private figure cases involving matters of public concern, the common law presumption of falsity is invalid—the plaintiff must prove the statement was false."); *see also Snyder*, 580 F.3d at 220 & n.13.

Of course, if the Plaintiff is a public figure or public official, she must also plead and prove "by clear and convincing evidence that the defendant acted with actual malice." *Erickson*, 368 S.C. at 467, 629 S.E.2d at 665. In the interest of judicial efficiency, Beach incorporates the other Defendants' arguments on this sub-issue, which show that the Plaintiff is at least a limited-purpose public figure or a public official. On the latter point, the Plaintiff affirmatively alleges that she is a public school employee with direct responsibility for children's education. Compl. ¶¶ 9–10. "To qualify as a public official, the plaintiff must occupy a position that would invite public scrutiny and discussion of the person holding it" because "the public has an independent interest in the qualifications and performance of the person holding the position." *Cruce v. Berkeley Cnty. Sch. Dist.*, 442 S.C. 1, 9, 896 S.E.2d 765, 769 (2024)

(cleaned up). That describes public school teachers, who have direct responsibility for educating youth that creates a significant public interest in the position. Recognizing the significance of public education, the South Carolina Constitution itself requires "the maintenance and support of a system of free public schools open to all children." S.C. Const. art. XI, § 3. Likewise, South Carolina law declares that "the proper education of all citizens is one of the most important responsibilities of the states to preserve a free and open society in the United States." S.C. Code Ann. § 59-11-10. Teachers like the Plaintiff "are public employees, hired by the school board and paid with public funds," and they "maintain highly responsible positions in the community"—making them public officials. *Basarich v. Rodeghero*, 24 Ill. App. 3d 889, 892, 321 N.E.2d 739, 742 (1974); *see also Elstrom v. Indep. Sch. Dist. No. 270*, 533 N.W.2d 51, 56 (Minn. Ct. App. 1995) ("Given [teachers'] authority, the public has a greater than normal interest in being able to debate and criticize freely the conduct of public school teachers."); *Kelley v. Bonney*, 221 Conn. 549, 581, 606 A.2d 693, 710 (1992) ("Robust and wide open debate concerning the conduct of the teachers in the schools of this state is a matter of great public importance."); *Campbell v. Robinson*, 955 S.W.2d 609, 612 (Tenn. Ct. App. 1997) (similar).[7]

But at this point, it makes little difference whether the Plaintiff is a public official or figure. At a minimum, the challenged statement was about a matter of public concern—public education and parental rights to direct their children's upbringing. "Speech deals with matters of public concern when it can be fairly considered as relating to any matter of political, social, or other concern to the community, or when it is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public." *Snyder v. Phelps*, 562 U.S.

[7] Thus, the Plaintiff, with broad teaching authority over dozens of students, is distinguishable from an assistant principal whose "duties included ninth-grade discipline." *Goodwin v. Kennedy*, 347 S.C. 30, 45, 552 S.E.2d 319, 327 (Ct. App. 2001).

443, 453 (2011) (cleaned up). As noted, South Carolina law declares that "the proper education of all citizens is one of the most important responsibilities of the states to preserve a free and open society in the United States." S.C. Code Ann. § 59-11-10. The South Carolina Supreme Court has likewise said that "education is perhaps the most important function of state and local governments," calling it "a principal instrument in awakening the child to cultural values." *Eidson v. S.C. Dep't of Educ.*, 444 S.C. 166, 192–93, 906 S.E.2d 345, 359 (2024) (quoting *Miller v. Sch. Dist. No. 2, Clarendon Cnty., S.C.*, 253 F. Supp. 552, 558 (D.S.C. 1966)); *accord* S.C. Const. art. XI, § 3; *Stroman v. Colleton Cnty. Sch. Dist.*, 981 F.2d 152, 158 (4th Cir. 1992) ("Public education is recognized as one of the most important public services offered by state government, and the maintenance of a professional and dedicated teaching staff to provide that service continuously ranks among the State's highest concerns."); *Williams v. Detroit Bd. of Educ.*, 306 F. App'x 943, 948 (6th Cir. 2009) (noting that citizens' "interest in their school system's well-being is justified because a well-functioning public educational system is critical to our democracy").

Likewise, citizens have a significant interest in ensuring that public schools inculcate *proper* cultural values while respecting the constitutional rights of parents to direct their children's upbringing. *See, e.g.*, *Hodgson v. Minnesota*, 497 U.S. 417, 445 (1990) ("Parents have an interest in controlling the education and upbringing of their children."); *Meyer v. Nebraska*, 262 U.S. 390, 401 (1923) (recognizing the right of parents "to control the education of their own"). Recognizing that public school surveys like the one given by the Plaintiff could affect those rights, federal law places strict limits on these types of surveys. *See* 20 U.S.C. § 1232h. Even the Plaintiff recognizes the connection between her lawsuit and "teaching" of "the 'leftist' or 'woke' agenda to South Carolina students." Compl. ¶ 33. And the primary post she challenges (and the only one at issue in her claim against Representative Beach) sought to address perceived "systemic" issues around "indoctrinating future

generations of America." Ex. 1. Thus, the challenged statement involved a matter of public concern.

Because the statement was about a matter of public concern, "the First Amendment requires the plaintiff 'to plead and prove common law malice, demonstrate the falsity of the statements, and show actual injury in the form of general or special damages.'" *Floyd*, 2007 WL 4458924, at *3 (quoting *Erickson*, 368 S.C. at 475, 629 S.E.2d at 670). Here, however, the Plaintiff has only the most conclusory allegations about malice (actual *or* common law), falsity, and damages—and *no* allegations specifically about Representative Beach and these issues. *See* Compl. ¶¶ 31, 39–41, 43. Her conclusory recitations of the legal standard are insufficient to plead the Plaintiff's claims. For instance, "[a] plausible allegation of actual malice requires 'factual allegations' that 'raise a right to relief above the speculative level.'" *Agbapuruonwu v. NBC Subsidiary (WRC-TV), LLC*, 821 F. App'x 234, 240 (4th Cir. 2020) (quoting *Mayfield v. Nat'l Ass'n for Stock Car Auto Racing, Inc.*, 674 F.3d 369, 377 (4th Cir. 2012)). And "[a] conclusory allegation of knowledge of falsity or reckless disregard thereof—that is, a mere recitation of the legal standard—does not constitute a plausible allegation." *Id.* So assertions like statements were "made 'with the knowledge they were false and so recklessly as to amount to a willful disregard for the truth'" are "entirely insufficient." *Id.* (cleaned up). But the Plaintiff offers even less than that here. *See, e.g.*, Compl. ¶ 39 ("All of the above statements were published with actual or implied malice."). Her "conclusory allegations fall short" because "naked assertions devoid of further factual enhancement" "fail to plausibly allege malice." *Harvey v. Cable News Network, Inc.*, 48 F.4th 257, 273–74 (4th Cir. 2022) (cleaned up); *see Mayfield*, 674 F.3d at 377 ("[M]alice must still be alleged in accordance with Rule 8—a 'plausible' claim for relief must be articulated.").

Last, the Plaintiff's claim for punitive damages (Compl. ¶ 44) fails. Even a "private-figure plaintiff bringing a defamation suit for opinion statements made on a matter of public concern" must "prove actual malice if [s]he seeks punitive damages." *McGlothlin*, 370 F. Supp. 3d at 616. But again, the Plaintiff has not pleaded facts alleging actual (or common law) malice, so she cannot claim punitive damages.

For all these reasons, the Plaintiff's claim against Representative Beach is not adequately pleaded.

B. Representative Beach's post is privileged as a fair comment.

At a minimum, Representative Beach has "a qualified privilege" under the "doctrine of 'fair comment,' which holds matters of public interest and concern to be legitimate subjects of criticism, and everyone has a right to comment thereon as long as he does so fairly and with an honest purpose." *Oswalt*, 250 S.C. at 433, 158 S.E.2d at 206. "Matters of public interest and concern are legitimate subjects of fair comment," and "[s]tatements constituting fair comment are not actionable, regardless of their severity, unless made with" actual malice. 20 S.C. Jur. Libel and Slander § 62 (Nov. 2024 update); *see Murray v. Holnam, Inc.*, 344 S.C. 129, 142, 542 S.E.2d 743, 750 (Ct. App. 2001) ("[I]f the communication is privileged, the plaintiff must prove actual malice.").

Here, as explained above, the underlying issue involved matters of significant public concern: public education and parental rights over their children's upbringing. Representative Beach's post did nothing except provide a link to a public blog post and comment "[g]reat reporting." Compl. Ex. S. By providing this link, Representative Beach was serving the public interest in understanding potential systemic issues in South Carolina public schools. His post does not "adopt[] the [alleged] defamatory statement as [his] own" and is limited to commenting on a public report about a matter of significant public interest. *Chapin*, 993 F.2d at 1098. Thus, the "fair comment" "privilege protects [Representative Beach] from any actionable

implication." *Id.* (affirming the grant of a motion to dismiss on this basis). And as shown above, the Plaintiff failed to adequately allege facts showing actual malice, so she cannot overcome the privilege. *See* Compl. ¶ 39 (conclusory allegation of malice, without supporting facts). Dismissal on this basis is also warranted.

V. Representative Beach joins dismissal arguments by other Defendants.

Beyond the above, and in the interest of judicial efficiency, Representative Beach further joins the dismissal arguments offered by the other Defendants in this case, to the extent they are relevant to the limited facts alleged against Representative Beach. *See* Compl. ¶ 30.

CONCLUSION

For the above reasons, the Court should dismiss the Plaintiff's claim against Representative Beach.

Dated: December 2, 2024

Respectfully submitted,

s/ Christopher Mills

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**Pro hac vice* applications forthcoming

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