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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 MOTION TO RECONSIDER ORDER GRANTING MOTION TO COMPEL

Under Fed. R. Civ. P. 72(a), LR 74.1(a), and 28 U.S.C. § 636(b)(1)(A), Plaintiff Harry Pollak moves to reconsider the order (ECF. No. 50) granting the Defendants' motion to compel. The undersigned certifies that the parties conferred in good faith about this discovery dispute in writing, by phone, and through an informal discovery conference (ECF No. 46). The Defendants have indicated that they oppose Pollak's motion to reconsider the magistrate judge's order.

NATURE OF THE CASE[1]

1. Plaintiff Harry Pollak signed up to speak during the Sheridan County School District No. 2 ("SCSD2") board meeting on February 7, 2022. Pollak stated that he

[1] All relevant facts are set forth in the underlying motion to compel, response, and reply, which Pollak incorporates by reference. (ECF Nos. 47, 48, & 49).

intended to address statements the Superintendent made during the board's public meeting one month earlier. But the board chair—defendant Susan Wilson—ordered him to stop speaking. She explained that the board's policies prohibited Pollak from mentioning the Superintendent at all. (ECF No. 43, ¶¶23–29).

Pollak challenges the constitutionality of the board's rule prohibiting speakers from discussing "personnel matters" when it prohibits mentioning public officials for any reason. (*Id.* at ¶¶42–57). Pollak also alleges that Wilson discriminatorily enforced the rule against him. (*Id.* at ¶¶52–53, 56–57). And Pollak facially challenges a related rule prohibiting "abusive" comments and similar categories of speech. (*Id.* at ¶¶58–73). This case thus boils down to two questions: First, are the board's policies constitutional? And second, did the board unconstitutionally enforce them against Pollak on February 7, 2022?

2. The present dispute arose after the defendants served discovery requests that implicate the inner workings of Free Our Faces ("FOF"), an association of individuals who began advocating against SCSD2's policies during the pandemic. (Pollak Decl., ECF No. 48-1, ¶¶2–3). FOF members largely communicate using a private group on Facebook that prevents the public from knowing who has joined them and what they are discussing. (*Id.*) This confidentiality is critical to Pollak's participation. (*Id.* ¶4). Members of the public have compared FOF and other similar groups to terrorists, leading to criminal investigations into even peaceful speech and protests related to school policies. (*Id.* ¶5; ECF No. 48-3). Some of those investigations "subjected . . . moms and dads to the opening of an FBI investigation

about them, the establishment of an FBI case file that includes their political views, and the application of a 'threat tag' to their names as a direct result of their exercise of their fundamental constitutional right to speak." (ECF No. 48-3 at 3).

The discovery requests at issue asked Pollak to disclose private communications with other FOF members related to the school board and its meetings. Pollak asserted the First Amendment associational privilege because disclosure would make it less likely he would engage in private political association with FOF in the future, (ECF No. 48 at 5; ECF No. 48-1 ¶¶4, 6), and the documents sought have little to no relevance to the claims or defenses in this case, (ECF No. 48 at 7–8).

3. The magistrate judge granted the Defendants' motion to compel. (ECF No. 50 at 5–9). The court held that Pollak's fear of reprisal or public harassment is not objectively reasonable. (*Id.* at 7–9). The court alternatively held that the balance of factors required disclosure even if the associational privilege applied. (*Id.* at 9–11). Thus, the magistrate judge granted the motion to compel, requiring Pollak to disclose the withheld documents subject to redactions that remove the identities of other individuals and a protective order prohibiting disclosure beyond the parties.

STANDARD OF REVIEW

The district court "must . . . modify or set aside any part" of a magistrate judge's decision on a non-dispositive matter when it is "clearly erroneous" or "contrary to law." Fed. R. Civ. P. 72(a). This mirrors the standard an appellate court ordinarily uses. *Jensen v. Solvay Chems., Inc.*, 520 F. Supp. 2d 1349, 1351 (D. Wyo. 2007). It

requires setting aside an order resting on a clear abuse of discretion. *Id.* And for "purely legal determinations," it requires the court to "conduct[] a plenary review."

ARGUMENT

I. THE COURT SHOULD SET ASIDE THE MAGISTRATE JUDGE'S DETERMINATION THAT THE FIRST AMENDMENT PRIVILEGE DOES NOT APPLY.

"[T]he First Amendment privilege generally guarantees the right to maintain private associations when, without that privacy, there is *a chance* that there may be no association and, consequently, no expression of the ideas that association helps to foster." *In re Motor Fuel Temperature Sales Practices Litig.*, 641 F.3d 470, 479 (10th Cir. 2011) (emphasis added). The privilege "attaches if a discovery order adversely affects the ability of an organization and its members to collectively advocate for the organization's beliefs." *Wyoming v. U.S.D.A.*, 239 F. Supp. 2d 1219, 1236 (D. Wyo.) (citation omitted), *vacated on other grounds*, 414 F.3d 1207 (10th Cir. 2005). "Federal courts have consistently held that disclosure of internal associational activities (i.e., membership lists, volunteer lists, . . . and past political activities of members) satisfy this prima facie showing because disclosure of these associational activities chills freedom of association." *Id.* at 1237.

The magistrate judge clearly erred in determining that disclosure would not objectively chill Pollak's future associational activities. The court ignored evidence that would reasonably persuade any individual to avoid future associational activities. And the court's decision rested on an erroneous legal conclusion that individuals who have not committed a crime should have no reason to worry about the implications and effects of a potential criminal investigation. Not only was that

legal conclusion wrong—the Defendants never advanced it. Invoking a novel theory *sua sponte* to reject a core First Amendment right amounts to a clear abuse of discretion. *See United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1579 (2020).

The magistrate judge acknowledged that the First Amendment privilege applies when an individual fears "public manifestations of hostility" from disclosure. (ECF No. 50 at 4 (citation omitted)). But the court ignored and discounted the evidence Pollak presented. For example, the magistrate judge minimized evidence that a media report about FOF prompted one public commenter to call anyone who agrees with FOF's political position "a terrorist." (ECF No. 48-1, ¶5). The magistrate judge dismissed this evidence because the commenter did not name a specific person. But the commenter posted this remark on an article *about FOF*, and he said that "[a]nyone" who agrees with FOF's political position about Covid restrictions is "a terrorist." This is precisely the kind of "manifestations of public hostility" the First Amendment privilege protects against. *See NAACP*, 357 U.S. at 462. It was clearly erroneous to ignore this comment's context, which directly implicated FOF and its members.

The magistrate judge also clearly erred in ignoring that one of the defendants in this case—Susan Wilson—has already shown public hostility toward "those who post comments online critical of the school board and its members." (ECF No. 48-1, ¶6). Pollak's uncontroverted declaration explained he would be less likely to participate in the private association if his communications are disclosed to the Defendants, given that Wilson has publicly condemned people like him who engage

in peaceful but critical advocacy of school board members online. The magistrate judge's order does not even mention this evidence.

The above evidence, coupled with Pollak's uncontroverted statements that he would be less likely to engage with FOF if his private communications are disclosed to the Defendants, is enough to make a prima facie case that the First Amendment privilege applies. *See In re Motor Fuel Temperature Sales Practices Litig.*, 641 F.3d at 492–93 (Kelly, J., concurring) (citing cases and explaining "that a party can meet this burden by submitting: an affidavit asserting that disclosure would 'drastically alter' how the affiant communicates in the future and would cause the affiant to be 'less willing to engage in such communications'"). But Pollak offered additional evidence as well: widespread public reports, including a letter from the Ranking Congressional member for the U.S. Committee on the Judiciary, that individuals who have engaged in similar peaceful advocacy about school policy have been subjected to criminal investigations and harassment. (ECF Nos. 48-1, ¶5; 48-3 at 3).

The magistrate judge rejected this evidence by relying on the novel legal theory that it is unreasonable for an individual engaged in lawful political activities to stop doing so out of fear of a government investigation. (ECF No. 50 at 8). That holding is contrary to law. The Tenth Circuit and the Supreme Court have both long recognized that government investigations *alone* impose an objective chilling effect on First Amendment rights. *See United States v. Church of World Peace*, 775 F.2d 265, 266 (10th Cir. 1985) ("The chilling effect of a summons served by an IRS agent to obtain membership records of a tax protestor group has been said to be 'readily

apparent.'"); *Dombrowski v. Pfister*, 380 U.S. 479, 487 (1965) ("Moreover, we have not thought that the improbability of successful prosecution makes the case any different. The chilling effect upon the exercise of First Amendment rights may derive from the fact of the prosecution, unaffected by the prospects of its success or failure."). The reason for that is simple: "The threat of sanctions may deter [the] exercise almost as potently as the actual application of sanctions." *NAACP v. Button*, 371 U.S. 415, 433 (1963). And that is why the Supreme Court has long held that "First Amendment freedoms need breathing space to survive." *Ams. for Prosperity Found. v. Bonta*, 141 S. Ct. 2373, 2389 (2021) (citation omitted).

This case presents that point starkly. The individuals identified by the Congressional letter in the record did not engage in criminal activity. Yet because of public hostility to their views, people reported them to the FBI for things like being part of a "right wing mom's group" that advocated against a school board's Covid policies. (ECF No. 48-3 at 3). This "subjected . . . moms and dads to the opening of an FBI investigation about them, the establishment of an FBI case file that includes their political views, and the application of a 'threat tag' to their names as a direct result of their exercise of their fundamental constitutional right to speak." (*Id.*). Those consequences impose an objective chilling effect on people like Pollak who have engaged in the same kind of lawful advocacy about school board policies.

The magistrate judge also relied on the fact that the order requires disclosure subject to a protective order and redacting third-party names. But the Supreme Court recently held that the chilling effect from disclosure persists even when

public disclosure would break the law. *See AFPF*, 141 S. Ct. at 2388; *see also Int'l Action Ctr. v. United States*, 207 F.R.D. 1, 3 (D.D.C. 2002).

II. THE COURT SHOULD SET ASIDE THE MAGISTRATE JUDGE'S CONCLUSION THAT THE DEFENDANTS' NEED FOR DISCLOSURE OVERCOMES THE PRIVILEGE.

When the privilege applies, the Defendants must overcome it by showing a compelling reason for obtaining discovery. That requires considering several factors: (1) relevance; (2) necessity; (3) whether the party can obtain it from other sources; (4) the nature of the information; and (5) whether the party asserting the privilege placed the information at issue. *Grandbouche v. Clancy*, 825 F.2d 1463, 1466–67 (10th Cir. 1987). The magistrate judge also clearly erred in balancing these factors. (ECF No. 50 at 9–11).

Relevance and necessity. "When a claim of Associational Privilege is asserted, the relevance standard is more exacting than the minimal showing of relevance under Rule 26(b)(1)." *Wyoming*, 239 F. Supp. 2d at 1241. It requires showing that the requested discovery goes "to the 'heart of the matter.'" *Id.* (citations omitted). The magistrate judge acknowledged this standard but failed to apply it.

The magistrate judge concluded that the "heart" of the case turns on "what [Pollak] was truly intending to state" at the meeting and whether his intended comments would have violated the rules. (ECF No. 50 at 10). But the magistrate judge cited no legal authority for reaching that conclusion. The board enforced the policy against Pollak, and so this case is about "the stated reason for denying" Pollak the ability to speak on February 7, 2022. *See Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 396 (1993). It is not about what Pollak may

have said (but did not) or the reasons the board may have offered (but did not). And whether Pollak intended to violate the board's rules is irrelevant. *Cf. FEC v. Ted Cruz for Senate*, 142 S. Ct. 1638, 1647 (2022) (rejecting argument that a plaintiff suffers no harm if an injury is "willingly incurred").

Consider the problem concretely: Suppose the discovery demonstrates, as the magistrate judge suggested, that Pollak intended to break the board's rules on February 7. How would the case change? It wouldn't make the constitutionality of the rule any different. And it couldn't explain why the Defendants enforced the rule against him. After all, the Defendants cannot argue that they enforced the rule against Pollak for reasons that they did not discover until more than a year later.

One last point: Even if the Court finds that the magistrate judge did not clearly err on the relevance issue, it clearly erred in the scope of its order. The magistrate judge compelled production of three separate categories of communications: (1) communications about a board meeting on November 1, 2021, which Pollak did not speak at; (2) communications about Pollak speaking at a board meeting on January 10, 2022; and (3) communications about Pollak speaking at the February 7, 2022 board meeting—the meeting giving rise to this case. But the magistrate judge's decision only discusses whether the last category of communications (those relating to February 7) is relevant. The magistrate judge never explained why communications about two other board meetings—one at which Pollak did not even speak—go "to the heart" of this case. Thus, at a minimum, the Court should set aside that part of the order as clearly erroneous and contrary to law.

Other factors. The magistrate judge also erred in holding that the other factors favor disclosure. The magistrate held that the Defendants cannot obtain this information elsewhere, ignoring that one of the Defendants in this case—Shelta Rambur—has access to all the disputed documents because she is the administrator of FOF. (ECF No. 43 ¶14; ECF No. 47-5 at 3). And the magistrate judge wrongly held that this information is not the kind of information ordinarily protected by the First Amendment privilege. In fact, even the case the magistrate judge cited undermines this holding. As the magistrate judge recognized, the privilege protects from disclosure "membership lists, volunteer lists, financial contributor lists, and *past political activities of members*." (ECF No. 50 at 11 (citing *Wyoming*, 239 F. Supp. 2d at 1237) (emphasis added)). The Defendants are seeking communications about the "past political activities" of FOF members. The magistrate judge's conclusion otherwise was clearly erroneous.

CONCLUSION

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

Dated: August 8, 2023.

Respectfully submitted by,

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

CERTIFICATE OF SERVICE

I certify that the foregoing was served on all counsel of record on August 8, 2023, using the Court's CM/ECF system.

/s/ Brett R. Nolan
Counsel for Plaintiff

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

PROPOSED ORDER GRANTING
PLAINTIFF'S MOTION TO RECONSIDER
ORDER GRANTING MOTION TO COMPEL

This matter comes before the Court on Plaintiff Harry Pollak's motion to reconsider the magistrate judge's order granting the Defendants' motion to compel.

NATURE OF THE CASE

According to the complaint, Plaintiff Harry Pollak signed up to speak during the Sheridan County School District No. 2 ("SCSD2") board meeting on February 7, 2022. Pollak stated that he intended to address statements the Superintendent made during the board's public meeting one month earlier. But the board chair—defendant Susan Wilson—ordered him to stop speaking. She explained that the board's policies prohibited Pollak from mentioning the Superintendent at all. (ECF No. 43, ¶¶23–29).

Pollak challenges the constitutionality of the board's rule prohibiting speakers from discussing "personnel matters" when it prohibits mentioning public officials for any reason. (*Id.* at ¶¶42–57). Pollak also alleges that Wilson discriminatorily enforced the rule against him. (*Id.* at ¶¶52–53, 56–57). Pollak also facially

challenges a related rule prohibiting "abusive" comments and similar categories of speech. (*Id.* at ¶¶58–73).

This dispute arose after the defendants served discovery requests that implicate the inner workings of Free Our Faces ("FOF"), an association of individuals who began advocating against SCSD2's policies during the pandemic. (ECF No. 48-1, ¶¶2–3). FOF members largely communicate using a private group on Facebook that prevents the public from knowing who has joined and what they are discussing. (*Id.*) According to his uncontroverted declaration, this confidentiality is critical to Pollak's participation. (*Id.* ¶4).

The discovery requests at issue asked Pollak to disclose private communications with other members of FOF related to the school board and its meetings. Pollak asserted the First Amendment associational privilege because disclosure would make it less likely he would engage in private political association with FOF in the future, (ECF No. 48 at 5; ECF No. 48-1 ¶¶4, 6), and the documents sought have little to no relevance to claims or defenses in this case, (ECF No. 48 at 7–8).

After an informal discovery conference with the magistrate judge, the Defendants moved to compel production of the withheld documents. (ECF No. 47). The magistrate judge granted the Defendants' motion to compel. (ECF No. 50 at 5–9). It held that Pollak's fear of reprisal or public harassment is not objectively reasonable. (*Id.* at 7–9). The magistrate judge alternatively held that the balance of factors required disclosure even if the associational privilege applied. (*Id.* at 9–11). The magistrate judge ordered Pollak to disclose the withheld documents subject to a

protective order restricting disclosure to the parties and redactions that remove the identities of other individuals.

Pollak filed the instant motion to reconsider under LR 74.1(a). The matter is fully briefed and ripe for review.

STANDARD OF REVIEW

The district court "must . . . modify or set aside any part" of a magistrate judge's decision on a non-dispositive matter when it is "clearly erroneous" or "contrary to law." Fed. R. Civ. P. 72(a). This mirrors the standard an appellate court ordinarily uses. *Jensen v. Solvay Chems., Inc.*, 520 F. Supp. 2d 1339, 1351 (D. Wyo. 2007). It requires setting aside an order resting on a clear abuse of discretion. *Id.* And for "purely legal questions," it requires the court to "conduct[] a plenary review."

RULING OF THE COURT

I. THE MAGISTRATE JUDGE'S DETERMINATION THAT THE FIRST AMENDMENT PRIVILEGE DOES NOT APPLY WAS CLEARLY ERRONEOUS AND CONTRARY TO LAW.

"[T]he First Amendment privilege generally guarantees the right to maintain private associations when, without that privacy, there is *a chance* that there may be no association and, consequently, no expression of the ideas that association helps to foster." *In re Motor Fuel Temperature Sales Practices Litig.*, 641 F.3d 470, 479 (10th Cir. 2011) (emphasis added). The privilege "attaches if a discovery order adversely affects the ability of an organization and its members to collectively advocate for the organization's beliefs." *Wyoming v. U.S.D.A.*, 239 F. Supp. 2d 1219, 1236 (D. Wyo.) (citation omitted), *vacated on other grounds*, 414 F.3d 1207 (10th Cir. 2005). "Federal courts have consistently held that disclosure of internal

associational activities (i.e., membership lists, volunteer lists, . . . and past political activities of members) satisfy this prima facie showing because disclosure of these associational activities chills freedom of association." *Id.* at 1237. The magistrate judge clearly erred in determining that disclosure would not objectively chill Pollak's future associational activities.

The magistrate judge acknowledged that the First Amendment privilege applies when an individual fears "public manifestations of hostility" from disclosure. (ECF No. 50 at 4 (citation omitted). But the court ignored and discounted the evidence Pollak presented on this issue. For example, the magistrate judge minimized evidence that a media report about FOF prompted one public commenter to call anyone who agrees with FOF's political position "a terrorist." (ECF No. 48-1, ¶5). The magistrate judge dismissed this evidence because the commenter did not name a specific person. But the commenter posted this remark on an article *about FOF*, and he said that "[a]nyone" who agrees with FOF's political position about Covid restrictions is "a terrorist." This is precisely the kind of "manifestations of public hostility" the First Amendment privilege protects against. *See NAACP*, 357 U.S. at 462. It was clearly erroneous to ignore the context of this comment, which directly implicated FOF and its members.

It was also clearly erroneous for the magistrate judge to ignore Pollak's declaration that one of the defendants in this case—Susan Wilson—has already shown public hostility toward "those who post comments online critical of the school board and its members." (ECF No. 48-1, ¶6). Pollak's uncontroverted declaration

explained he would be less likely to participate in the private association if his communications are disclosed to the Defendants, given that Wilson has publicly condemned people like him who engage in peaceful but critical advocacy of school board members online. The magistrate judge clearly erred in failing to consider this this evidence that would make it reasonable for Pollak to fear public hostility.

The above evidence, coupled with Pollak's uncontroverted statements that he would be less likely to engage with FOF if his private communications are disclosed to the Defendants, is enough to make a prima facie case that the First Amendment privilege applies. *See In re Motor Fuel Temperature Sales Practices Litig.*, 641 F.3d at 492–93 (Kelly, J., concurring) (citing cases and explaining "that a party can meet this burden by submitting: an affidavit asserting that disclosure would 'drastically alter' how the affiant communicates in the future and would cause the affiant to be 'less willing to engage in such communications'"). But Pollak offered additional evidence as well: public reports, including a letter from the Ranking Congressional member for the U.S. Committee on the Judiciary, that individuals who have engaged in similar peaceful advocacy about school policy have been subjected to criminal investigations and harassment. (ECF Nos. 48-1, ¶5; 48-3 at 3).

The magistrate judge rejected this evidence by holding that it is unreasonable for an individual engaged in lawful political activities to stop doing so out of fear of criminal investigation. (ECF No. 50 at 8). The Defendants never raised this argument, and it was a clear abuse of discretion for the magistrate judge to raise it

sua sponte to reject Pollak's assertion of a core First Amendment right. *See United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1579 (2020).

The holding is also contrary to law. The Tenth Circuit and the Supreme Court have both long recognized that government investigations *alone* impose an objective chilling effect on First Amendment rights. *See United States v. Church of World Peace*, 775 F.2d 265, 266 (10th Cir. 1985) ("The chilling effect of a summons served by an IRS agent to obtain membership records of a tax protestor group has been said to be 'readily apparent.'"); *Dombrowski v. Pfister*, 380 U.S. 479, 487 (1965) ("Moreover, we have not thought that the improbability of successful prosecution makes the case any different. The chilling effect upon the exercise of First Amendment rights may derive from the fact of the prosecution, unaffected by the prospects of its success or failure."). "The threat of sanctions may deter [the] exercise almost as potently as the actual application of sanctions." *NAACP v. Button*, 371 U.S. 415, 433 (1963). That is why the Supreme Court has long held that "First Amendment freedoms need breathing space to survive." *Am. for Prosperity Found. v. Bonta*, 141 S. Ct. 2373, 2389 (2021) (citation omitted).

This case presents that point starkly. The individuals identified by the Congressional letter in the record did not engage in criminal activity. Yet people reported them to the FBI for things like being part of a "right wing mom's group" that advocated against a school board's Covid policies. (ECF No. 48-3 at 3). This "subjected . . . moms and dads to the opening of an FBI investigation about them, the establishment of an FBI case file that includes their political views, and the

application of a 'threat tag' to their names as a direct result of their exercise of their fundamental constitutional right to speak." (*Id.*). Those consequences impose an objective chilling effect on people like Pollak who have engaged in the same kind of lawful advocacy about school board policies.

Nor does that chilling effect subside because the order requires disclosure subject to a protective order and redacting third party names. As the Supreme Court recently held, the chilling effect from disclosure persists even when public disclosure would break the law. *See AFPF*, 141 S. Ct. at 2388; *see also Int'l Action Ctr. v. United States*, 207 F.R.D. 1, 3 (D.D.C. 2002).

II. THE MAGISTRATE JUDGE'S CONCLUSION THAT THE DEFENDANTS' NEED FOR DISCLOSURE OVERCOMES THE PRIVILEGE WAS CLEARLY ERRONEOUS AND CONTRARY TO LAW.

When the privilege applies, the Defendants must overcome it by showing a compelling reason for obtaining discovery. That requires considering several factors: (1) relevance; (2) necessity; (3) whether the party can obtain it from other sources; (4) the nature of the information; and (5) whether the party asserting the privilege put the information at issue. *Grandbouche v. Clancy*, 825 F.2d 1463, 1466–67 (10th Cir. 1987). The magistrate judge also clearly erred in balancing these factors. (ECF No. 50 at 9–11).

Relevance and necessity. "When a claim of Associational Privilege is asserted, the relevance standard is more exacting than the minimal showing of relevance under Rule 26(b)(1)." *Wyoming*, 239 F. Supp. 2d at 1242. It requires showing that the

requested discovery goes "to the 'heart of the matter.'" *Id.* (citations omitted). The magistrate judge acknowledged this standard but failed to apply it.

The magistrate judge concluded that the "heart" of the case turns on "what [Pollak] was truly intending to state" at the meeting and whether his intended comments would have violated the rules. (ECF No. 50 at 10). The conclusion was clearly erroneous. The board enforced the policy against Pollak, and so this case is about "the stated reason for denying" Pollak the ability to speak on February 7, 2022. *See Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 396 (1993). Additionally, whether Pollak intended to violate the board's rules is irrelevant. *Cf. FEC v. Ted Cruz for Senate*, 142 S. Ct. 1638, 1648 (2022) (rejecting argument that a plaintiff suffers no harm if an injury is "willfully incurred").

Other factors. The magistrate judge also erred in holding that the other factors favor disclosure. The magistrate judge held that the Defendants cannot obtain this information elsewhere. Yet one of the defendants in this case—Shelta Rambur—has access to all the disputed documents because she is the administrator of FOF. (ECF No. 43 ¶14; ECF No. 47-5 at 3). The magistrate judge also wrongly held that this information is not the kind of information ordinarily protected by the First Amendment privilege. The privilege typically protects from disclosure "membership lists, volunteer lists, financial contributor lists, and *past political activities of members*." (ECF No. 50 at 11 (citing *Wyoming*, 239 F. Supp. 2d at 1237) (emphasis added)). The Defendants are seeking communications about the "past political

activities" of FOF members. The magistrate judge's conclusion otherwise was clearly erroneous.

CONCLUSION

The motion to reconsider is granted and the magistrate judge's order granting the Defendants' motion to compel is set aside.

Dated: _____.

_____

UNITED STATES DISTRICT JUDGE