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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 RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

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NATURE OF THE CASE

This is a First Amendment case brought under 42 U.S.C. § 1983. The plaintiff, Harry Pollak, sued the trustees of SCSD2's Board of Trustees (collectively, "SCSD2" or the "Board") after the Board prevented him from speaking during the public-comment period of its February 7, 2022 meeting. Pollak challenges the constitutionality of the rules governing public comment at SCSD2 board meetings, and he contends that the Board discriminatorily enforced those policies against him to prevent him from criticizing the superintendent's public statements.

Pollak filed suit on March 9, 2022, (ECF No. 1), and he moved for a preliminary injunction, (ECF No. 8). The Court denied that motion, (ECF No. 17), and Pollak appealed to the Tenth Circuit, (ECF No. 18). During that appeal, the Court stayed this case. (ECF No. 29). The Tenth Circuit affirmed. (ECF No. 30-1). The Court then lifted the stay, (ECF No. 31), Pollak amended his complaint (ECF No. 43), and the parties proceeded with discovery, (ECF No. 42). Discovery closed on October 2, 2023. (ECF No. 60). The defendants moved for summary judgment on September 26, 2023, (ECF Nos. 63 & 64), and Pollak cross-moved for summary judgment on all his claims on October 6, 2023 (ECF Nos. 65 & 66).

RESPONSE TO THE DEFENDANTS' STATEMENT OF UNDISPUTED MATERIAL FACTS

Pollak does not dispute the facts stated in Paragraphs 1, 3, 4, 5,[1] 7, 8, 9, and 16 of the Statement of Facts and responds as follows to the remaining paragraphs:

[1] Pollak does not dispute the last two sentences of Paragraph 5 with respect to the specific meetings cited. The board prevented Pollak from criticizing its policies on February 7, 2022, as described below.

2. Pollak disputes the first sentence, which is not a factual statement and cites no record evidence for support. Pollak does not dispute the remaining sentences, but the defendants cite no evidence supporting sentences six and seven.

6. Pollak does not dispute that he contacted the district to express opposition to the district's mask requirement more than once during the 2021-20022 school year. Exhibits I through K speak for themselves. Pollak testified he did not write the e-mails marked Exhibits I and J. Pollak Depo. at 22:1–8, 26:12–25.

10. The e-mails marked as Exhibit M and N speak for themselves.

11. Pollak does not dispute Paragraph 11 but Exhibit N speaks for itself.

12. Pollak does not dispute the first sentence of Paragraph 12. The transcription of Pollak's quote in the second sentence contains a minor error, and the correct transcript is stated below in Paragraph Q. Pollak disputes any implication that the defendants' summary captures all relevant portions of the interaction and submits that the videos marked as Exhibits O and P, as well as Plaintiff's Exhibit 16, "speak for themselves." *Culver v. Armstrong*, Case No. 14-CV-012, 2015 U.S. Dist. LEXIS 180491, at *12 (D. Wyo. Apr. 30, 2015).

13. Pollak disputes any implication that SCSD2's summary, which relies on an affidavit rather than the videos in the record, captures all relevant portions of the interaction. Pollak submits that the videos marked as Exhibits O and P, as well as Plaintiff's Exhibit 16, "speak for themselves." *Culver*, 2015 U.S. Dist. LEXIS 180491, at *12. Defendant Wilson told Pollak to leave before advising him he could continue if he did not discuss personnel. Ex. 16 at 0:00–0:52. Pollak stated multiple

times that he was not discussing a personnel matter. *Id.* at 0:52–55. Pollak additionally disputes that he did not "accept . . . the opportunity to speak on a topic that did not involve personnel" because Pollak offered to state his comments without referring to the superintendent, but Wilson said his time was up and did not let him do so. *Id.* at 5:00–5:12.

14. Pollak does not dispute the factual claims in Paragraph 14, except for the claims in sentences one and two that purport to state the reason the Board recessed. This claim is supported by Superintendent Stults's affidavit, but Stults is not competent to testify about why each individual trustee took certain actions.

15. Pollak does not dispute Paragraph 15, but Exhibit Q speaks for itself.

ADDITIONAL STATEMENT OF MATERIAL FACTS

A. SCSD2 is governed by a 9-member Board of Trustees that conducts its meetings open to the public. (ECF No. 64-1 at 1 ¶3); Ex. 1, BEDH Policy at 1.

B. During its regular meetings, the Board receives reports and other information from SCSD2 employees, including the superintendent. Ex. 2, SCSD2 Depo. at 28:16–29:10.[2]

C. School administrators regularly recognize employees by name during public portions of the Board's meetings. *See, e.g.*, Ex. 3 at 11 (Aug. 2021 Board Minutes); Ex. 4 at 6 (Oct. 2021 Board Minutes) ("Mr. Mayhue has had a steep learning curve and has done an incredible job . . . ."); Ex. 5 at 2–3 (Jan. 2022 Board Minutes)

[2] Superintendent Scott Stults testified on behalf of SCSD2 under Fed. R. Civ. P. 30(b)(6). *See id.* at 15:5–16:1, 37:11–13, 38:1–8, 55:24–56:1, 86:19–21; Ex. 21 (Attachment A).

("Superintendent Stults thanked Mr. Julian for all that he does and wanted to publicly recognize him for this award of merit he received."); Ex. 6 at 10 (Feb. 2022 Board Minutes); Ex. 8 at 2, 3 (Mar. 2022 Board Minutes); Ex. 9 at 8 (Oct. 2022 Board Minutes) (discussing the District Math Coordinator by name); Ex. 10 at 4 (Jan. 2023 Board Minutes)[3] (expressing "appreciation for everything [an employee] has done"); Ex. 11 a 4 (March 2023 Board Minutes) (celebrating high school theater director for putting on "amazing" performances). During this time, school administrators sometimes discuss the employee's job performance. *Id.*

D. The Board provides time for public comments at its regular meetings. BEDH Policy at 1; SCSD2 Depo. at 19:21–23.

E. The Board has adopted a policy that restricts what citizens can talk about during the public-comment period, which it calls the BEDH Policy (the "Policy"). *See* Ex. 1.

F. The purpose of the public-comment period is "to hear the viewpoints of citizens throughout the district." *Id.* at 1. Under the Policy, "Speakers will be recognized by the chairperson of the board and may make objective comments on school operations and programs." *Id.* The Policy further provides that "[s]peakers will be advised that their comments must be limited to items which relate directly to the school district." *Id.* at 2.

[3] The minutes from January 2023 do not have page numbers. Page 4 is also marked as SCSD#2 Doc. 00382.

G. The Policy includes a rule (the "Personnel Rule") prohibiting speakers from discussing personnel matters "at regular board meetings," which states: "Personnel matters are not appropriate topics to be discussed at regular board meetings. Decorum requires that such matters be entertained in executive session as arranged by the Board." *Id.*; SCSD2 Depo. at 30:7–15. The Policy does not define "personnel matters." *See generally* BEDH Policy; SCSD2 Depo. at 35:4–7.

H. The Board gives the presiding chair discretion "to decide whether or not comments violate the policy." SCSD2 Depo. at 55:4–10; *see also id.* at 58:23–24.

I. Defendant Susan Wilson, who served as chair during the events of this suit, understands the Personnel Rule to prohibit mentioning the name of any SCSD2 employee for any reason, Ex. 14, Wilson Depo. at 11:3–17, 34:8–20, 35:8–11. Defendant Shane Rader, the current chair, disagrees that mentioning a staff member, without more, violates the policy. *See* Ex. 15, Rader Depo. at 45:11–47:21; 49:1–50:18. Rader has allowed at least two individuals to speak positively about the superintendent, and he testified that such comments did not violate the rule. *Id.* at 46:7–9, 49:12–50:7; *see* Ex. 17 (Jan. 2023 Board Meeting Excerpt); Ex. 19 (Mar. 2023 Board Meeting Excerpt).[4]

J. When serving as chair, Wilson "often" told speakers that "[c]ompliments and congratulations to employees are always welcome," even though she believed that

[4] The full videos of the January and March 2023 meetings are attached as Exhibits 18 and 20. The expected portions include 1:39:44 through 1:43:11 from Exhibit 18 (Ex. 17) and 26:11 through 28:38 from Exhibit 20 (Ex. 19).

such positive feedback would violate the Personnel Rule. Wilson Depo. at 36:25–37:20. She said this to make people "feel welcome." *Id.* at 37:8–9, 37:16–20.

K. Wilson never stopped a speaker for making positive comments about SCSD2 staff, *id.* at 76:16–19, even though multiple speakers did so when she was chair, *see* Ex. 3 (August 2021 Board Minutes); Wilson Depo. at 38:18–39:15; Ex. 9 (Oct. 2022 Board Minutes); Wilson Depo. at 62:9–18, 64:7–11.

L. The BEDH Policy also includes a rule (the "Offensive Speech Rule") prohibiting speakers from using certain kinds of language: "Speakers will not be permitted to participate in gossip, make defamatory remarks, use abusive or vulgar language." BEDH Policy at 2. Like the Personnel Rule, the terms "gossip," "defamatory remarks," "abusive," and "vulgar" are not defined. *See generally id.*

The Board censors Pollak on February 7, 2022

M. The Board held a regular, public meeting on January 10, 2022. *See* Ex. 5 (Jan. 2022 Board Minutes).

N. During this meeting, Superintendent Stults reported on the district's COVID-19 Plan Update. *Id.* at 5. As part of that report, Stults commented about the school district's legal authority to enact restrictions related to protecting the health and welfare of the people. *Id.*

O. Stults delivered these comments during the public portion of the Board's regular meeting, *id.*, but after the meeting's public-comment period, *compare id.* at 4, *with id.* at 5; *see also* Ex. 12, Pollak Depo. at 89:14–22. Individuals at the meeting

had no chance to speak about the issues that Stults publicly addressed during the public-comment period. Pollak Depo. at 89:18–22.

P. Pollak signed up to speak at the meeting on February 7, 2022. *See* Ex. 13.

Q. When it was his turn, Pollak stated that he intended to respond to the comments Stults publicly made at the meeting one month earlier. He stated:

> Hello my name is Harry Pollak. 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 have 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.

Ex. 16, Feb. 7, 2022 Video at 0:00–25; *see also* Pollak Depo. at 88:12–22.

R. Defendant Wilson, the then-chair, interrupted Pollak and asked whether this was a personnel matter. Pollak stated that "Mr. Stults addressed these items last month" and so he was "addressing them this month." *Id.* at 0:42–48. Wilson told him he had to "leave because we do not discuss personnel during board meetings in open session." *Id.* at 0:47–53. Pollak denied that he was discussing personnel matters. *Id.* 0:52–54

S. Wilson and Pollak then engaged in a back and forth about whether he had a right to speak and whether the Board's policies prohibited him from doing so. During that discussion, Wilson stated that Pollak was not permitted to talk about Superintendent Stults for any reason. *Id.* at 1:30–44 ("You are speaking about Mr.

Stults. That's all that's to be said."). Wilson eventually asked for a recess, and the Board recessed.[5]

T. During the recess, Superintendent Stults called the police. SCSD2 Depo. at 83:18–19. The officers responding to the call informed Pollak that he would be committing criminal trespass if he did not leave. Pollak Depo. at 106:2–13. Pollak complied with the officers' orders and left the building. *Id.*

U. Wilson testified that one reason she enforced the Personnel Rule against Pollak was because "he was very critical in his speech." *Id.* at 43:25–44:12. Wilson "never allowed anyone to speak critical about" an employee. *Id.* at 76:16–19.

Pollak's Ongoing Harm

V. Pollak still wants to speak at a school board meeting. Pollak Depo. at 124:5–11. He has chosen not to speak because he worries about the Board calling the police, having him removed, having him arrested, or telling him to leave, making him "embarrassed and humiliated in front of the media and [his] peers." *Id.* at 124:5–21.

W. Pollak does not believe that his comments on February 7 discussed personnel matters. *Id.* at 95:22–24; Ex. 22, Pollak Decl. at 3 (¶14 ("I was told I was not allowed to talk about personnel matters . . . even though nothing I had said had anything to do with personnel."); Pollak Depo. at 98:17–18. He does not understand

[5] Exhibit 16 is a video of the full interaction between Pollak and Wilson up until the point at which the Board votes to recess. *See* SCSD2 Depo. at 77:25–78:8, 80:10–13; Wilson Depo. at 43:4–12. The defendants likewise submitted two videos which capture discrete parts of the same interaction. Pollak submits that "[t]he video recordings speak for themselves." *Culver*, 2015 U.S. Dist. LEXIS 180491, at *12.

how the Board interprets the Personnel Rule. *Id.* at 134:15–18. Pollak also does not know what the Policy means by gossip, defamatory remarks, abusive language, or vulgar language. *Id.* at 133:9–134:10.

LEGAL STANDARD

Courts should grant summary judgment when "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "A dispute of fact is genuine if a reasonable juror could resolve the disputed fact in favor of either side." *Victory Processing, LLC v. Michael*, 333 F. Supp. 3d 1263, 1266 (D. Wyo. 2018). "A dispute of fact is material if under the substantive law it is essential to the proper disposition of the claim." *Id.*

ARGUMENT[6]

I. THE PERSONNEL RULE VIOLATES THE FIRST AMENDMENT AS APPLIED TO SPEAKERS MENTIONING STAFF WHILE DISCUSSING SCHOOL POLICY.

The Personnel Rule violates the First Amendment as applied to speakers mentioning staff while discussing school policy. (*See* ECF 66 at 9–18). The parties agree on the basics here: The public-comment period at SCSD2 board meetings is a limited public forum. Thus, speech restrictions must be reasonable and viewpoint neutral. The Personnel Rule fails both tests. (*Id.* at 8–9).

A. The nature of Pollak's as-applied claim.

Pollak does not facially challenge the Personnel Rule, but instead limits his claim to the rule as applied to speakers who mention public officials while

[6] The Court should deny the defendants' motion for the same reasons it should grant Pollak's motion for summary judgment and Pollak incorporates his motion for summary judgment by reference. (*See* ECF Nos. 65 & 66).

discussing an otherwise permissible topic—school policy. Contrary to SCSD2's argument otherwise, (ECF No. 64 at 10), this alters the Court's analysis. In an as-applied challenge, the plaintiff need only show the law is unconstitutional in the "universe" of challenged circumstances. *United States v. Supreme Court of N.M.*, 839 F.3d 888, 912–13 (10th Cir. 2016). That distinction matters here. Pollak *does not* challenge the Personnel Rule as applied to employment matters (such as grievances or evaluations) that potentially raise personal or confidential information. (*See* ECF No. 43 at 12 (¶¶49–50), 13–14 (¶53), 14–15 (¶¶55, 57)). Thus, the question here is whether the Personnel Rule is reasonable and viewpoint neutral within this smaller "universe" of applications. *See Supreme Court of N.M.*, 839 F.3d at 914.

B. The Personnel Rule is unreasonable.

The Personnel Rule is unreasonable as a matter of law for two reasons. First, it bans speakers from commenting on the very school policy issues discussed during SCSD2's public meetings. Second, the rule unreasonably invites arbitrary enforcement. (*See* ECF No. 66 at 14–16).

1. On the first issue, the rule's overbroad ban against mentioning SCSD2 staff for any reason undermines the purpose of the forum—which is to "hear viewpoints of citizens throughout the district" on issues related to "school operations and programs." BEDH Policy at 1. Schools are run by people. Those people implement school programs, manage school operations, and execute district policy. As Defendant Wilson recognizes, it makes no sense to conflate discussions about school operations that include discussing personnel with comments about "personnel

matters" like evaluations. Wilson Depo. at 73:9–15. The public-comment period exists to hear from citizens about school operations and programs, and the Board's expansive application of the Personnel Rule prohibiting speakers from mentioning staff while discussing school policy "undermine[s]" that purpose. *Minn. Voters All. v. Mansky*, 138 S. Ct. 1876, 1891 (2018); *see also Marshall v. Amuso*, 571 F. Supp. 3d 412, 426 (E.D. Pa. 2021).

SCSD2's inconsistency in prohibiting discussing staff in public makes the rule even more unreasonable. SCSD2 hears from various district administrators at every meeting, including the superintendent. And in fact, the Board schedules audience comments at the end of its meetings so speakers can listen to those administrators and "hear all about the workings of the school district" before giving their remarks. SCSD2 Depo. at 28:16–19, 29:11–17, 30:1–6; Ex. 7 at 3–4. But the Personnel Rule prohibits speakers from responding to those reports—as Pollak tried to do here—because doing so involves mentioning personnel. This case illustrates that bizarre result: The Board prevented Pollak from responding to the superintendent's comments about school policy at a public meeting because Pollak mentioned the superintendent. This rule in no way "preserves the purpose of the forum." *See Summum v. Callaghan*, 130 F.3d 906, 917 (10th Cir. 1997).

SCSD2 justifies its rule because "the school district has a significant interest in keeping personnel matters from being discussed during public comment." (ECF No. 64 at 12). The Board does not want "personal and/or confidential information about [an individual's] employment discussed in public." (ECF No. 64 at 12). But Pollak is

not challenging the Personnel Rule as applied to speakers discussing employment matters in which that kind of information may come up. SCSD2 also wants to prevent addressing things like employment evaluations in public, instead shifting those discussions to its grievance process. (*Id.*). But again, Pollak is not challenging the Personnel Rule as applied to speakers who want to discuss employment evaluations or otherwise submit complaints about employees. SCSD2's interest in removing those topics from public discussion is thus irrelevant to the claim here.

The Board's attempt to recast Pollak's comments as an "allegation" against the superintendent to shoehorn it into some kind of employment issue strains credulity and ignores Wilson's own statements when she enforced the rule. Wilson asked Pollak if this was a "personnel matter," and he said no, explaining that he was simply responding to the superintendent's public comments from the Board's earlier meeting: "Mr. Stults addressed these items last month. I'm addressing them this month." Ex. 16 at 0:37–0:48. Seconds later, Pollak again clarified that he was not addressing a personnel matter: "[Stults] sat back here, made a comment, *I'm rebutting his comment*." *Id.* at 0:48 (emphasis added). In response, Wilson left no doubt that she was forbidding Pollak from mentioning the superintendent for any reason: "You are speaking about Mr. Stults. That's all that's to be said." *Id.* at 1:39; *id.* at 3:38 ("We do not speak of personnel. You mentioned Mr. Stults by name. He is our superintendent. He is personnel.").

One last point. SCSD2 conspicuously avoids defining the term "personnel matters" anywhere in its brief. That makes this case different than *Fairchild v.*

Liberty Independent School District, 597 F.3d 747 (5th Cir. 2010), where the Fifth Circuit upheld a similar rule only because the Board narrowly defined "personnel matters" to include issues pertaining to "'appointment, employment, evaluation, reassignment, duties, discipline, or dismissal.'" *See id.* at 760 n.47. As the defendants note, the Fifth Circuit held that such a rule was reasonable "to protect student and teacher privacy and to avoid naming or shaming as potential frustration of its conduct of business." *Id.* at 760. But that justification does not apply here, where the Board does not limit it to private employment disputes. The incongruence between the Board's expansive application of the Personnel Rule and its narrow justification demonstrates how unreasonable the rule is.

2. The Personnel Rule is doubly unreasonable because it invites arbitrary enforcement by giving the chair absolute discretion without "objective, workable standards" to guide enforcement. *See Mansky*, 138 S. Ct. at 1891. The Board testified during its deposition that whether mentioning the name of an employee violates the rule "is a decision made by the Board Chair." SCSD2 Depo. at 53:9–13; *id.* at 55:4–10 ("Q: [T]he Board's understanding of this policy is that the Board Chair has the prerogative to decide whether or not comments violate the policy; is that right? A: That is correct."); *id.* at 58:23–24 ("That's the Board [Chair's] decision to determine whether it violates participation guidelines."). But this issue—what the basic scope of the Personnel Rule includes—is an issue on which the two most recent chairs do not even agree. Defendant Wilson, the former chair, believes the rule prohibits mentioning the name of any employee for any reason. Wilson Depo. at

34:21–35:8–11; *see also id.* at 32:15–18. Rader, by contrast, disagrees that mentioning a staff member, without more, violates the policy. *See* Rader Depo. at 45:11–47:21; 49:1–50:18. Rader has allowed at least two individuals to speak positively about the superintendent, and he testified that such comments did not violate the rule. *Id.* at 45:11–47:21, 49:1–50:18; *see* Ex. 17 (Jan. 2023 Board Meeting Excerpt); Ex. 19 (Mar. 2023 Board Meeting Excerpt).

"It is self-evident that an indeterminate prohibition carries with it the opportunity for abuse, especially where it has received a virtually open-ended interpretation." *Mansky*, 138 S. Ct. at 1891 (cleaned up). While "[p]erfect clarity and precise guidance have never been required even of regulations that restrict expressive activity," *id.*, SCSD2's "difficulties with its restriction go beyond close calls on borderline or fanciful cases," *id.* "And that is a serious matter when the whole point of the exercise is to prohibit the expression of political views." *Id.*

The Board vests total discretion in the chair to decide whether comments violate the rule. "[T]hat discretion must be guided by objective, workable standards." *Id.* But when asked "how does the Board Chair know what violates the public participation guidelines," SCSD2's representative said, "That's a question I can't answer. That's a question that you would have to ask the Board Chair." SCSD2 Depo. at 50:14–19. If SCSD2 "wishes" to limit the context in which speakers can discuss personnel during public comment, "it must employ a more discernable approach than the one [it] has offered here." *Mansky*, 138 S. Ct. at 1891.

Nor does it matter that the Board allows individuals to take their comments in executive session because doing so does not allow speakers to deliver *public* comments that can be heard by the Board and those attending the Board's meetings. Alternative channels for speech only matter when those channels allow the speakers to effectively communicate with their target audience. *See Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 53 (1983). While the option of speaking during executive session might allow speakers to reach their target audience when discussing employment issues, it does not do the same for those speakers who want reach the public while discussing school policy.

B. The Personnel Rule discriminates based on viewpoint.

The Board contends that the Personnel Rule does not discriminate based on viewpoint and instead "simply removes personnel matters as a topic of discussion." (ECF No. 64 at 12). But what topic is that? The Board does not define "personnel matters," and its broad enforcement includes *any* topic if the speaker mentions an SCSD2 official as part of his or her discussion. That understanding of the Personnel Rule discriminates based on viewpoint as applied to speakers who mention personnel while discussing the otherwise permissible topic of school policy.

"The First Amendment's viewpoint neutrality principle protects more than the right to identify with a particular side." *Matal v. Tam*, 582 U.S. 218, 249 (2017) (op. of Kennedy, J.). "It protects the right to create and present arguments for particular positions in particular ways, as the speaker chooses." *Id.* This principle reflects an "understanding of the complex and multifaceted nature of public discourse." *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 831 (1995). Not

"all debate is bipolar." *Id.* One person may oppose a government policy for one reason, while another individual may oppose that same policy for a different reason.

The Supreme Court's decision in *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384 (1993), shows how this principle works. In *Lamb's Chapel*, a church sued a school district for rejecting its request to use school facilities to show a religious film series about family issues. *Id.* at 388–89, 393. The district allowed the public to use its property "for social or civic purposes" but not for "religious purposes." *Id.* at 393. It argued that the restriction against religious use was a permissible subject-matter limitation for a limited public forum because it simply removed the subject of religion, treating "all religions and all uses for religious purposes . . . alike." *Id.* But the Supreme Court rejected this narrow version of viewpoint discrimination. The school district opened its facilities for "social and civic purposes," and "[t]he film series involved here no doubt dealt with a subject otherwise permissible." *Id.* at 394. The church's application "was denied solely because the series dealt with the subject from a religious standpoint." *Id.*

This same problem exists here: Pollak sought to speak about the legality of district's pandemic rules, "a subject otherwise permissible" under the Policy, but the Personnel Rule excluded his viewpoint because he wanted to disagree with the superintendent's public defense of that policy. The Personnel Rule thus excludes an entire class of viewpoints on a permissible topic by prohibiting speakers from talking about employees while discussing school policy and programs.

Other examples help illustrate the problem. Under the Policy, a speaker may voice the opinion that a school is underperforming because the curriculum is wrong, because teachers are underpaid, or because the class sizes are too large. But a speaker is forbidden from voicing the opinion that a school is underperforming because the school officials—the superintendent, the principal, or the teachers—responsible for executing school policy are failing. A comment criticizing school curriculum is fine. A comment criticizing personnel for choosing that curriculum is not. That is quintessential viewpoint discrimination. It "targets 'particular views taken by speakers on a subject.'" *Summum*, 130 F.3d at 917 (quoting *Rosenberger*, 515 U.S. at 829–30). In this way, the Personnel Rule is not a subject-matter limitation at all, as even Wilson herself recognizes. *See* Wilson Depo. at 73:11–12 (explaining that "when you're talking about programs, you talk about the people that are running them").

Nor does it matter that the Personnel Rule prohibits positive and negative comments. That argument "reflects an insupportable assumption that all debate is bipolar." *Rosenberger*, 515 U.S. at 831. Public policy debates do not boil down to being for or against a proposal, and so "[t]he First Amendment's viewpoint neutrality principle protects more than the right to identify with a particular side." *Matal*, 582 U.S. at 249 (op. of Kennedy, J.). This "broad construction" of viewpoint discrimination dooms the Personnel Rule. *Summum*, 130 F.3d at 917.

One more point. The defendants argue that the rule "does not prohibit discussion about public officials." (ECF No. 64 at 16). They do not explain this statement, but

add that the superintendent "is an employee of the school district," "not an elected or appointed public official." (*Id.*). The argument that the superintendent is not a public official appears to be created out of whole cloth, as the defendants cite no authority for their claim. For good reason: the superintendent, like all government employees, is a public official. *Cf. Milligan-Hitt v. Bd. of Trs. of Sheridan Cnty. Sch. Dist. No. 2*, 523 F.3d 1219, 1233 (10th Cir. 2008). That is why, for example, qualified immunity applies to superintendents, *see id.* (explaining the purpose of the qualified immunity defense for "public officials" and applying it to the SCSD2 superintendent), as well as countless other non-elected government employees, *see Irizarry v. Yehia*, 38 F.4th 1282, 1289–90 (10th Cir. 2022).

C. The Board unconstitutionally applied the Personnel Rule against Pollak.

Even if the Court holds that the Personnel Rule is constitutional, it should deny the defendants' motion because the Board discriminatorily enforced it against Pollak. To prevail on this claim, Pollak "'must show that [he was] prevented from speaking while someone espousing another viewpoint was permitted to do so.'" *Harmon v. City of Norman*, 61 F.4th 779, 789 (10th Cir. 2023) (quoting *McCullen v. Coakley*, 573 U.S. 464, 485 n.4 (2014)). The undisputed facts establish that with ease: Wilson never enforced the Personnel Rule against speakers who spoke favorably about the superintendent but enforced it against Pollak when she perceived that he was speaking critically. *See* Wilson Depo. at 32:15–18, 34:21–35:8–11, 36:25–37:12, 37:16–20; 41:4–12, 44:9–12; Ex. 3 at 4; Wilson Depo. at 38:18–39:15; Ex. 9 at 17; Wilson Depo. at 62:9–18, 64:7–11; Wilson Depo. at 76:9–17.

The defendants' argument otherwise relies on sleight of hand. It characterizes the issue as whether Wilson discriminated against him because of "his opposition to the mask requirement and/or other actions taken by the Board during the pandemic," and then cites evidence of the Board allowing such criticism. (ECF No. 64 at 13). But focusing on whether Pollak could criticize the masking policy ignores his claim. Pollak alleges that Wilson censored him to stop him from "criticiz[ing] the superintendent's public statements." (ECF No. 43 at 13 (¶52)). No evidence shows that Pollak or anyone else could do so. Yet ample evidence shows that Wilson (and Rader after her) allowed speakers to praise SCSD2 employees, the superintendent included. The Court should thus deny the defendants' motion for summary judgment. (*See* ECF No. 66 at 18–20).

II. DEFENDANT WILSON IS NOT ENTITLED TO QUALIFIED IMMUNITY.[7]

Defendant Wilson is not entitled to qualified immunity because even the case law cited in her brief clearly establishes that enforcing the Personnel Rule against Pollak while allowing other speakers to praise SCSD2 staff violates the First Amendment. (*See* ECF No. 64 at 10 (citing *Harmon*, 61 F.4th at 789)).

To overcome qualified immunity, Pollak must show (1) that the official violated a statutory or constitutional right, and (2) that the right was clearly established at the time of the challenged conduct." *Quinn v. Young*, 780 F.3d 998, 1004 (10th Cir.

[7] Pollak agrees that the evidence does not support individual claims against Defendants Arin Waddell, Shellie Szmyd, Wayne Schatz, Shane Rader, Ann Perkins, Ed Fessler, Mary Beth Evers, and Dana Wyatt, and he consents to dismissing the individual-capacity claims against them.

2015). For the reasons stated above, Wilson violated Pollak's constitutional rights when she enforced the Personnel Rule against him. Qualified immunity thus turns on whether that right is clearly established. It is.

A plaintiff can show that a right was clearly established when "a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question." *Taylor v. Riojas*, 141 S. Ct. 52, 53–54 (2020) (quoting *Hope v. Pelzer*, 536 U.S. 730, 741 (2002)). That applies here. "It is axiomatic that the government may not regulate speech based on . . . the message it conveys." *Rosenberger*, 515 U.S. at 828. For decades the Supreme Court has emphatically and repeatedly held that viewpoint discrimination is "egregious," explaining that targeting "particular views" makes the constitutional violation "blatant." *Id.* at 828–29; *see also Iancu v. Brunetti*, 139 S. Ct. 2294, 2299 (2019). And the Tenth Circuit clearly held more than two decades ago that restrictions on speech in a limited public forum that "target[] particular views taken by speakers on a subject" are "presumed impermissible." *Summum*, 130 F.3d at 917.

Given that, Wilson cannot plausibly argue that she "did not have 'fair warning' that [her] specific acts were unconstitutional." *Taylor*, 141 S. Ct. at 53. She testified that she regularly encouraged speakers to make positive comments about personnel despite the rule prohibiting them from doing so. She testified that she never stopped someone from making positive comments, despite speakers doing so. Wilson Depo. at 36:25–37:12, 37:16–20, 76:16–19; Ex. 3 at 4; Wilson Depo. at 38:18–39:15; Ex. 9 at 17; Wilson Depo. at 62:9–18, 64:7–11. And she testified that she enforced

the rule against Pollak in part because she perceived him as being "very critical." *Id.* at 44:9–12. That Wilson's discriminatory enforcement violated Pollak's constitutional rights was clearly established when she censored him.

III. POLLAK HAS STANDING TO CHALLENGE THE OFFENSE SPEECH RULE.

Pollak has standing to challenge the Offensive Speech Rule because it imposes a chilling effect on his speech. A plaintiff has standing for "a First Amendment claim" when the evidence shows "an intention to engage in a course of conduct arguably affected with a constitutional interest," a "credible threat of future prosecution," and "an ongoing injury resulting from the [law's] chilling effect on his desire to exercise his First Amendment rights." *Peck v. McCann*, 43 F.4th 1116, 1129 (10th Cir. 2022) (cleaned up). Here, Pollak testified that he still wants to speak at school board meetings and has information to share. Pollak Depo. at 124:5–11. But Pollak has abstained from speaking because he worries about the Board calling the police, having him removed, having him arrested, or telling him to leave, making him "embarrassed and humiliated in front of the media and [his] peers." *Id.* at 124:5–21. Those fears are compounded because the Board already enforced the Policy against him based on an interpretation that he does not understand, *id.* at 95:22–24, and Pollak does not know what the Board means by gossip, defamatory remarks, abusive language, or vulgar language, *id.* at 133:9–134:10.

The Board submits that Pollak lacks standing because he testified that he does not intend to engage in gossip, make defamatory remarks, or use abusive or vulgar language. (ECF No. 64 at 17–18). But that is beside the point. Pollak also testified that he does not believe his comments on February 7 discussed personnel matters.

Pollak Depo. at 95:22–24; (ECF No. 64-22 at 3 (¶14)). For standing purposes, the point is that Pollak would like to speak at future board meetings but that the Board's discriminatory enforcement of its vague policy prevents him from doing so. *Id.* at 124:5–11.

IV. THE OFFENSIVE SPEECH RULE VIOLATES THE FIRST AMENDMENT.

The defendants devote only a footnote to defending the Offensive Speech Rule on the merits. (ECF No. 64 at 18 n.4). For good reason: The rule obviously violates the First Amendment in multiple ways.

A. The Offensive Speech Rule discriminates based on viewpoint.

Abusive speech. The First Amendment's prohibition on viewpoint discrimination prevents the government from banning speech because it disparages or offends. *See Matal*, 137 S. Ct. at 1763, 1766; *Brunetti*, 139 S. Ct. at 2299–2300. The Policy does not define "abusive," but the ordinary meaning is "harsh insulting language." *Gooding v. Wilson*, 405 U.S. 518, 525 (1972) (citing Webster's Third New International Dictionary (1961)); *accord Abusive,* Merriam-Webster ("using harsh, insulting language"), available at https://perma.cc/R7DYC9SR. That definition matches the Board's understanding, as well as the current chair's. SCSD2 Depo. at 110:7–22; Rader Depo. at 56:13:–21 (explaining that abusive language is "hurtful words"). Banning language because it is harsh, insulting, negative, or hurtful is viewpoint discrimination. *See Brunetti*, 139 S. Ct. at 2900–2300; *see also Ison v. Madison Loc. Sch. Dist. Bd. of Educ.*, 3 F.4th 887, 893–94 (6th Cir. 2021).

Vulgar speech. The policy does not define "vulgar." Rader testified that he understands vulgar to include "[c]urse words, something inappropriate for the

public audience," Rader Depo. at 60:7–11, and the Board's understanding is similar. SCSD2 Depo. at 110:24–7. The ordinary meaning of "vulgar" includes "lacking in cultivation, perception, or taste," "morally crude," "and offensive in language." *See Vulgar*, Merriam-Webster, available at https://perma.cc/Y5YP-FJZU. Prohibiting vulgar speech thus discriminates based on viewpoint because it restricts speech in reference to "conventional moral standards." *Brunetti*, 139 S. Ct. at 2300.

B. The Offensive Speech Rule is vague and overbroad.

Vagueness. 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). "Uncertain meanings inevitably lead citizens to steer far wider of the unlawful zone . . . than if the boundaries of the forbidden areas were clearly marked." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972) (cleaned up). That kind of chilling effect cannot stand when it "abuts upon sensitive areas of basic First Amendment freedoms." *Id.* at 109 (cleaned up).

All four categories of banned speech in the Offensive Speech Rule are unconstitutionally vague because they lack "objective, workable standards" that a person of ordinary intelligence can understand. *Marshall*, 571 F. Supp. 3d at 424 (quoting *Mansky*, 138 S. Ct. at 1891). The terms are "irreparably clothed in subjectivity." *Id.* This subjectivity renders the rule unconstitutionally vague. *Id.*

The term "abusive" lacks any objective criteria that a person of ordinary intelligence can understand because what is considered "harsh" or "insulting" is subjective. *Id.* The same is true for the terms "vulgar," "gossip," and "defamatory

remarks." Rader testified that "vulgar" language is any language the chair deems "inappropriate." Rader Depo. at 59:12–21. "Gossip," Rader explained, depends on whether the chair personally "knew [the comments] to be [true] one way or the other." *Id.* at 53:4–11. And whether something amounts to a "defamatory remark" changes based on the chair's subjective, guidance-free "judgment" about whether the speaker was being nice or not. *Id.* at 54:18–21, 54:25–55:5, 55:25–56:7.[8] All these terms lack the kind of objective criteria the First Amendment requires.

Overbreadth. "[V]agueness and overbreadth [are] logically related and similar doctrines." *Kolender v. Lawson*, 461 U.S. 352, 358 n.8 (1983). A law is overbroad when it "punishes a substantial amount of protected speech, judged in relation to the statute's plainly legitimate sweep." *Faustin*, 423 F.3d at 1199.

Here, that burden is easily satisfied. The Supreme Court has already held that a restriction that prohibits speakers from using "words offensive to some who hear them . . . sweeps too broadly." *Gooding*, 405 U.S. at 527. That is precisely what the prohibition on abusive and vulgar speech do. *See supra* at 22–23. The ban on gossip likewise sweeps too broadly, as it includes even truthful speech with no obvious example of what kind of unprotected speech it even covers. Rader Depo. at 52:25–53:1 (explaining the common definition of gossip is "talk that may – may or may not

[8] Although defamation is not protected speech, the tort includes elements that no person could adjudicate on the spot during a board meeting—compounding the vagueness problem. Rader himself admits that he does not even know, for example, whether a true statement can be defamatory. *Id.* at 54:22–24. Given that its own chair cannot explain what defamation is under the policy, no person of reasonable intelligence could be expected to do so either.

be true about someone"). The same is true for the ban on defamatory remarks. While actual defamation is not protected by the First Amendment, the chair has discretion to enforce this rule based on his own judgment—not the law—which means it could include true and complimentary statements if the chair determines in his "judgment" that the comment was derogatory, *id.* at 54:22–56:7.

V. BOTH RULES VIOLATE THE PETITION CLAUSE.

Pollak agrees with the defendants that the Petition Clause claims rise and fall with his Free Speech claims. (*See* ECF No. 64 at 15–21; ECF No. 66 at 23–24). On these claims, the defendants contend that the superintendent and other SCSD2 staff are not "public officials." For the reasons stated above, that argument is wrong, and the defendants cite no authority otherwise. *Supra*, at 17–18. Regardless, Pollak's use of the term "public officials" is not some kind of incantation—whether one calls SCSD2 administrators "government employees" or "public employees" or "public officials," the point is the same: The Personnel Rule is unconstitutional as applied to speakers who mention such individuals in discussing school policy.

CONCLUSION

The Court should deny the defendants' motion for summary judgment.

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CERTIFICATE OF SERVICE

I certify that the foregoing was served on all counsel of record on October 10, 2023, using the Court's CM/ECF system. I further certify that the video exhibits submitted with this filing were served via mail upon the following:

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