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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING**

HARRY POLLAK,

Plaintiff,

vs.

SUSAN WILSON, in her individual capacity; ARIN WADDELL, in her individual and official capacities; SHELLIE SZMYD, in her individual capacity; WAYNE SCHATZ, in his individual and official capacities; SHANE RADER, in his individual and official capacities; ANN PERKINS, in her individual and official capacities; ED FESSLER, in his individual and official capacities; MARY BETH EVERS, in her individual and official capacities; DANA WYATT, in her individual and official capacities; MICHAEL LANSING, in his official capacity; and SHELTA RAMBUR, in her official capacity,

Defendants.

Case No. 22-CV-49-ABJ

Jury trial demanded

FIRST AMENDED COMPLAINT

INTRODUCTION

When Harry Pollak criticized the superintendent at his local school board meeting, the board chair cut him off, stopped him from speaking, and called the police. The chair claimed that Pollak violated a rule against discussing “personnel matters” at public meetings simply because Pollak intended to criticize the superintendent’s legal reasoning in his recent public comments.

The chair’s reason was pretextual. No ordinary person would think that criticizing a public official at a public meeting amounts to discussing “personnel matters.” And if that’s really what the board’s rule prohibits, it is unreasonable, overly broad, and amounts to impermissible viewpoint discrimination. Either way, the board violated Pollak’s First Amendment rights by censoring his speech.

The “personnel” prohibition is not the school board’s only unconstitutional rule restricting Pollak’s political speech. Its prohibitions against “gossip,” “defamatory remarks,” and “abusive or vulgar language”—whatever they might mean to the school board—encompass a fair amount of core First Amendment political speech. Having already had the police called on him for allegedly running afoul of the Board’s rules, these prohibitions further deter Pollak from expressing himself.

This Court should put an end to Defendants’ unconstitutional policies and practices.

JURISDICTION AND VENUE

1. This Court has subject-matter jurisdiction under 28 U.S.C. § 1331 because the claims arise under federal law.

2. This Court is the proper venue because a “substantial part of the events . . . giving rise to the claim[s] occurred” in the district, 28 U.S.C. § 1392(b)(2), and one or more of the defendants resides in this district, 28 U.S.C. § 1391(b)(1).

PARTIES

3. Plaintiff Harry Pollak is a natural person and citizen of Wyoming and the United States. He lives in Sheridan County School District No. 2 and pays property taxes in Sheridan County. He is also the parent of a student who attended a school operated by Sheridan County School District No. 2 at the time the school board censored Pollak.

4. Defendant Susan Wilson is a natural person and resident of Wyoming. Wilson previously served as a trustee and the Chairperson of the Board of Trustees for the Sheridan County School District No. 2 (“the Board”). The plaintiff is suing Wilson in her individual capacity.¹

5. Defendant Arin Waddell is a natural person and resident of Wyoming. Waddell serves as a trustee and Vice-Chair of the Board. The plaintiff is suing Waddell in her individual and official capacities.

¹ Pollak initially sued Wilson in her official capacity as well (ECF No. 1 at 1), but Defendant Wilson is no longer a trustee of the Board. Under Fed. R. Civ. P. 25(d), the new trustee (identified below) is automatically substituted in Wilson’s place for any official-capacity claims.

6. Defendant Shellie Szmyd is a natural person and resident of Wyoming. Szmyd previously served as a trustee of the Board. The plaintiff is suing Szmyd in her individual capacity.²

7. Defendant Wayne Schatz is a natural person and resident of Wyoming. Schatz is a trustee of the Board. The plaintiff is suing Schatz in his individual and official capacities.

8. Defendant Shane Rader is a natural person and resident of Wyoming. Rader is a trustee and the current Chairperson of the Board. The plaintiff is suing Rader in his individual and official capacities.

9. Defendant Ann Perkins is a natural person and resident of Wyoming. Perkins is a trustee of the Board. The plaintiff is suing Perkins in her individual and official capacities.

10. Defendant Ed Fessler is a natural person and resident of Wyoming. Fessler is a trustee of the Board. The plaintiff is suing Fessler in his individual and official capacities.

11. Defendant Mary Beth Evers is a natural person and resident of Wyoming. Evers is a trustee of the Board. The plaintiff is suing Evers in her individual and official capacities.

² Pollak initially sued Szmyd in her official capacity as well (ECF No. 1 at 1), but Defendant Szmyd is no longer a trustee of the Board. Under Fed. R. Civ. P. 25(d), the new trustee (identified below) is automatically substituted in Szmyd's place for any official-capacity claims.

12. Defendant Dana Wyatt is a natural person and resident of Wyoming. Wyatt is a trustee of the Board. The plaintiff is suing Wyatt in her individual and official capacities.

13. Defendant Michael Lansing is a natural person and resident of Wyoming. Lansing is a trustee of the Board. The plaintiff is suing Lansing in his official capacity.³

14. Defendant Shelta Rambur is a natural person and resident of Wyoming. Rambur is a trustee of the Board. The plaintiff is suing Rambur in her official capacity.⁴

FACTS

The public-participation policy for Board meetings

15. The Board of Trustees for Sheridan County School District No. 2 conducts its business through regularly scheduled meetings, which are open to the public.

16. During these meetings, the Board provides a period for public comment so that it can “hear the viewpoints of citizens throughout the district.” BEDH Policy at 1. The Board believes that “public participation” is an important part of ensuring “proper governance of the schools.” *Id.* Citizens are thus invited to speak about “school operations and programs.” *Id.*

³ Under Fed. R. Civ. P. 25(d), Lansing is automatically substituted in place of Defendant Shellie Szmyd for all official-capacity claims.

⁴ Under Fed. R. Civ. P. 25(d), Rambur is automatically substituted in place of Defendant Susan Wilson for all official-capacity claims.

17. The Board has adopted a policy that restricts what citizens can talk about during the public-comment period. *See id.* at 2. The Board calls this the BEDH Policy.

18. Under the BEDH Policy, citizens must limit their comments “to items which relate directly to the school district.” *Id.* “Speakers will be recognized by the chairperson of the board and may make objective comments on school operations and programs.” *Id.* at 1.

19. The BEDH Policy, however, prohibits individuals from discussing “[p]ersonnel matters.” It provides that “[p]ersonnel matters are not appropriate topics to be discussed at regular board meetings.” *Id.* at 2. Rather, “[d]ecorum requires that such matters be entertained in executive session as arranged by the Board.” *Id.* The Policy does not define “[p]ersonnel matters.”

20. The BEDH Policy also states that “[s]peakers will not be permitted to participate in gossip, make defamatory remarks, [or] use abusive or vulgar language.” *Id.* The Policy does not define “gossip,” “defamatory remarks,” “abusive,” or “vulgar.”

21. The BEDH Policy allows the Board to “set a time limit on the length of [the public-comment] period or a time limit for individual speakers.” *Id.* at 1.

22. The Board Chairperson is responsible for enforcing the BEDH Policy during meetings and can “discontinue any presentation which violates any of the public participation guidelines.” *Id.* at 2. The Chairperson can also answer citizen

questions, direct questions to other members of the staff, or refer matters to the Board for further consideration. *Id.*

The Board silences Pollak on February 7, 2022

23. Harry Pollak began worrying about education policy soon after he moved to Sheridan County in 2021. He worried that school policies were harming children—including his own. So Pollak began advocating for change. He contacted public officials responsible for school policy, like the superintendent, to discuss his concerns. And he started speaking at Board meetings during the public-comment period.

24. In January 2022, Superintendent Scott Stults decided to publicly address concerns that individuals had about the district’s pandemic-related policies. Stults spoke at the January Board meeting to defend the district’s legal authority to enact such policies over the objections of parents.

25. Pollak wanted to respond to the superintendent’s public comments. So he signed up to speak during the public-comment period at the next Board meeting on February 7, 2022.

26. The Board held its usual public-comment period at its February 7 meeting. But this time, the Board purported to add additional restrictions on the topics individuals could discuss. The sign-up sheet for speakers contained the following statement: “Due to ongoing litigation we will not hear audience comments on mask mandates, vaccinations, or comments regarding whether or not the district is following the constitution. Thank you for your understanding.”

27. Then-Chairperson Defendant Wilson opened the public-comment period by stating that the Board does not allow individuals to talk about personnel unless it's favorable. She also admonished speakers to refrain from making comments of a personal nature that reflect upon the character of a trustee, a school employee, or other speakers. As the Board Chairperson, Defendant Wilson had made similar comments at prior meetings.

28. Pollak spoke third. When his turn arrived, Pollak announced that he intended to address legal opinions that the superintendent had expressed at the previous Board meeting:

Madam Chair, Board of Trustees, and Superintendent Stults, we aim to set the record straight from the board meeting on January 10 of this year regarding superintendent Stults rebutting parents' declaration that the board and superintendent had violated our rights under Article I, Section 38A of the Wyoming Constitution, and that Article I, Section 38C gave them the authority to do so.

29. But Defendant Wilson cut him off. She seized on the fact that Pollak mentioned Stults, invoking the Board's rule against discussing "personnel matters."

30. A back and forth began in which Defendant Wilson informed Pollak that he cannot discuss the superintendent in his public comments:

Wilson: I'm going to have to leave -- ask you to leave because we do not discuss personnel during a board meeting in open session.

Pollak: This is not personnel.

Wilson: Uh, you specifically --

Pollak: He [Superintendent Stults] sat back here, made a comment. I'm rebutting his comment.

Wilson: I'm sorry. Do you have --

Pollak: So you're not going to let me finish?

Wilson: No I'm not because it's a personnel issue.

31. The conversation continued, and Defendant Wilson made clear that Pollak could not mention the superintendent for any reason:

Wilson: Do we have someone that can escort him out of the building if he's not willing to do it on his own?

Pollak: You're not going to let me finish my comment?

Wilson: It's a personnel --

Pollak: It is a public comment.

Wilson: You are speaking about Mr. Stults. That's all that's to be said.

32. When Pollak tried explaining that he was simply responding to views that the superintendent offered at the previous Board meeting, Defendant Wilson again dismissed him: "Then you need to do it in private to the board."

33. The exchange continued a little longer. At one point, Stults also spoke up to say that the Board's policy "specifically says that you may not speak about personnel."

34. Eventually, Defendant Wilson interjected: "Is his time up?" Pollak responded: "You've already -- you've already involved my time. I'm not going to give up my time because you've stopped me from talking."

35. Wilson agreed that she prevented him from talking, and she again confirmed that she did so because Pollak mentioned the superintendent: "That's right," she said, "we do not discuss personnel."

36. When Pollak offered to make his comments without mentioning the superintendent by name, Wilson stated, “Your time is up.”

37. Defendant Wilson then called for a motion for the Board to take a recess. The Board took a recess.

38. During the recess, the Board called the police. Several officers arrived to escort Pollak out of the building. The officers informed Pollak that he would be committing criminal trespass if he did not leave.

39. Pollak complied with the officers’ orders and left the building.

*The continuing impact of
Defendants’ censorship*

40. Pollak intends to continue speaking before the Board about various subjects related to school policy and procedure, including Pollak’s belief that the superintendent, Board trustees, and other public officials, have enacted policies harmful to his child’s education. But the Board’s speech restrictions have caused Pollak to refrain from speaking at Board meetings altogether. Pollak cannot effectively speak about problems with the district’s education policies if he cannot criticize the public officials responsible for enacting those policies or respond to the public officials who have defended them. Defendants’ censorship would thus force Pollak to use less effective speech, and to forgo some aspects of his message entirely for fear of being interrupted, arrested, or physically removed from the Board meeting by law enforcement.

41. Specifically, Pollak refrains from speaking at board meetings because he fears that Defendants will invoke the “personnel” policy, as well as the policy

barring “gossip,” “defamatory remarks,” and “abusive or vulgar language” to prevent him from offering his views, and to punish him if he does.

COUNT ONE

RIGHT OF FREE SPEECH, U.S. CONST. AMENDS. I, XIV, 42 U.S.C. § 1983
AS-APPLIED CHALLENGE TO THE “PERSONNEL” SPEECH RESTRICTION

42. Pollak realleges and incorporates by reference paragraphs 1 through 41.

43. The First Amendment embodies “a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.” *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

44. “[A] public forum may be created by government designation of a place or channel of communication for use by the public at large for assembly and speech, for use by certain speakers, or for the discussion of certain subjects.” *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 802 (1985) (citation omitted). A limited public forum exists where the government has reserved the forum for “certain groups” or for “the discussion of certain subjects.” *Pleasant Grove City v. Summum*, 555 U.S. 460, 470 (2009).

45. In a limited public forum, the government can restrict the content of speech so long as the restrictions “are reasonable in light of the purpose served by the forum and are viewpoint neutral.” *Cornelius*, 473 U.S. at 806.

46. A school board meeting at which the public is allowed to speak about school policies and governance is a limited public forum.

47. The public-comment period at the Board of Trustees meetings for Sheridan County School District No. 2 is a limited public forum for individuals to discuss the operation and governance of the school district, including school policies and procedures.

48. Because the comment period is a limited public forum, any content-based regulation must be “reasonable in light of the purpose served by the forum” and viewpoint neutral. *Shero v. City of Grove*, 510 F.3d 1196, 1202 (10th Cir. 2007).

49. The Board does not define “[p]ersonnel matters.” Responding to public comments that a public official made is not discussing a “[p]ersonnel matter” under any ordinary meaning of the phrase.

50. The restriction against discussing personnel matters, as applied to speakers who simply discuss or refer to public officials in their comments about school policy, is not “reasonable in light of the purpose served by the forum.” *See id.* The Board opens its public-comment period for the purpose of having public discussion on issues of “school operations and programs.” BEDH Policy at 1. The rule prohibiting speakers from talking about public officials, like the superintendent, undermines that purpose. Speakers cannot reasonably discuss school operations and programs if the Board forbids them from talking about or referring to the public officials responsible for enacting, administering, and defending school policies. And a rule prohibiting speakers from talking about public officials for any reason does not further any legitimate interest that the Board may have in confining discussions about private personnel matters to executive session.

51. Prohibiting individuals from speaking about public officials at a forum that the government has opened for discussing school policy also amounts to viewpoint discrimination. Individuals can express the view that the schools are under-performing because the curriculum is wrong, because teacher salaries are too low, or because classrooms are too large, but individuals are prohibited from expressing the view that schools are under-performing because the public officials responsible for enacting school policies have failed. This restriction discriminates against speech based on viewpoint.

52. Defendant Wilson censored Pollak's protected political speech because of his viewpoint. Defendant Wilson claimed that Pollak violated the Board's rule against discussing "[p]ersonnel matters" when he mentioned the superintendent. Although Wilson has repeatedly stated that individuals can make favorable comments about personnel, Wilson told Pollak that merely mentioning the superintendent violates the Board's rules. Defendant Wilson enforced the personnel prohibition as pretext for discriminating against Pollak because he intended to criticize the superintendent's public statements and the district's policies.

53. By enforcing the personnel prohibition to bar speech that mentions public officials, Defendants, under color of law, deprived Pollak of the right of free speech in violation of the First and Fourteenth Amendments to the United States Constitution, and continue to deprive Pollak of this fundamental right. Accordingly, Pollak is damaged in violation of 42 U.S.C. § 1983, and is entitled to damages; declaratory relief; preliminary and permanent injunctive relief against continued

enforcement of this unconstitutional personnel prohibition; and attorneys' fees and expenses under 42 U.S.C. § 1988.

COUNT TWO

RIGHT TO PETITION, U.S. CONST. AMENDS. I, XIV, 42 U.S.C. § 1983
AS-APPLIED CHALLENGE TO THE "PERSONNEL" SPEECH RESTRICTION

54. Pollak realleges and incorporates by reference paragraphs 1 through 41.

55. The public-comment period during the Sheridan County School District No. 2's Board of Trustees meetings is a forum that enables people to exercise their fundamental First Amendment right to petition their elected government officials. The restriction against discussing personnel matters, as applied to speakers who simply discuss or refer to public officials in their comments about school policy, violates the First Amendment by impermissibly prohibiting citizens from petitioning their elected government officials about matters of public concern. This prohibition is not reasonable in light of the purpose served by the forum. Instead, this prohibition suppresses petitions for redress, discriminates against viewpoint, and makes it harder for citizens to criticize government officials and ask for change. And a rule prohibiting speakers from talking about public officials for any reason while petitioning the government for redress does not further any legitimate interest that the Board may have in confining discussions about private personnel matters to executive session.

56. Enforcing the personnel prohibition as pretext for discriminating against Pollak because he intended to criticize the superintendent's public statements and

the district's policies, as Defendants did in censoring Pollak's speech, violates the right to petition.

57. By enforcing the personnel prohibition to bar speech that mentions public officials, Defendants, under color of law, deprived Pollak of the right to petition in violation of the First and Fourteenth Amendments to the United States Constitution, and continue to deprive Pollak of this fundamental right. Accordingly, Pollak is damaged in violation of 42 U.S.C. § 1983, and is entitled to damages; declaratory relief; preliminary and permanent injunctive relief against continued enforcement of this unconstitutional personnel prohibition; and attorneys' fees and expenses under 42 U.S.C. § 1988.

COUNT THREE
RIGHT OF FREE SPEECH, U.S. CONST. AMENDS. I, XIV, 42 U.S.C. § 1983
FACIAL CHALLENGE TO THE RESTRICTIONS ON SPEECH CONTENT

58. Pollak realleges and incorporates by reference paragraphs 1 through 41.

59. The Board's policy providing that speakers may not "participate in gossip, make defamatory remarks, [or] use abusive or vulgar language" violates the right of free speech on its face by impermissibly discriminating against speech based on viewpoint. *See Iancu v. Brunetti*, 139 S. Ct. 2294, 2299–300 (2019); *Ison v. Madison Local Sch. Dist. Bd. of Educ.*, 3 F.4th 887, 893–95 (6th Cir. 2021). The First Amendment protects speech that constitutes gossip, as well as abusive and vulgar speech. And while the First Amendment does not protect defamation, Defendants are not qualified to Adjudicate on the spot, whether any assertions of fact a speaker might make about another person are true. This prohibition thus does not reasonably confine speech to the limited and legitimate purpose of the Board's

public-comment period, but rather, suppresses viewpoints and opinions about matters properly before the Board.

60. By enforcing these rules, Defendants, under color of law, deprive Pollak of the right of free speech and due process in violation of the First and Fourteenth Amendments to the United States Constitution. Accordingly, Pollak is damaged in violation of 42 U.S.C. § 1983, and is entitled to damages; declaratory relief; preliminary and permanent injunctive relief against continued enforcement of this unconstitutional speech restriction; and attorneys' fees and expenses under 42 U.S.C. § 1988.

COUNT FOUR
RIGHT TO PETITION, U.S. CONST. AMENDS. I, XIV, 42 U.S.C. § 1983
FACIAL CHALLENGE TO THE RESTRICTIONS ON SPEECH CONTENT

61. Pollak realleges and incorporates by reference paragraphs 1 through 41.

62. The Board's policy providing that speakers may not "participate in gossip, make defamatory remarks, [or] use abusive or vulgar language" violates the right to petition on its face by impermissibly discriminating against petitions based on viewpoint.

63. The First Amendment protects petitions that constitutes gossip, as well as petitions that contain abusive and vulgar speech. And while the First Amendment does not protect defamation, Defendants are not qualified to adjudicate on the spot, whether any assertions of fact a speaker might make about another person are true. This prohibition thus does not reasonably confine petitions to the limited and legitimate purpose of the Board's public-comment period, but rather, suppresses viewpoints and opinions about matters properly before the Board.

64. By enforcing these rules, Defendants, under color of law, deprive Pollak of the right to petition and due process in violation of the First and Fourteenth Amendments to the United States Constitution. Accordingly, Pollak is damaged in violation of 42 U.S.C. § 1983, and is entitled to damages; declaratory relief; preliminary and permanent injunctive relief against continued enforcement of this unconstitutional speech restriction; and attorneys' fees and expenses under 42 U.S.C. § 1988.

COUNT FIVE
RIGHT OF FREE SPEECH, U.S. CONST. AMENDS. I, XIV, 42 U.S.C. § 1983
OVERBREADTH

65. Pollak realleges and incorporates by reference paragraphs 1 through 41.

66. The First and Fourteenth Amendment prohibit the enforcement of substantially overbroad laws that would punish protected speech.

67. The prohibition against “gossip,” “defamatory remarks,” and “abusive or vulgar language” is overbroad, sweeping in protected political speech, pure opinions, and true statements of fact.

68. By enforcing these rules, Defendants, under color of law, deprive Pollak of the right of free speech and due process in violation of the First and Fourteenth Amendments to the United States Constitution. Accordingly, Pollak is damaged in violation of 42 U.S.C. § 1983, and is entitled to damages; declaratory relief; preliminary and permanent injunctive relief against continued enforcement of this unconstitutional speech restriction; and attorneys' fees and expenses under 42 U.S.C. § 1988.

COUNT SIX
RIGHT OF FREE SPEECH, U.S. CONST. AMENDS. I, XIV, 42 U.S.C. § 1983
VAGUENESS

69. Plaintiff realleges and incorporates by reference paragraphs 1 through 41.

70. The Due Process Clause of the Fourteenth Amendment prohibits enforcement of vague laws. The First Amendment likewise forbids enforcement of laws so vague as to chill protected speech.

71. A law or regulation is void-for-vagueness when “people of ordinary intelligence” do not have “a reasonable opportunity to understand what conduct it prohibits.” *Faustin v. City & Cnty. Of Denver*, 423 F.3d 1192, 1201 (10th Cir. 2005) (quotation omitted).

72. The prohibition against “gossip,” defamatory remarks,” and “abusive or vulgar language” is unconstitutionally vague. No person of ordinary intelligence can readily identify the applicable standard of the prohibition. This causes speakers and potential speakers—including Pollak—to self-censor their speech to avoid having their speech interrupted or terminated.

73. By enforcing these rules, Defendants, under color of law, deprive Pollak of the right of free speech and due process in violation of the First and Fourteenth Amendments to the United States Constitution. Accordingly, Pollak is damaged in violation of 42 U.S.C. § 1983, and is entitled to damages; declaratory relief; preliminary and permanent injunctive relief against continued enforcement of this unconstitutional speech restriction; and attorneys’ fees and expenses under 42 U.S.C. § 1988.

PRAYER FOR RELIEF

Wherefore, Plaintiff Harry Pollak requests judgment in his favor and against the defendants as follows:

A. Orders enjoining the defendants, their officers, agents, servants, employees, and all persons in active concert or participation with them who receive actual notice of the injunction, from enforcing the Board's policies (1) prohibiting discussing personnel matters, as applied to individuals who want to mention, refer to, or criticize public officials while discussing school policies and procedure; and (2) prohibiting speakers from "participat[ing] in gossip, mak[ing] defamatory remarks, [or] us[ing] abusive or vulgar language";

B. A declaration that the Board's policies (1) prohibiting discussing personnel matters, as applied to individuals who want to mention, refer to, or criticize public officials while discussing school policies and procedure; and (2) prohibiting speakers from "participat[ing] in gossip, mak[ing] defamatory remarks, [or] us[ing] abusive or vulgar language" violate the First and Fourteenth Amendments;

C. Nominal damages in the amount of \$17.91;

D. Costs and attorneys' fees under 42 U.S.C. § 1988; and

E. Any other relief this Court may grant in its discretion.

JURY TRIAL DEMAND

Plaintiff demands a trial by jury on claim for nominal damages.

Dated: March 3, 2023.

Respectfully submitted by,

/s/ Brett R. Nolan

Brett R. Nolan⁵

(pro hac vice)

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CERTIFICATE OF SERVICE

I certify that the foregoing was served on all counsel of record on March 3, 2023, using the Court’s CM/ECF system.

/s/ Brett R. Nolan

Counsel for Plaintiff

⁵ Admitted in Kentucky. Not admitted to practice in the District of Columbia. Supervised by D.C. bar attorneys under D.C. App. R. 49(c)(8).