IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

HARRY POLLAK,

Plaintiff,

v.

SUSAN WILSON, *et. al.*,

Defendants.

Case No. 22-CV-49-ABJ

ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT (ECF NO. 65) AND GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION FOR SUMMARY JUDGMENT (ECF NO. 63)

THIS MATTER comes before the Court on Defendants' initial *Motion for Summary Judgment* (ECF No. 63) and accompanying *Memorandum in Support* (ECF No. 64), filed on September 26, 2023. Plaintiff filed a cross-*Motion for Summary Judgment* (ECF No. 65) and *Memorandum in Support* (ECF No. 66) on October 6, 2023. Defendants and Plaintiff each filed a brief opposing the other side's motions on October 10th (ECF No. 67) and 13th (ECF No. 68), respectively. Defendants replied to Plaintiff's opposition brief on October 13, 2023 (ECF No. 69), and Plaintiff replied to Defendants' opposition brief on October 20, 2023 (ECF No. 70).

Having reviewed the filings, the applicable law, and being otherwise fully advised on the premises, the Court finds and orders that Plaintiff's *Motion for Summary Judgment*

(ECF No. 65) is **GRANTED** in part and **DENIED** in part, and Defendants' *Motion for Summary Judgment* (ECF No. 63) is also **GRANTED** in part and **DENIED** in part.

FACTUAL BACKGROUND

The case before us turns on whether a man's comments at a school board meeting were constitutionally restricted. At a Sheridan County school board meeting on February 7, 2022, Harry Pollak, who had been calling for the resignation of the superintendent and the board members for months, began criticizing the school district's superintendent, who had spoken at the previous meeting. The Board Chair, Defendant Susan Wilson, cut him off to say that he could not discuss "personnel matters" during the public portion of school board meetings, per the Board's policies. He protested that his criticism was not a personnel matter. A back-and-forth discussion followed, and eventually Ms. Wilson called a recess and asked police to escort him out. Shortly afterwards, Mr. Pollak filed suit against Ms. Wilson and other members of the Board, claiming the Board's policy violated the First Amendment. He initially asked for a preliminary injunction, claiming that the Board's policy on public commentary was unconstitutional on its face. Both this Court and the Tenth Circuit rejected that claim as unlikely to succeed on the merits. The case returns to us now after Mr. Pollak amended his complaint to include a narrower facial challenge and an as-applied challenge. The undisputed facts of the case are summarized below.

The Sheridan County School District No. 2 (SCSD2) is governed by a 9-member Board of Trustees and has regular meetings which are open to the public. ECF No. 66 at 7. The public is invited to comment during a portion of these meetings as long as they abide

by certain regulations, known collectively as the BEDH Policy, imposed by the Board. *Id.* at 8-9. This policy provides:

> Personnel matters are not appropriate topics to be discussed at regular board meetings. Decorum requires that such matters will be entertained in executive session as arranged by the Board. Speakers will not be permitted to participate in gossip, make defamatory remarks, use abusive or vulgar language… The board chairperson will maintain the prerogative to discontinue any presentation which violates any of the public participation guidelines.

ECF No. 30-1 at 5-6. We will refer to the first sentence as the "Personnel Policy" and the third sentence as the "Offensive Speech Policy." This policy is interpretable and enforceable at the discretion of the Board Chair, but the policy itself cannot be changed by the Chair. ECF No. 66 at 9; ECF No. 66-2 at 10.

At the January 2022 board meeting, Superintendent Stults commented on the school district's legal authority to enact policies to protect health and welfare. ECF No. 66 at 11. As background, the SCSD2 Board had required all persons to wear face masks while in school buildings between August 2021 and mid-November 2021 due to a surge in COVID-19 cases in Sheridan. ECF No. 64 at 4. Mr. Pollak felt strongly that the mask requirement was wrong: he and his wife signed a petition calling for the resignation of board members in September and in October he emailed the Board requesting the resignation of Superintendent Stults. *Id.* at 4-6. After the mask mandate ended in November, Mr. Pollak continued to criticize the policy and request for the resignation of Mr. Stults and other officials, including at the January 2022 Board meeting. *Id.* at 6-7.

On February 7, 2022, the Board held a meeting which allowed for a period of public comment. *Id.* at 6. During this particular comment period, the Board also prohibited

discussion of "whether the district [was] following the state constitution, personnel matters, criticism, and ridicule." *Id.* Chair Wilson added that "[w]e do not talk about personnel unless it's favorable things. We always like to hear those." *Id.* Mr. Pollak signed up to speak at this meeting. ECF No. 66 at 11. When it was Mr. Pollak's turn, 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.

ECF No. 66 at 11. The conversation continued:

> **Ms. Wilson**: And this is a personnel matter?
>
> **Mr. Pollak**: I'm sorry, you cannot delimit what we say. We have a First and Fourteenth Amendment right to say – this is a public forum. This is a public comment. You can't stop me.
>
> **Ms. Wilson**: This is a meeting in the public. It is not for the public.
>
> **Mr. Pollak**: Mr. Stults addressed these items last month. I'm addressing them this month.
>
> **Ms. Wilson**: I'm going to have to ask you to leave because we do not discuss personnel during the board meeting open session.
>
> **Mr. Pollak**: This is not personnel. Mr. Stults sat back there and made a comment. I'm rebutting his comment.
>
> **Ms. Wilson**: I'm sorry.
>
> **Mr. Pollak**: So you're not going to let me finish.
>
> **Ms. Wilson**: No I'm not, because it's a personnel issue.
>
> **Mr. Pollak**: So you're going to violate my First and Fourteenth Amendment right-

Ms. Wilson: If you see it that way.

Mr. Pollak: -of the Constitution of the United States and of Wyoming.

Ms. Wilson: The law says you cannot speak about personnel. So you have a choice. You can either –

Mr. Pollak: No ma'am, a piece of paper, typed above a section in which I signed up to speak said that. There was nothing in the Constitution that says you can prevent me from speaking my opinion or having free speech.

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

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

Ms. Wilson: It's a personnel issue. You are speaking about Mr. Stults. That's all that's to be said. You have a choice –

Mr. Pollak: He represented himself and this Board last month. I have a right –

Ms. Wilson: Then you need to do it in private to the board. Not in public. Once again you have a choice to stop speaking, speak about something else, or leave.

ECF No. 66-16 at 0:00-2:01.

Mr. Pollak went on to insist that the policy was not a law or part of the Constitution. *Id.* at 2:50-3:15. Ms. Wilson reiterated, "We do not speak of personnel. You mentioned Mr. Stults by name. He is our superintendent. He is personnel." *Id.* at 3:38-3:51. Mr. Pollak then stated he would like to use his remaining time to repeat his comment without mentioning Mr. Stults' name. *Id.* at 5:01-5:10. Ms. Wilson responded that his time was up and recessed the meeting. *Id.* at 5:10-5:30. During the recess, Superintendent Stults called the police, and Mr. Pollak left after speaking with them. ECF No. 66 at 12.

On March 25, 2022, Superintendent Stults sent a letter to Mr. Pollak stating that if he still had information he wished to share, he could do so during the April 11th board meeting or during the executive session afterwards if it related to personnel. ECF No. 64 at 9. Mr. Pollak did not do so and has not spoken at subsequent meetings "on the advice of my counsel" and because he did not know if he "was going to be arrested the next time [he] spoke at a council meeting." ECF No. 66-12 at 8.

PROCEDURAL BACKGROUND

Plaintiff initially filed suit on March 9, 2022 (ECF No. 1) and moved for a preliminary injunction (ECF No. 8). This Court denied Plaintiff's motion (ECF No. 17), which he then appealed to the Tenth Circuit (ECF No. 18). The Tenth Circuit affirmed (ECF No. 30-1), and consequently Plaintiff amended his complaint (ECF No. 31). After discovery, Defendants filed their *Motion for Summary Judgement* and accompanying *Memorandum in Support* on September 26, 2023. ECF No. 63; ECF No. 64. Plaintiff cross-motioned for summary judgment on October 6, 2023 (ECF No. 65) and submitted a *Response in Opposition to Defendant's Motion* four days later (ECF No. 67). Defendants responded with their own *Memorandum in Response to Plaintiff's Motion for Summary Judgment* on October 13th (ECF No. 68) and replied to Plaintiff's opposition brief the same day (ECF No. 69). Plaintiff replied on October 20th (ECF No. 70).

STANDARD OF REVIEW

Under Rule 56 of the Federal Rules of Civil Procedure, summary judgment is appropriate where "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 material

if, under the substantive law, it is essential to the proper disposition of the claim. *See Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 670 (10th Cir. 1998). When the Court considers the evidence presented by the parties, "[t]he evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in [the non-movant's] favor." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

The party moving for summary judgment has the burden of establishing the nonexistence of a genuine dispute of material fact. *See Lynch v. Barrett*, 703 F.3d 1153, 1158 (10th Cir. 2013). The moving party can satisfy this burden by either: (1) offering affirmative evidence that negates an essential element of the non-moving party's claim; or (2) demonstrating that the non-moving party's evidence is insufficient to establish an essential element of the non-moving party's claim. *See* Fed. R. Civ. P. 56(c)(1)(A)–(B). A movant who does not bear the ultimate burden of persuasion at trial does not need to disprove the other party's claim; rather, the movant need simply point out to the Court a lack of evidence for the other party on an essential element of that party's claim. *Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 671 (10th Cir. 1998) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986)).

Once the moving party satisfies this initial burden, the non-moving party must support its contention that a genuine dispute of material fact exists by either: (1) citing to materials in the record; or (2) showing that the materials cited by the moving party do not establish the absence of a genuine dispute. *See* Fed. R. Civ. P. 56(c)(1)(A)–(B). To survive a summary judgment motion, the non-moving party must "make a showing sufficient to establish the existence of [every] element essential to that party's case, and on which that

party will bear the burden of proof at trial." *Celotex*, 477 U.S. at 322. Credibility determinations are the province of the factfinder, not the Court. *Anderson*, 477 U.S. at 255; *Seamons v. Snow*, 206 F.3d 1021, 1026 (10th Cir. 2000).

PARTIES' ARGUMENTS

In Plaintiff's initial complaint and brief for preliminary injunction, he argued that the Board's "policy against discussion of personnel matters is unconstitutional on its face, and the[] enforcement of it is nothing but a cloak for viewpoint discrimination." ECF No. 9 at 17. Both the Tenth Circuit and this Court decided that a preliminary injunction would not be granted because the claim was unlikely to succeed on the merits. *Pollak v. Wilson*, No. 22-8017, 2022 WL 17958787, at *1 (10th Cir. Dec. 27, 2022). The Tenth Circuit interpreted the initial complaint as a facial challenge, with an added as-applied challenge that was not fully fleshed out. *Id.* at *7, 9-10. After this determination, Mr. Pollak amended his complaint. ECF No. 43. He now challenges the Board's Policy more narrowly, on quasi-facial, quasi-as-applied grounds: he claims that the Personnel Policy is unconstitutional as applied to "speakers who mention public officials while discussing school policy outside the context of private or confidential employment matters." *See* ECF No. 67 at 13-14; ECF No. 66 at 15. He alleges these violations under both the right to free speech and the right to petition. ECF No. 43.

Both parties agree that the public comment period at the Sheridan County School Board meeting constituted a limited public forum for the purposes of the First Amendment. ECF No. 66 at 9; ECF No. 64 at 11. Mr. Pollak argues that the Personnel Policy, as applied to certain speakers, violates the two requirements of speech regulations

in such forums: that they be reasonable in light of the purpose of the forum and viewpoint neutral. ECF No. 66 at 14.

Mr. Pollak argues that the Personnel Policy is unreasonable and does not serve the interests of the forum primarily because it prevents members of the public from speaking about district policy, even though "hearing viewpoints from citizens throughout the district" on school operations is the stated purpose of the Board meetings. ECF No. 66 at 15-16. "Schools are run by people. Those people implement… school district policy. It thus makes no sense to conflate discussions about school policy that mention personnel with discussions about actual personnel matters." *Id.* Plaintiff adds that the right to criticize public officials is a core First Amendment protection. *Id.* at 17.

Secondarily, Mr. Pollak argues that the Personnel Policy fails the reasonableness test because it provides the Board Chair with absolute discretion over how to enforce the rule without "objective, workable standards." *Id.* at 19 (quoting *Minnesota Voters All v. Mansky*, 138 S. Ct. 1876, 1891 (2018)). He cites as evidence the fact that the Defendant and the current Chair disagree over whether a mention of an employee's name, without more, violates the rule. *Id.*

Mr. Pollak also argues that the rule discriminates based on viewpoint because it "targets the perspective of those who believe school officials deserve credit or blame for school operations." *Id.* at 21. Mr. Pollak frames this as a class of viewpoints which the rule is excluding – the viewpoint that an individual is to blame. *See id.* at 22. As a backstop, Mr. Pollak argues that the Board applied the Personnel Policy

unconstitutionally against him specifically, because it was only used against negative comments like his and not against positive comments. *Id.* at 23-24.

Finally, Mr. Pollak argues that the portion of the Policy barring abusive and vulgar language – the Offensive Speech Policy – (1) discriminates based on viewpoint and (2) is unconstitutionally vague and overbroad. *Id.* at 25-26.

By contrast, the Defendants' argument for summary judgment is relatively simple. They argue that the same substantive standard applies to both facial and as-applied challenges, and that the Tenth Circuit already reviewed and rejected Mr. Pollak's claims. ECF No. 64 at 10-11. They state that the Board leaves open alternative channels for communication on personnel matters, and that Mr. Pollak had that option and refused to use it. *Id.* at 12-13. Defendants also note that the Tenth Circuit had considered and rejected Mr. Pollak's as-applied challenge (even though it was not fully formed in the first complaint) because of the context of Mr. Pollak's previous actions, which included asking for Mr. Stults' resignation. *Id.* at 14. Finally, Defendants contend that, per the Tenth Circuit's assessment, Mr. Pollak does not have standing to assert his claims on the portion of the Policy that restricts the use of abusive and vulgar language because he has stated that he has no intention of using such language. *Id.* at 16-18.

Of note, Plaintiff consents to dismiss all individual-capacity claims against all defendants except for Ms. Wilson. ECF No. 67 at 23 n.7. That leaves the individual complaint against Ms. Wilson and the official-capacity complaints against the Board. Defendants argue that the suit against Ms. Wilson is barred because of qualified immunity. ECF No. 64 at 18-19.

ANALYSIS

We hold that the Sheridan County School District No. 2's Personnel Policy restricting the discussion of personnel matters is constitutional, but that the enforcement of the Policy to prohibit the mention of any district employee for any reason is not reasonable and violates the First Amendment. We conclude that the Personnel Policy was enforced unconstitutionally against Mr. Pollak because the Board prevented him from speaking but did not exclude other speakers who expressed different viewpoints. Finally, we hold that Mr. Pollak's claims against the Offensive Speech Policy fail because we cannot reevaluate the Tenth Circuit's holding on Mr. Pollak's facial claims and he has not asserted the elements required to show that the Policy is unconstitutionally overbroad or vague.

A. First Amendment Legal Standard

The First Amendment prohibits any law "abridging the freedom of speech." U.S. Const. amend. I.[1] However, the Constitution does not require the government to "freely grant access to all who wish to exercise their right to free speech on every type of Government property without regard to the nature of the property or to the disruption that might be caused by the speaker's activities." *Mansky*, 138 S. Ct. at 1891. The Supreme Court has created different levels of constitutional protection depending on the type of government property where the speech takes place – the forum, in other words. *Verlo v. Martinez,* 820 F.3d 1113, 1129 (10th Cir. 2016). Both Plaintiff and Defendants agree that the

[1] The Fourteenth Amendment incorporates the First Amendment against the States and their political subdivisions. *Manhattan Cmty. Access Corp. v. Halleck*, --- U.S. ---, 139 S. Ct. 1921, 1928 (2019). The First Amendment also applies to less formal governmental acts like the policy at issue here. *Brewer v. City of Albuquerque*, 18 F.4th 1205, 1217 (10th Cir. 2021).

public-comment period of the Sheridan County School District No. 2 Board meeting is a limited public forum. ECF No. 66 at 14; ECF No. 64 at 11. In limited public forums, the government may impose restrictions as long as they are "reasonable in light of the purpose served by the forum" and viewpoint neutral. *Martinez*, 561 U.S. at 679 n.11, 685; *see also Pleasant Grove City, Utah v. Summum,* 129 S. Ct. 1125, 1127 (2009).

Plaintiffs may bring two types of First Amendment challenges to government policy: facial and as-applied. *Colo. Right to Life Comm. V. Coffman*, 498 F.3d 1137, 1146 (10th Cir. 2007). "A facial challenge considers the restriction's application to all conceivable parties, while an as-applied challenge tests the application of that restriction to the facts of a plaintiff's concrete case." *Id.* In December of 2022, the Tenth Circuit held that the Personnel Policy, as written, was facially constitutional: it was both reasonable and viewpoint neutral. *Pollak*, No. 22-8017 at *7-8 (10th Cir. Dec. 27, 2022).

Mr. Pollak asserts his claims under both the right to free speech and the right to petition under the First Amendment. ECF No. 43 at 19. Although the rights are separate guarantees, "they are related and generally subject to the same constitutional analysis." *Wayte v. United States,* 470 U.S. 598, 611 n.11 (1985). Because the Mr. Pollak does not argue each right differently, we can analyze them together. *See id.*

B. Scope of the Analysis

Although the bulk of Mr. Pollak's new claims challenging the Personnel Policy must still be evaluated as facial challenges, their narrower scope and the fact that new evidence has been uncovered means that the Tenth Circuit's holding does not preclude our analysis. Mr. Pollak's claim that the Offensive Speech Policy discriminates based on viewpoint fails,

however, because this Court is not at liberty to relitigate the Tenth Circuit's adjudication on his lack of standing to assert them. His claim that the Offensive Speech Policy is overbroad is not covered by the Tenth Circuit's analysis, but it fails nonetheless because Mr. Pollak does not prove the required elements for standing.

i. Personnel Policy

This Court is not bound to the Tenth Circuit's holdings on the Personnel Policy for two reasons: 1) Mr. Pollak has introduced new and relevant evidence about the enforcement of that portion of the BEDH Policy, and 2) Mr. Pollak's amended complaint requests relief on narrower grounds. Per *Fish v. Schwab*, "The law-of-the-case doctrine provides that, when a court rules on an issue of law, the ruling should continue to govern the same issues in subsequent stages in the same case." 957 F.3d 1105, 1139 (10th Cir. 2020) (citations omitted). Furthermore, a fully considered appellate ruling on an issue of law made on a preliminary injunction appeal becomes the law of the case for subsequent proceedings in the trial court. *Id.* at 1140. Exceptions exist when "there is new and different evidence, an intervening change in controlling authority, or the prior ruling was clearly erroneous." *Id.* at 1141. The Tenth Circuit fully considered Mr. Pollak's initial facial challenge under the "likelihood of success" prong of its preliminary injunction analysis, but it did not have access to the new and different evidence before this Court regarding the enforcement of the Personnel Policy. Since the close of discovery, several important facts have come to light. First, we learned that Ms. Wilson considers the mere mention of an employee's name to be a violation of the Personnel Policy. ECF No. 66-14 at 9. Second, we learned that the current Board Chair does not interpret the Policy the same way. ECF

No. 66 at 9. Third, we now know that during previous Board meetings Ms. Wilson, as Board Chair, did not enforce her version of the Policy against positive comments even though she thought they violated the policy. ECF No. 66-14 at 8.

Another reason this Court must analyze Mr. Pollak's claims anew is that although he is still arguing facial claims, they are narrower than the universal facial claims he initially presented to the Tenth Circuit when arguing for a preliminary injunction. Mr. Pollak is now challenging the Personnel Policy "as applied to speakers who mention public officials while discussing school policy outside of the context of private or confidential employment matters." ECF No. 66 at 15. Despite the specific "as-applied" language, we must still apply a facial standard here, albeit in narrower form. *United States v. Supreme Court of New Mexico*, which both Defendant and Plaintiff cite, sums up how to analyze claims and relief that would reach beyond the plaintiff, but are not universal:

> [F]irst, the labels the parties attach to the claims are not determinative; second, in determining whether to apply facial standards to the claim… the court must focus on whether the claim and the relief therein extend beyond the plaintiffs' particular circumstances; and third, if the claim and relief do so, facial standards are to be applied but only to the universe of applications contemplated by plaintiffs' claim.

839 F.3d 888, 914 (10th Cir. 2016). Here, Mr. Pollak claims that the Policy is unconstitutionally unreasonable, invites arbitrary enforcement, and discriminates based on viewpoint "when applied to individuals who mention public officials while discussing school policy outside the context of private or confidential employment matters." ECF No. 66 at 14, 15, 19, 21. Additionally, the relief he requests is an injunction that would apply to all "individuals who want to mention, refer to, or criticize public officials while

discussing school policies and procedure." ECF No. 43 at 19. These claims and relief extend beyond Mr. Pollak's individual circumstances. Therefore, this Court must apply facial standards here as well, but only to the "universe of applications contemplated" by Mr. Pollak's claim. *Supreme Ct. of New Mexico*, 839 F.3d at 914.

However, the fact that the Tenth Circuit rejected Mr. Pollak's broader facial claim does not necessarily constrain us here: lower courts are free to consider more focused claims after a facial claim is rejected. *See John Doe No. 1 v. Reed*, 561 U.S. 186, 191 (2010) (holding that the lower courts could consider narrower, as-applied claims after it rejected a broader, partially facial, partially as-applied claim: "upholding the law against a broad-based challenge does not foreclose a litigant's success in a narrower one.").

Mr. Pollak makes an additional claim that the Policy was discriminatorily and unconstitutionally applied to him individually. ECF No. 66 at 23. We consider this claim using the traditional as-applied analysis.

ii. Offensive Speech Policy

Mr. Pollak's claim that the portion of the Board's Policy barring abusive and vulgar language unconstitutionally discriminates based on viewpoint is precluded by the Tenth Circuit's holding that he does not have standing to challenge that portion of the Policy. Unlike his Personnel Policy claims, Mr. Pollak argued precisely the same Offensive Speech Policy claim in his brief for preliminary injunction as he does now, that the prohibition on "abusive and vulgar language" discriminates based on viewpoint. ECF No. 9 at 20. The Tenth Circuit determined that Mr. Pollak did not have standing to challenge the provision because he could not establish injury in fact. *Pollak*, No. 22-8017 at *11 (10th Cir. Dec.

27, 2022); *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016). Specifically, the Tenth Circuit held that even with the relaxed First Amendment standing requirements per *Initiative & Referendum Institute v. Walker*, "Mr. Pollak did not allege that he engaged or hopes to engage in abusive speech or that he does not intend to engage in abusive speech because of a credible threat of enforcement." 450 F.3d 1082 (10th Cir. 2006); *Pollak*, No. 22-8017 at *11 (10th Cir. Dec. 27, 2022).

Per *Fish*, this Court cannot relitigate Mr. Pollak's claim unless he can support it with "new and different evidence." 957 F.3d at 1141. However, Mr. Pollak has not presented any new evidence that satisfies the Tenth Circuit's explicit requirement for standing: in fact, Mr. Pollak stated in his deposition that he does *not* plan to use gossip, defamatory, or abusive or vulgar language during the public comment period of a future Board meeting. ECF No. 68 at 16. The only new evidence that Mr. Pollak presents is that the enforcement of the "personnel matter" portion of the Policy against him has chilled his ability to speak at future meetings. ECF No. 67 at 25. However, he gives no evidence that the "abusive language" portion of the policy has produced any similar "chilling effect." *Id.*; *Peck v. McCann*, 43 F.4th 1116, 1129 (10th Cir. 2022). We therefore cannot assess Mr. Pollak's claims regarding the viewpoint-discrimination of the offensive speech policy because he lacks standing.

Mr. Pollak did not assert his overbreadth and vagueness claims until his second amended complaint, and therefore they were not heard by the Tenth Circuit. However, even under the looser standard for standing in the context of a First Amendment overbreadth challenge, Mr. Pollak has not met the required showing for injury-in-fact. "Although

plaintiffs bringing overbreadth challenges are not always required to show that their own First Amendment rights have been violated (as opposed to the rights of third parties), they still must show that they themselves have suffered some cognizable injury from the statute... In addition, we have required that plaintiffs… must show that the statute censors or chills third parties whose speech is more likely to be protected by the First Amendment than the plaintiff's own speech." *D.L.S. v. Utah*, 374 F.3d 971, 976 (10th Cir. 2004); *see also Faustin v. City, Cnty. of Denver, Colorado*, 268 F.3d 942, 948 (10th Cir. 2001) (holding that a plaintiff lacks standing under the overbreadth doctrine where the plaintiff offers no explanation of how the statute inhibits the speech of third parties, but instead focuses solely on the argument that the statute unconstitutionally inhibits his own speech).

Mr. Pollak cannot show any personal cognizable injury from the Offensive Speech Policy because it was not used against him. While he claims that it chills his speech, there is no "credible threat of future prosecution" because no recent Board Chair has ever invoked it against any speaker. *Peck v. McCann,* 43 F.4th 1116, 1129 (10th Cir. 2022); ECF No. 66-15 at 11-12; ECF No. 66-2 at 20. Furthermore, Mr. Pollak does not mention third parties anywhere in his multiple briefs on overbreadth and vagueness. In his explanation of why he has standing, he specifically limits his argument to himself: "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." ECF No. 67 at 26. The overbreadth doctrine has no application in this case because Mr. Pollak never mentions how "it may conceivably be applied unconstitutionally to others in

situations not before the Court." *Initiative & Referendum Inst. v. Walker*, 450 F.3d 1082, 1104 (10th Cir. 2006).

C. Limited Facial Analysis of the Personnel Policy

1. Determination of the Policy's Scope

The Board's Personnel Policy includes at least the option for the Board Chair to bar speakers from mentioning the names of district staff during the public-comment period of the Board meetings.

"The first step in the proper facial analysis is to assess the… laws' scope." *Moody v. NetChoice, LLC*, 144 S. Ct. 2383, 2398 (2024). There is some dispute about what exactly the Personnel Policy covers, and there is no definition of "personnel matter" in the Policy itself. ECF No. 66-1 at 2-3. Defendant Wilson, during her time as Board Chair, adopted the widest possible definition. In her deposition, she defines "personnel" as people "paid for and employed by the district," and "personnel matters" as "[m]atters that have to do *anything* that concerns these people." ECF No. 66-14 at 6 (emphasis added). According to her, any mention of an employee by name violates the rule. ECF No. 66-14 at 7. During the February 7th Board meeting, when enforcing the Personnel Policy against Mr. Pollak, she stated as her reasoning: "You are speaking about Mr. Stults. That's all that's to be said." ECF No. 66-16 at 1:40-1:45. Mr. Rader, the current Board Chair, interprets the Personnel Policy much more narrowly. He defines personnel matters as "[matters] pertaining to the *employment* of a district staff member," (emphasis added) and he does not believe that merely mentioning the name of an employee, without more, constitutes a violation. ECF No. 69 at 3; ECF No. 66 at 19.

However, both parties agree that it is the prerogative of the Board Chair to enforce this rule and to decide if it is violated, and no one contends that Ms. Wilson did not have the ability to interpret the Policy to exclude such a broad swath of speech. ECF No. 66-2 at 11. We will therefore assess the constitutionality of the Personnel Policy assuming it includes this broader interpretation.

2. Evaluation of the Effects of the Policy's Enforcement

While the Personnel Policy's restriction of "matters pertaining to the employment of a district staff member" are constitutional, the prohibition on mentioning any individual staffer's name, for any reason, is not.

"The next order of business is to decide which of the laws' applications violate the First Amendment, and to measure them against the rest." *Moody,* 144 S. Ct. at 2398. While the Constitution permits the Board to limit the discussion of employment-related matters, it may not exclude all public comments that mention a staffer's name. Such a broad rule does not serve the purpose of the Board meeting and it leaves open the possibility of arbitrary enforcement. This unreasonableness is particularly significant as applied to individuals who wish to refer to or criticize public officials during the meetings.

i. Unreasonableness – Purpose of the Forum

Narrower policies that restrict the discussion of more traditional personnel matters – those "pertaining to the employment of a district staff member," per the definition of the current Board Chair Mr. Rader, or confidential personal information – do indeed serve the purpose of the Board meetings and are reasonable, even as applied to speakers who wish to criticize public officials while discussing school policy. ECF No. 69 at 3. The Board's

Personnel Policy as interpreted by Ms. Wilson, which allows a Board Chair to exclude the mention of an individual's name, is unreasonable.

The School Board may only exclude speech if the exclusion is "reasonable in light of the purpose served by the forum." *Christian Legal Soc. Chapter of the Univ. of California, Hastings Coll. of the L. v. Martinez*, 561 U.S. 661, 685 (2010). While "public bodies may confine their meetings to specified subject matter and may hold nonpublic sessions to transact business," *City of Madison Joint School District Number 8 v. Wisconsin Employment Relations Commission*, 429 U.S. 167, 175 n.8 (1976), the restrictions must be consistent with the government's legitimate interest in "preserving the property for the use to which it is lawfully dedicated." *Perry Educ. Ass'n v. Perry Loc. Educators' Ass'n*, 460 U.S. 37, 50–51 (1983).

The SCSD2 Board has an interest in restricting the public discussion of employment-related information at Board meetings, and such a restriction furthers its purpose of "carrying out the official business of the school district," per their Policy. ECF No. 66-1 at 2. While the Board "desires to hear the viewpoints of citizens throughout the district" and provides "time at all meetings for citizens to be heard," its first priority is governance of the school district, and it must "conduct its business in an orderly and efficient manner." *Id.* at 2-3. The Tenth Circuit has already held that a prohibition on the discussion of employment-related information is reasonable because it allows the Board to focus on the purpose of its meetings – school policies and programming – and because it "prevent[s] public discussion of district employees' confidential or personal information."

Pollak, No. 22-8017 at *5 (10th Cir. Dec. 27, 2022).[2] It also provides an alternative forum for the excluded speech: for speakers who wish to discuss personnel, the Board will schedule a non-public "executive session" during which such issues can be discussed. ECF No. 66-1 at 3.

Policies that restrict the discussion of defined personnel matters have been deemed constitutional by other courts, and practically speaking such a restriction does not exclude a large percentage of speech. While there are no Tenth Circuit opinions precisely on point, the Fifth Circuit has held that a school board policy was constitutional when it prohibited the public discussion of "Personnel Matters – including the appointment, employment, evaluation, reassignment, duties, discipline, or dismissal of a public employee." *Fairchild v. Liberty Indep. Sch. Dist.*, 597 F.3d 747, 757 (5th Cir. 2010); *accord Cipolla-Dennis v. Cnty. of Tompkins,* No. 21-712, 2022 WL 1237960, at *2 (2d Cir. Apr. 27, 2022). Carving out employment-related matters does not impinge much, if at all, on speakers' ability to "criticize officials while discussing school policy." Speakers are free to respond to the comments of district staff or mention their names with regard to school-wide policies, as long as, for example, they refrain from suggesting that employees be disciplined or otherwise suffer employment-related consequences for their actions. In fact, Mr. Pollak himself does not challenge the interpretation of the Personnel Policy that restricts "speakers discussing employment matters… or otherwise submit[ting] complaints about employees

[2] Mr. Pollak's argument that the Board cannot justify its interest in protecting personnel is unfounded. The fact that employee performance has been discussed during *private* executive sessions and employees have been "recognized… for accomplishments" during portions of the meeting that are *not open for public comment* has no bearing on the Board's interest in protecting employees from targeted personal or professional attacks during the public portion of the meeting. ECF No. 69 at 2; ECF No. 66 at 13.

[in public]." ECF No. 67 at 16. Indeed, he was able to criticize school officials (the Board members) while speaking during the previous Board meeting in January of 2022. ECF No. 69 at 8.

However, a restriction that allows the Board Chair to prevent any speaker from mentioning the name of any paid district employee for any reason does *not* serve the purpose of the Board meetings, nor does the Board have a legitimate interest in enforcing it. The circuit courts are split on whether restrictions on personally directed comments in local government meetings are constitutional. The Fifth and Fourth Circuits hold that policies against "personal attacks" and "complaint[s] involv[ing] naming of people" (employees or students) are facially constitutional and serve the legitimate public interest of maintaining decorum and order in a limited forum. *Fairchild v. Liberty Indep. Sch. Dist.*, 597 F.3d 747, 756 (5th Cir. 2010); *Steinburg v. Chesterfield Cnty. Plan. Comm'n*, 527 F.3d 377, 387 (4th Cir. 2008). By contrast, the Eleventh Circuit holds that a ban on "personally directed speech" obstructs the purpose of a school board meeting. *Moms for Liberty - Brevard Cnty., FL v. Brevard Pub. Sch.*, No. 23-10656, 2024 WL 4441302, at *9 (11th Cir. Oct. 8, 2024).

We find that these varying outcomes make sense when we consider the twin purposes of publicly held local government meetings: to efficiently handle government business and to receive and incorporate feedback from the community. While personal "attacks" and "complaints" may bog down a meeting and threaten efficiency, the majority of "personally directed speech" does not do so – it describes the normal, colloquial manner

of speaking. Banning it goes far beyond the government interest of upholding decorum and efficiency; it interferes with the public's ability to communicate with their government.

Here, SCSD2's enforcement of the Personnel Policy to ban any mention of an employee name for any reason is similarly too broad. The purpose of SCSD's Board meetings is "to carry[] out the official business of the school district" in an organized and efficient manner. ECF No. 66-1 at 2-3. This rule would make Board meetings less efficient because it would require speakers to jump through the arbitrary and unnecessary rhetorical hurdle of avoiding mentioning anyone's name, even in the most banal manner. For instance, if a teacher presented a request for funding to start a debate team at a Board meeting and an audience member wished to voice support, that speaker would be prevented from saying "I support Mx. Smith's proposal." Such a broad restriction certainly does not further the interest of the Board.

Additionally, this broad rule excludes much more speech than the government has a legitimate interest in excluding. The Board, as stated, wishes to protect confidential personal and employment information. *Pollak*, No. 22-8017 at *5 (10th Cir. Dec. 27, 2022). However, thanking an employee or referencing the superintendent's presentation from a previous meeting does not involve confidential or employment-related information. The Board has not submitted any argument that would justify a ban on mentioning employee names beyond the context of confidential or employment-related matters.

ii. Unreasonableness – Arbitrary Interpretation

The Personnel Policy also runs into constitutional hot water because it is enforced unpredictably. "[P]erfect clarity and precise guidance have never been required even of

regulations that restrict expressive activity." *Ward v. Rock Against Racism*, 491 U.S. 781, 794 (1989). However, "indeterminate prohibition carries with it the opportunity for abuse," *Minnesota Voters All. v. Mansky*, 585 U.S. 1, 21 (2018), particularly when "arbitrary discretion is vested in some governmental authority." *Heffron v. International Soc. for Krishna Consciousness, Inc.*, 452 U.S. 640, 649 (1981). "[T]hat discretion must be guided by objective, workable standards." *Mansky*, 585 U.S. at 22.

While a policy restricting the discussion of personnel matters is not inherently unclear, this Board's radically different interpretations of what counts as a personnel matter, arbitrarily dependent on the Board Chair, do not provide potential speakers with an objective, workable standard. As previously mentioned, the former Board Chair, Ms. Wilson, interpreted the Policy to apply to any identification of an individual employee, for any reason. ECF No. 66-14 at 7. The current Board Chair, Mr. Rader, came to the opposite conclusion. ECF No. 66 at 19. This may seem like a minor difference, but it is significant as applied to individuals who wish to refer to or criticize school officials while discussing school policy. Because the Board Chair has sole authority to enforce the Personnel Policy, and there is no requirement that the Chair publicize their interpretation, speakers simply have no way of knowing, on any given day, whether their comments will be in violation of the Personnel Policy or not. ECF No. 66-2 at 10. Such variability in enforcement "carries with it the opportunity for abuse," and therefore violates the First Amendment. *Mansky*, 585 U.S. 1, 21 (2018).

iii. Viewpoint Neutrality

However, this Court does not find that a policy prohibiting the naming of staff members discriminates based on viewpoint, at least facially. Mr. Pollak argues that the Policy excludes an entire class of speakers, namely "those who believe school officials deserve credit or blame for school operations." ECF No. 66 at 21. It does not. The Eleventh Circuit, which considered a similar school-board policy banning "personally directed" speech, concurred that while the restriction was not reasonable, it did not discriminate based on viewpoint. *Moms for Liberty*, No. 23-10656 at *7 (11th Cir. Oct. 8, 2024). Speakers retain a wide array of rhetorical options for blaming school officials: they can criticize or praise (a) Board members by name, as they are not considered "personnel" (ECF No. 66-14 at 8); (b) staff members as a group, i.e. "school administrators" or "teachers" (id. at 7); and (c) staff members individually, at an executive session (ECF No. 66-1 at 3). As an example, Mr. Pollak states that "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." ECF No 66 at 22. However, a speaker could say "the school is underperforming because of the school administrators." Alternatively, they could specifically blame the principal in a private session. Both options permit speakers to blame school officials; no "class" of speakers is excluded.

3. Remedy

A narrow permanent injunction best addresses the First Amendment violations in this case. To obtain a permanent injunction, Mr. Pollak must prove "(1) actual success on

the merits; (2) irreparable harm unless the injunction is issued; (3) the threatened injury outweighs the harm that the injunction may cause the opposing party; and (4) the injunction, if issued, will not adversely affect the public interest." *United States v. Uintah Valley Shoshone Tribe*, 946 F.3d 1216, 1222 (10th Cir. 2020). Mr. Pollak has proven success on the merits, but only to the extent that the Personnel Policy is used against all speakers who refer to individual employees. He has not proven, and in fact has specifically stated that he has no claim against, the Policy as applied to "speakers discussing employment matters" or "submit[ting] complaints about employees." ECF No 67 at 16. Both parties agree that the Board has a legitimate interest in regulating such matters, suggesting a broader injunction would violate the balance cautioned by injunctions requirements 3 and 4, as mentioned above. *Id.* at 15. Therefore, we find that a permanent injunction only against the unconstitutional interpretation of the Personnel Policy – the enforcement of it against speakers who merely mention district staffers – is necessary.

D. As-Applied Challenge

While the Personnel Policy is facially viewpoint-neutral, it was enforced discriminatorily against Mr. Pollak to exclude his comments at the February 7th meeting. "To succeed on First Amendment as-applied challenges premised on viewpoint discrimination, plaintiffs 'must show that [they were] prevented from speaking while someone espousing another viewpoint was permitted to do so.'" *Harmon v. City of*

Norman, Oklahoma, 61 F.4th 779, 789 (10th Cir. 2023) (quoting *McCullen v. Coakley*, 573 U.S. 464, 485 n.4 (2014)).

As in our analysis of the facial claims, the existence of newly discovered, relevant evidence signifies that we do not need to adhere to the holding of the Tenth Circuit. While the Tenth Circuit ultimately rejected as insufficiently developed Mr. Pollak's as-applied challenge in his motion for preliminary injunction, it also held that, on the record, he would likely lose on the merits regardless. *Pollak*, No. 22-8017 at *10 (10th Cir. Dec. 27, 2022). Specifically, it held that Ms. Wilson's enforcement was "bona fide and reasonable" because Mr. Pollak had previously called for Superintendent Stults' resignation; therefore, Ms. Wilson assumed that Mr. Pollak was about to do so again, and that could be categorized as a personnel matter. *See id.* However, per *Fish*, we have "new and different evidence" to consider – specifically, the occasions in which Ms. Wilson chose *not* to enforce the Personnel Policy. 957 F.3d at 1141

We independently agree with the Tenth Circuit that Ms. Wilson could reasonably have interpreted that Mr. Pollak was violating the Policy by speaking about personnel matters. It is true that Ms. Wilson believed that the identification of an employee was a violation of the Personnel Policy. ECF No. 66-14 at 7. However, in both her deposition and her statements during the Board meeting, she makes it clear that she enforced the Policy against Mr. Pollak not *only* because he mentioned Mr. Stults' name, but also because he was specifically making a complaint against the superintendent, which could be considered a personnel matter. "Q. And can you explain how Mr. Pollak violated the personnel matter rule? A. Because he became – he started right out saying that his amendment rights were

discredited. He [was] going to rebuttal Mr. Stults, and he was very critical in his speech." *Id.* at 9. Considering the context, as the Tenth Circuit did, that Mr. Pollak had previously called for the superintendent to resign and planned to do so again during the February 7th meeting, Ms. Wilson interpreted this to be an employment-related complaint and a personnel issue. ECF No. 64-22 at 8-9; *Pollak*, No. 22-8017 at *10 (10th Cir. Dec. 27, 2022). As previously noted, Mr. Pollak himself does not challenge the interpretation of the Personnel Policy that restricts "speakers discussing employment matters… or otherwise submit[ting] complaints about employees [in public]." ECF No. 67 at 16.

The constitutional issue arises from the fact that Ms. Wilson had previously *not* enforced this same rule against speakers who said positive things about district employees, even though she acknowledged such comments were against the Policy. ECF No. 66-14 at 8, 10-11. Specifically, she permitted several speakers to express appreciation for specific staffers by name at previous meetings. *Id.* She also explicitly stated on February 7th, "You're not allowed to talk about personnel unless it's favorable things." ECF 64-22 at 2.

The argument could be made that thanking a staffer is not a personnel matter because such a comment does not affect their employment, while certain complaints (allegations of violating the law, for instance) are personnel matters precisely because they do affect employment. However, Defendants do not make that argument; instead, Ms. Wilson explicitly states that positive comments violate the Personnel Policy as well. ECF No. 66-14 at 8. As a result, her behavior of enforcing the Policy against Mr. Pollak's negative comment but not against other speakers' positive comments constitutes viewpoint discrimination and is a violation of Mr. Pollak's First Amendment rights.

Ms. Wilson's assertion of qualified immunity also fails. "Individual defendants named in a § 1983 action may raise a defense of qualified immunity, which shields public officials from damages actions unless their conduct was unreasonable in light of clearly established law." *Irizarry v. Yehia*, 38 F.4th 1282, 1287 (10th Cir. 2022). A plaintiff can overcome a defendant's claim of qualified immunity by showing "(1) the defendant's actions violated a constitutional or statutory right, and (2) that right was clearly established at the time of the defendant's complained-of conduct." *Truman v. Orem City*, 1 F.4th 1227, 1235 (10th Cir. 2021). "[T]o make such a showing of clearly established law in our circuit, the plaintiff must point to a Supreme Court or Tenth Circuit decision on point, or the clearly established weight of authority from other courts must have found the law to be as the plaintiff maintains." *Frasier v. Evans*, 992 F.3d 1003, 1014 (10th Cir. 2021) (citations omitted).

In this case, the law was clearly established. "It is axiomatic that the government may not regulate speech based on… the message it conveys." *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 828 (1995). Enforcing a policy against one individual because his comments were "critical" but not enforcing it against others whose viewpoints were positive constitutes viewpoint discrimination, which is a violation of the First Amendment. As a result, we must grant nominal damages. *Stoedter v. Gates*, 704 F. App'x 748, 758 (10th Cir. 2017).

CONCLUSION

This Court finds that there is no genuine issue of material fact that the Board's Personnel Policy, inasmuch as it restricts personnel matters as they are commonly

understood, is constitutional. However, we find that the interpretation of the Policy to exclude all speakers who mention individual employees is unreasonable and unconstitutional. Based on the foregoing, **IT IS HEREBY ORDERED** that the Defendants shall be permanently enjoined from enforcing the Personnel Policy to exclude speakers solely for referring to individual employees, and such enforcement is declared unconstitutional.

We also find that the Personnel Policy was unconstitutionally enforced against Mr. Pollak because his comments were critical, while speakers expressing positive comments that also violated the Personnel Policy were not similarly restricted. Based on the foregoing, **IT IS HEREBY ORDERED** that judgment is entered against Ms. Wilson in favor of Plaintiff, and that Plaintiff shall receive nominal damages in the amount of $17.91 for the unconstitutional enforcement of the Personnel Policy against him. Additionally, **IT IS HEREBY ORDERED** that Plaintiff shall recover costs and attorney fees. Plaintiff should submit his bill of costs and fees within 30 days. Defendants may respond within two weeks thereafter.

Finally, we hold that Mr. Pollak does not have standing to assert claims against the Offensive Speech Policy. Therefore, **IT IS HEREBY ORDERED** that Plaintiff's claims against the Offensive Speech Policy are **DISMISSED**.

Dated this 25th day of October, 2024.

Alan B. Johnson
United States District Judge