UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

RICHARD LOWERY, *Plaintiff,* v. LILLIAN MILLS, in her official capacity as Dean of the McCombs School of Business at the University of Texas at Austin; ETHAN BURRIS, in his official capacity as Senior Associate Dean for Academic Affairs of the McCombs School of Business at the University of Texas-Austin; and CLEMENS SIALM, in his official capacity as Finance Department Chair for the McCombs School of Business at the University of Texas-Austin, *Defendants.*	§ § § § § § § § § § § § § § § §	CIVIL ACTION NO. 1:23-cv-00129-DAE

DEFENDANTS' RESPONSE TO PLAINTIFF'S MOTION TO DISSOLVE PROTECTIVE ORDER

INTRODUCTION AND BACKGROUND

Lowery seeks to dissolve a protective order based on a statement he made in a June 2022 Washington Times op-ed about "self-interested administrators . . . working hard to disadvantage in the admissions process people the same identified profile as their own children." Lowery claims (1) that this vague reference to unidentified (and plural) university "administrators" was actually—at least in his own mind[1]—an accusation that President Hartzell sought favorable treatment for his son in the admissions process and (2) Lowery's vague allegation purportedly motivated Hartzell to try to silence Lowery's public speech on other matters. *See* Motion, Dkt. 140 at 3. But this is a distraction based upon multiple implausible inferences.

Ultimately, Lowery's allegation that President Hartzell sought favorable treatment for his son in the admissions process is unrelated to his core legal claims in this suit that UT Austin administrators sought to muffle his public speech about various political topics. Lowery merely inserted the allegations he made in the declaration considered during the discovery order into the amended complaint. *Compare* Dkt. 77-1 (Jan. 2024 Lowery Decl.) *with e.g.*, Dkt. 126 (Am. Compl.) ¶¶ 19, 106. But nothing has changed since Judge Howell "conclude[d] that discovery related to this nepotism theory is not relevant . . . [and] habor[ed] some question as whether it would be relevant even if the hypocrisy remarks would be added to the Amended Complaint," even though Judge Howell left that latter "question for another day." Dkt. 114 at 97:17–24. Accordingly, all arguments made in Defendants' successful motion for a protective order and reply (Dkt. 88 and 103) apply and are incorporated.

Moreover, this harassing inquisition into the irrelevant topic of President Hartzell's son is emblematic of Lowery's general approach to discovery, where he has exhibited a McCarthyite preoccupation with rooting out whether the "faculty at UT-Austin . . . skews left politically", Ex. 1 (Flores Depo.) at 58:9–13, and asking "Do you consider yourself to be a Marxist?," *id.* at 26:7–11. There has been an inquisitors' zeal in investigating whether a Dean was "a supporter of DEI at the McCombs School?," Ex. 2 (Mills Depo.) at 20:7–11; whether "DEI is a political ideology . . ." and "DEI is [a]

[1] *See* Motion, Dkt. 140 at 3 ("Lowery has stated under oath [over a year later] that he 'had President Jay Hartzell in mind as an example of the category of administrator that [he] criticized' when he published this article on June 28, 2022.") (citing Dkt. 77-1 (2024 Lowery Decl.) ¶¶ 12, 14).

coherent set of political beliefs with certain goals," *id.* at 24:12–25:9; and whether a Dean was "personally a supporter of DEI" despite being constrained by a recent state law prohibiting DEI initiatives and whether if she "could be tsar for a day, would [she] undo that law?", *id.* at 25:15–27:6.

These questions have nothing to do with Lowery's claims. Rather, they reflect Lowery's personal views about "critical theory or what [he] would call DEI ideology, diversity, inclusion, equity, inclusion ideology, which [he claims] is a political ideology," and Lowery's intention to explore those theories in the discovery process. Dkt. 114 at 40:3–11. The Court should not lift the protective order for this purpose.

This Court should dismiss this lawsuit by a plaintiff who lacks a legally cognizable injury, Dkt. 132, 136 (MPSJ and Reply), and presents a cooked-up, made-up claim, Dkt. 129, 131 (Motion to Dismiss Amended Complaint and Reply). Dismissal would moot this discovery motion. But if Lowery's suit somehow lives another day, the Court should maintain the protective order because the claims and facts have not substantively changed since the Court granted it. Accordingly, the Court should decline to allow Lowery to pursue bad-faith discovery that appears designed to advance his own political agenda and harass Defendants and non-parties, like President Hartzell's son, rather than shed light on any legitimate legal claim.

I. Lowery's claims and the Defendants' defenses have nothing to do with President Hartzell's son, so that discovery is out-of-bounds regardless of their burden.

Lowery's arguments in support of responsiveness in his efforts to obtain discovery regarding nepotism allegations are: (1) that this case is governed by *Pickering v. Board of Education*, 391 U.S. 563 (1968); (2) that Defendants have an as-yet-unpled defamation claim; or (3) that Defendants will claim that Lowery's speech is false and therefore unprotected. All are wrong.

First, Lowery's claims have nothing to do with *Pickering*. For one, the public educator in *Pickering* was fired, 391 U.S., at 574–75, whereas Lowery has been consistently given raises in his tenured faculty role and reappointed to his coveted Salem Center position. *See, e.g.*, Dkt. 132 (Motion for Partial Summary Judgment) at 3 (documenting that Lowery was reappointed to Salem Center with stipend and received a raise before suing and then each year since); see also Dkt. 141 (Supplemental Notice)

(reappointment to Salem Center with stipend and raise for 2024–25 Academic Year). But more importantly, Defendants have never asserted that Lowery's public speech unprotected. *Contra* Motion, Dkt. 140 at 6. Lowery claims that Defendants "contended that "Lowery's views that 'President Hartzell is a hypocrite and a liar' may 'cross the line as . . . [y]ou can't accuse somebody of stealing or being a thief and then expect that to be protected by the First Amendment." *Id.* But Lowery deliberately omits that this was this Court's observation, *compare* Dkt. 140 (omitting this fact and citation) *with* Dkt. 103 at 5 (noting this observation was from the Court), and that the portion actually foreswears pursuing Lowery for any claims that have crossed a line, *see* Dkt. 103 at 5 ("Defendants have not and will not threaten or retaliate against Lowery for those views . . .").

The reason Defendants referred to Lowery's "[p]ublic statements defaming leaders and sabotaging fundraising efforts" was to point out that certain statements were "imped[ing] University operations," not to establish that Lowery's statements were actionable defamation. Dkt. 14 (Response to PI) at 11. Indeed, whether Lowery's statements are false does not affect whether his public appeals to stop funding the university is disruptive to the university's operations. *See id.* (arguing that "Lowery has no protected right to make statements that intentionally seek to undermine university operations, including its fundraising efforts").

Second, Defendants are not interested in litigating the substance of Lowery's speech because first, Defendants, consistent with the First Amendment, have respected Lowery's right to speak regardless of its content. *See, e.g.*, Ex. 2 (Mills Depo.) at 169:17–18 ("I disagree with his views. I support his right to make that opinion about that."); Dkt. 132-14 (Mills Depo.) at 193:15–194:4 (confirming no threat was made regarding Lowery's affiliation with the Salem Center); Dkt 132-15 (Burris Depo.) at 109:19–110:14 (same). And, second, because Lowery's controversial public speech is generally in the nature of political commentary, it constitutes personal opinions that can neither be proven true nor proven false. Nor do the Defendants have any counterclaim or defense that make the truth, falsity, or actual malice relevant to the analysis. And Lowery's vague reference to "self-interested administrators" could not be considered defamatory of President Hartzell for the reason explained above: whomever Lowery "was thinking of" when he penned the op-ed, Dkt. 126, at 6 (¶ 19), no reasonable reader

would have understood Lowery to have been referring to President Hartzell when he spoke of university "administrators."

Third, Lowery merely rehashes his same claim that he is "entitled to prove the truth of his criticisms." Motion, Dkt. 140 at 7. He unsuccessfully made that claim in response to the Protective Order. *See* Dkt. 95 (Resp. to PO) at 9 ("Lowery is entitled to prove that university administrators like Hartzell do in fact shield their own family from the disadvantages of affirmative action . . ."). And again, all Lowery did was shove the same allegations into his complaint. *Compare* Dkt. 77-1 (Jan. 2024 Lowery Decl.) at 2 (cited by Dkt. 95 (Resp. to PO at 3–4) *with e.g.*, Dkt. 126 (Am. Compl.) ¶¶ 19, 106.

The truth of Lowery's rants about UT Austin and officials is not material to his pending claims. For Lowery's self-chill retaliation claim, all that matters is (1) whether he was engaged in constitutionally protected activity; (2) whether Defendants engaged in adverse actions causing him to suffer a cognizable injury that would chill a person of ordinary firmness; and (3) whether any such adverse actions were because of the constitutionally protected conduct. *See, e.g.*, *Kennen v. Tejeda*, 290 F.3d 252, 258 (5th Cir. 2002). Whether Lowery's views on any particular topic are "valid" does not affect whether his conduct was constitutionally protected, his injury was cognizable, Defendants' actions would chill a person of ordinary firmness, or whether the actions were because of constitutionally protected conduct. Indeed, many constitutional violations likely come out of a desire to suppress statements that the suppressor sincerely believes are untrue. But even false statements are not categorically unprotected by the Constitution. *See, e.g.*, *United States v. Alvarez*, 567 U.S. 709 (2012) ("Absent from those few categories where the law allows content-based regulation of speech is any general exception to the First Amendment for false statements.").

Plaintiff's speech code claim has no identifiable elements in law, nor does the discovery pertain to the existence of a policy or practice to police speech. Still Lowery insists on injecting his magic word "motive" to grasp at this discovery. Just as the "validity" of Lowery's rants does not change whether his speech was unlawfully chilled, the validity of Lowery's nepotism allegations does not change whether the non-existent speech code was selectively enforced. If Lowery's speech code claim was anything but a repackaged version of his retaliation claim, which the Court has already rejected

due to Lowery's inability to point to any adverse action that has been taken against him, nothing would turn on Lowery's discovery requests prevented by the Protective Order.

In sum, Lowery's discovery motion relating to his nepotism allegations has nothing to do with his First Amendment claims and everything to do with his desire to harass. The Court can deny the motion on the lack of relevance alone because Lowery has not shown that these materials are within the scope of permissible discovery, and therefore has not shifted to Defendants the burden to show overbreadth or unduly burdensomeness or oppressiveness. *See Median v. Schnatter*, No. 1-22-CV-498-LY, 2022 WL 2161712, at *1 (W.D. Tex. June 15, 2022).

II. The discovery requests are cumulative.

On top of not being relevant to his claims, Lowery's discovery requests would be cumulative. To any already implausible extent that Lowery needs to show that he was not acting with actual malice—even though it is not relevant to any of Lowery's claims and Defendants have foresworn any such defense—Lowery already has that evidence from Carlos Carvalho, according to his own declaration. *See generally* Dkt. 77-1 (Jan. 2024 Lowery Decl.).

III. Timing of the Ruling

Defendants do not object to having Plaintiff's motion heard on an expedited basis at the September 25th hearing. Defendants merely ask the Court to postpone ruling on the motion to dissolve the protective order until it has decided Defendants' motions to dismiss and for partial summary judgment. Those rulings may either moot this discovery motion or provide more context to the permissible scope of discovery for any claim(s) that survive.

CONCLUSION

The Court should decline to dissolve the protective order. Further, the Court should postpone ruling on Plaintiff's motion to dissolve the protective order until it has decided Defendants' motions to dismiss and for partial summary judgment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 19, 2024, I caused a copy of the foregoing pleading to be served upon counsel of record for all parties via the Court's ECF system.

/s/Matt Dow
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