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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, *et al.*, Defendants.	Case No. 2:22-CV-49-ABJ

PLAINTIFF'S REPLY IN SUPPORT OF MOTION TO RECONSIDER ORDER GRANTING MOTION TO COMPEL

In reply to the Defendants' opposition (ECF No. 55) to Plaintiff Harry Pollak's motion to reconsider (ECF No. 51), Pollak states the following:

I. THE FIRST AMENDMENT PRIVILEGE APPLIES.

1. The magistrate judge's holding that the First Amendment privilege does not apply rested on the legal conclusion that it is unreasonable for individuals engaged in lawful political activities to stop doing so for fear of a government investigation. (*See* ECF No. 51 at 6–7 (citing ECF No. 50 at 8)). But "First Amendment freedoms need breathing space to survive." *Ams. for Prosperity Found. v. Bonta*, 141 S. Ct. 2373, 2389 (2021) (citation omitted); (*see also* ECF No. 51 at 6–7). That is why the Tenth Circuit and the Supreme Court have long held that investigations alone chill First Amendment rights whether or not prosecution or conviction is likely. (*Id.*). The

magistrate judge's conclusion was thus contrary to law. On top of that, the Defendants never raised this issue and so Pollak had no opportunity to address it before the magistrate judge granted the motion to compel—making the legally erroneous holding doubly problematic. *See United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1579 (2020); (ECF No. 51 at 4–5).

Remarkably, the Defendants do not address this issue in their response. They do not defend the magistrate judge's erroneous legal conclusion. They cite no cases supporting the holding. And they do not even suggest a way to square the decision with precedent saying otherwise. The Court should set aside magistrate judge's holding that the First Amendment privilege does not apply on this basis alone.

2. The Defendants' discussion of the evidence fares no better. The Defendants either mischaracterize Pollak's arguments or ignore them entirely.

The Defendants first claim that "Pollak argues that the Magistrate judge failed to acknowledge a social media post that referred to terrorist[s]." ECF No. 55 at 5. Not so. Pollak argued that the court *minimized* the evidence on faulty grounds—namely, that the post did not name a specific person. (ECF No. 51 at 5).[1] Pollak argued doing so was clearly erroneous because the comment was posted on an article about FOF and referred to individuals sharing FOF's political views, thus demonstrating "public hostility" toward the very people implicated by this discovery

[1] Pollak did argue that the magistrate judge ignored other evidence— evidence that one of the defendants in this case has shown public hostility toward online advocates criticizing the school board. (ECF No. 51 at 5). The Defendants likewise ignore this uncontroverted evidence supporting Pollak's objectively reasonable worry about disclosure.

dispute. (*Id.*); *see NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 462 (1958). The Defendants likewise ignore the context of this post. Thus, they do not explain why it is unreasonable for Pollak to worry about hostile comments posted publicly on an article about FOF directed toward individuals who share FOF's views.

The Defendants also minimize the evidence of reports that people who have engaged in similar peaceful advocacy about school policy have been subjected to criminal investigations and harassment. As the Defendants see it, this evidence is irrelevant because the reports do not "reference FOF, or anything related to Sheridan, Wyoming." (ECF No. 55 at 5). The magistrate judge did not take that same view (instead resting its decision on the legal error discussed above). For good reason: The question here is whether it is reasonable to worry about public hostility or retaliation such that "there is *a chance* that" Pollak or others would stop engaging in private political association. *In re Motor Fuel Temperature Sales Practices, Litig.*, 641 F.3d 470, 479 (10th Cir. 2011) (emphasis added). The reports cited in the record show public hostility and retaliation directed at parents across the nation who have engaged in similar advocacy related to school board policies. Pollak and other members of FOF should not have to wait to be the specific target of harassment to benefit from the First Amendment's protection. It is reasonable to worry about public hostility in the face of high-profile instances of other individuals engaged in similar peaceful advocacy experiencing retaliation.

The Defendants' last point is that Pollak cannot rely on "his own unsupported declaration" to establish the First Amendment privilege applies because it is "based

only on his own self-serving and unsubstantiated speculation." (ECF No. 55 at 5). But Pollak's statements about his own fears are not speculation,[2] and it is hard to understand how Pollak could prove his own fear of public hostility or reprisal other than with his own statements. Nor can Pollak rely on the statements of other FOF members when the whole point is to protect their identities from disclosure. That Pollak's personal fear from disclosure arises from recent events reported by Congress and the media is enough to establish that his fear is reasonable.

II. THE BALANCE OF FACTORS WEIGHS AGAINST DISCLOSURE.

The Defendants argue that the magistrate judge did not err in balancing the factors in favor of disclosure. But they ignore Pollak's arguments and rely on the wrong legal standard.

The primary issue is relevance—but not ordinary relevance. The First Amendment imposes an exacting relevance standard that requires showing the information goes to the "heart of the matter." *Wyoming v. U.S.D.A.*, 239 F. Supp. 2d 1219, 1242 (D. Wyo. 2002), *vacated on other grounds*, 414 F.3d 1207 (10th Cir. 2005). Yet the Defendants do not grapple with the heightened standard. Instead, they claim *ipse dixit* that these documents are "certainly relevant" because they may show Pollak did not have a "legitimate purpose[]" for speaking at the meeting. (ECF No. 55 at 6). But what is a "legitimate purpose," and how does Pollak's

[2] Pollak submitted a declaration under 28 U.S.C. § 1746, giving his statements the same legal force as an oath or affidavit.

"purpose" make the board's rules more or less constitutional? In three briefs on this issue (ECF No. 47, 49, & 55), the Defendants have yet to answer that question.

Nor do the Defendants address the problem with the scope of the magistrate judge's order. As explained in the motion to reconsider, the magistrate judge's reasoning on relevance only addresses the meeting on February 7, 2022. (ECF No. 51 at 9). Yet the order requires Pollak to also disclose communications about meetings in January 2022 and November 2021. The Defendants do not defend the clearly erroneous scope of the order, which requires Pollak to produce communications about a board meeting at which he did not even speak. At the very least, that part of the order should be set aside.

CONCLUSION

The Court should set aside the order granting the motion to compel.

Dated: August 23, 2023.

Respectfully submitted by,

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[3] 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).

CERTIFICATE OF SERVICE

I certify that the foregoing was served on all counsel of record on August 23, 2023, using the Court's CM/ECF system.

/s/ Brett R. Nolan
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