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

RICHARD LOWERY,

Plaintiff,

v.

LILLIAN MILLS, *et al.*,

Defendants.

Case No. 1:23-cv-00129-DAE

PLAINTIFF'S MOTION TO DISSOLVE PROTECTIVE ORDER RE NEPOTISM ALLEGATIONS AND FOR EXPEDITED HEARING RE SAME

RULE CV-7(G) STATEMENT

Plaintiff conferred with counsel for Defendants via email on September 11 and 12, 2024, who indicated that this motion would be opposed.

INTRODUCTION

The accuracy of plaintiff Richard Lowery's public speech criticizing UT President Jay Hartzell is front and center in this case, especially since UT has accused him of making inaccurate and disparaging statements about Hartzell. Among other evidence, Lowery has sought documentary and deposition discovery about allegations that Hartzell used state resources to favor his privileged, white-male son for admission to a UT graduate program, while advocating that diversity, equity, and inclusion (DEI) standards be applied to other Texans' children. *See* Dkt. 77-1. Shortly before the campaign to silence Lowery gained momentum, Lowery publicly called out such hypocrisy.

Before Hartzell became a party, UT's lawyers successfully sought a protective order to prevent further discovery about this topic (Dkt. 88), which prevented Plaintiff's counsel from asking witness Carlos Carvalho and defendant Lillian Mills about the nepotism allegations. Lowery reasonably believes that Carvalho, in particular, has direct personal knowledge of the nepotism allegations' veracity. Dkt. 77-1. Obviously, Hartzell himself knows whether the allegations are true. To date, he has not denied the nepotism allegations in a sworn declaration or testimony.

In granting UT's protective order, Judge Howell ruled that Lowery could re-visit the issue of discovery into the nepotism allegations after consideration of the amended complaint adding Hartzell as a party. Dkt. 110 at 4; ("The Court GRANTS the motion without prejudice to Plaintiff's re-raising these topics as appropriate for discovery should the Court grant Plaintiff's motion to amend his complaint, found at Dkt. 94."); Dkt. 124 at 9 (affirming magistrate judge).

Since then, Lowery has been permitted to amend his complaint, adding Hartzell as a party, as well as new allegations about his role in the events that triggered this lawsuit. Dkt. 120, 124, 126. At the parties' request, this Court subsequently paused

all discovery, pending resolution of Hartzell's new motion to dismiss (UT later also filed a motion for partial summary judgment). Dkt. 122. Those motions are now set for oral argument on September 25, 2024 (Dkt. 139), with the prospect of a relatively short 60-day discovery sprint resuming on or about that date, or whenever the Court issues its ruling. Dkt. 122.

UT has already committed to making President Hartzell available for a deposition if Lowery's claims against him survive the pending motions. If Lowery is successful in resisting those motions, he would like to ask Hartzell about the allegations at his subsequent deposition and obtain the discovery he was previously denied. If Hartzell did not use state resources to benefit his son, that should be easy to establish through targeted discovery and we can move on. The fact that Hartzell has blocked all inquiry on this topic is a red flag.

This Court, therefore, should dissolve the protective order and allow Lowery to make discovery requests and ask deposition questions regarding the nepotism allegations. This Court should also require Lillian Mills and Carlos Carvalho to attend a short second deposition about these nepotism allegations within 30 days of its order.

Due to the fact that only 60 days will remain for discovery to be completed after this Court rules on UT's pending motions, Lowery also requests that this Court consider this motion at the hearing set for September 25, 2024. All briefing on this motion will be complete before the hearing and delegating this matter to Judge Howell would make it more difficult for it to be resolved within the 60-day timeframe remaining for discovery. All parties would benefit from an expeditious ruling.

FACTS AND BACKGROUND

The events of this case are known to the Court, *see, e.g.*, Dkt. 134 at 7-14; Dkt. 120 at 2-3, so Lowery will only review relevant facts.

Lowery alleges that over the past several years he "has repeatedly criticized UT's senior officials . . . including President Jay Hartzell, and their approaches to issues such as critical-race theory indoctrination, affirmative action, academic freedom, competence-based performance measures, and the future of capitalism." Dkt. 126, ¶ 10. Part of that criticism has focused on the hypocritical and dishonest way that UT administrators promote DEI policies and affirmative action in the university's admissions and hiring process. *Id.*, ¶¶ 12-13, 16-19. In a *Washington Times* article opposing of race-based affirmative action, for instance, Lowery decried the hypocrisy of "self-interested administrators [who] find themselves in the interesting position of working hard to disadvantage in the admissions process people the same identity profile as their own children—though, of course, this disadvantage seldom reaches to their children themselves." Dkt. 8-7 at 4.

Lowery has stated under oath 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. Dkt. 77-1, ¶¶ 12, 14. Lowery has a credible basis to believe that in December 2020, Hartzell—who is white—and his deputy Nancy Brazzil tried to secure special treatment for Hartzell's son in his application for admission to a selective UT graduate program. *Id.*, ¶¶ 4-11. That Hartzell may have sought "special, unearned privileges for his son . . . while denying those benefits to other people's children" is the exact hypocrisy that Lowery criticized. *See id.*, ¶¶ 12, 16-17. Moreover, Lowery believes that "[t]he article could well have been a factor in Hartzell wanting to silence [him]," due to the proximity in time between the piece and UT's actions against Lowery's speech. *Id.*, ¶ 15.

According to Sheridan Titman's testimony, for instance, on July 19, 2022—three weeks after the article appeared—Hartzell told Titman that he was "annoyed" with Lowery, "grumble[d] [to Titman] about something that Richard said," and "mention[ed] that Richard was being a pain." Dkt. 134-2 at 100:11-102:14, 113:2-14; *see also* Dkt. 126, ¶¶ 45-46. Likewise, Carlos Carvalho, Lowery's supervisor at UT's Salem Center for Policy, testified that in late July 2022, UT leaders began leaning on Carvalho to stop Lowery from criticizing Hartzell and the university. Dkt. 134-3 at 151:11-152:24, 163:16-164:20, 188:14-189:12; Dkt. 8-2, ¶¶ 6-7. Defendants Burris and Mills have admitted that in August—a little over a month after the *Washington Times* article—they sought to get Prof. Carvalho to "counsel" Lowery to change the tone of his speech and stop making comments that they disliked and considered factually inaccurate. *See* Dkt. 134-4 at 154:12-155:5, 156:22-157:17; Dkt. 134-5 at 199:4-14, 210:22-211:11.

On February 13, 2024, Magistrate Judge Howell granted without prejudice UT's motion for a protective order preventing discovery into "allegations that UT President Jay Hartzell used state resources to advantage his son in admission to UT." Dkt. 124 at 8. Judge Howell emphasized that his ruling permitted "Plaintiff's re-raising these topics as appropriate for discovery" if the Court eventually granted Lowery's then-pending motion to amend the complaint and add Jay Hartzell as defendant. Dkt. 110 at 4; *see also* Dkt. 114 at 97:16-98:13. On March 26, this Court affirmed Judge Howell's ruling "especially where he granted the motion on this issue without prejudice." Dkt. 124 at 9. The same day, this Court also granted Lowery leave to amend and to add Hartzell as a defendant. Dkt. 123. Lowery's Amended Complaint contains allegations about Hartzell's motives and hypocrisy, which did not appear in the original complaint. *Compare* Dkt. 126, ¶¶ 10, 12-13, 16-19, 46-51, 60, 100, 106-07, 117, 125-26 with Dkt. 1.

ARGUMENT

I. THE NEPOTISM ALLEGATIONS ARE RELEVANT TO WHETHER LOWERY'S PUBLIC SPEECH WAS TRUE AND CONSTITUTIONALLY PROTECTED

Lowery's Amended Complaint claims that UT's threats and unwritten speech code violate Lowery's rights both by chilling his exercise of First Amendment freedoms, *see* Dkt. 126, ¶¶ 109-15, 126-27, and by empowering Defendants to selectively enforce its policies in a viewpoint discriminatory manner against speakers such Lowery who oppose DEI and similar leftwing ideologies, *see id.*, ¶¶ 118-125. As a result, discovery into allegations that Defendant Hartzell used state resources to advantage his son in UT graduate admissions is relevant to Lowery's Amended Complaint in at least three ways.

First, it is relevant to the truth of Lowery's public speech. As this Court held, "to establish a chilled speech claim" a plaintiff must demonstrate that "(1) he was engaged in constitutionally protected activity, (2) the defendants' actions caused him to suffer an injury that would chill a person of ordinary firmness from continuing to engage in that activity, and (3) the defendants' adverse actions were substantially motivated against the plaintiff's exercise of constitutionally protected conduct." Dkt. 51 at 25 (cleaned up). Likewise, university policies transgress the First Amendment when they arguably proscribe constitutionally protected speech and there is a substantial threat of enforcement. *See Speech First, Inc. v. Fenves*, 979 F.3d 319, 332, 335 (5th Cir. 2020); *see also* Dkt. 51 at 15-16.

Lowery has repeatedly criticized UT leaders as dishonest *and hypocritical,* and he has urged donors to stop giving to the university. *See, e.g.*, Dkt. 126, ¶¶ 12, 17, 31, 40, 100, 106, 117; Dkt. 95 at 3-5. Supreme Court precedent holds that "it is essential that [teachers] be able to speak out freely" on "the question whether a school system requires additional funds[,] a matter of legitimate public concern," if the teacher does not make "false statements knowingly or recklessly." *Pickering v.*

Bd. of Educ., 391 U.S. 563, 571, 574 (1968). Thus, if Lowery's public criticisms were only opinions, true statements, or falsehoods caused by mere negligence, his speech is constitutionally protected.

Second, Defendants have themselves made the accuracy of Lowery's public criticisms a central issue in this case. UT leaders have called Lowery's statements "factually inaccurate," "false," "disparaging," and "slanderous." *See, e.g.*, Dkt. 134-4 at 156:22–157:22; Dkt. 134-5 at 199:4-14; Dkt. 134-6 at 1; Dkt. 14-2 at 3. UT argued in response to an earlier motion that "Lowery has no protected right to make statements that intentionally seek to undermine university operations, including its fundraising efforts" because Lowery's "[p]ublic statements *defaming leaders* and sabotaging fundraising efforts impede University operations." Dkt. 14 at 18 (emphasis added). More recently, UT contended that Lowery's views that "President Hartzell is 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." Dkt. 103 at 6 (citation and internal quotation omitted). Under UT's theory, its administrators were authorized to reprimand or "counsel" Lowery because his speech was intentionally or recklessly false and disruptive to university operations. If they are going to attack the veracity of Lowery's statements, he should be allowed to gather evidence that support his opinions.

Third, Rule 26(b)(1) permits parties to "obtain discovery about any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case." *See LULAC v. Abbott*, 2022 U.S. Dist. LEXIS 150422, at *6-7 (W.D. Tex. Aug. 22, 2022) (citations omitted). This is a "low bar." *Medina v. Schnatter,* No. 1-22-CV-498-LY, 2022 U.S. Dist. LEXIS 106547, at *7 (W.D. Tex. June 15, 2022). "Relevant information encompasses any matter that bears on, or that reasonably could lead to other matters that could bear on, any issue that is or may be in the

case." *Allen v. Priority Energy Servs., LLC*, No. MO:16-CV-00047-DAE-DC, 2017 U.S. Dist. LEXIS 229525, at *15 (W.D. Tex. Jan. 30, 2017) (quotation marks omitted). "It must be clear that the information sought has *no possible bearing* on the claim or defense of a party for the court to deny the request for discovery." *Id.* at *16 (emphasis added).

Because UT suggests that Lowery's speech is both false and constitutionally unprotected, Lowery is entitled to prove the truth of his criticisms. That is, Lowery is entitled to discovery that could show that Defendant Hartzell or other UT administrators dishonestly and hypocritically promote DEI policies within the university. *See* Dkt. 126, ¶¶ 11-12, 16-19, 100, 106-07, 117. Therefore, evidence that Hartzell used his influence to advantage his son while simultaneously advocating policies that disadvantage other Texans' children is relevant both to Lowery's chilled speech claim and to his speech code claim.

Moreover, if Hartzell didn't use state resources to favor a family member then he has nothing to fear from Lowery's investigating what really happened. The fact that UT is trying mightily to prevent Lowery from even looking signals that evidence substantiating the nepotism allegations exists, and that Lowery's discovery would unearth it.

II. THE NEPOTISM ALLEGATIONS ARE RELEVANT TO DEFENDANTS' MOTIVE TO CHILL LOWERY'S SPEECH AND TO SELECTIVELY ENFORCE ITS SPEECH CODE AGAINST HIM

Discovery into nepotism also bears on UT's motive for silencing Lowery and selectively enforcing its implicit speech code against him.

Lowery alleges that UT censored him for criticizing Hartzell and other senior UT officials for their dishonesty and hypocritical promotion of harmful DEI policies, among other things. Dkt. 126, ¶¶ 11-12, 106, 117. As discussed above, Lowery's *Washington Times* op-ed is a key example of these criticisms. Dkt. 8-7 at 4. That

Hartzell may have sought special, unearned privileges for his son while denying those benefits to other people's children is the exact hypocrisy that Lowery's *Washington Times* article condemned. *See* Dkt. 126, ¶¶ 16-19. If Hartzell hypocritically engaged in this practice, that fact supports Lowery's theory that UT administrators wanted to stop Lowery from speaking out about this issue. Hartzell or someone close to him may well have read the *Washington Times* article and recognized themselves in Lowery's description. *See* Dkt. 77-1, ¶ 15. UT leaders unquestionably read many other articles publishing Lowery's criticisms. *See, e.g.*, Dkt. 134-7; Dkt. 132-6 at 4-8. And Hartzell knows that Lowery is a friend of Carlos Carvalho's, whom Hartzell allegedly used to contact the UT Philosophy Department on his son's behalf. *See* Dkt. 77-1, ¶¶ 15-16. At least, Lowery is entitled to ask UT leaders if they read the article and request documents bearing on the issue.

Additionally, Lowery maintains that "UT's unwritten speech code or practice does not sufficiently cabin official discretion and thereby invites selective enforcement against disfavored viewpoints or speakers." Dkt. 126, ¶ 121. Indeed, Lowery alleges that UT administrators already have selectively enforced this code against him "because [his speech] was embarrassing to them" and "because they disagreed with his opinions, and found his commentary offensive and thought that it offended other, more favored faculty at UT." *Id.*, ¶¶ 124-25. According to Lowery Defendants use vague terms such as "rude" or "uncivil" to justify enforcing their speech code against him, while permitting leftwing faculty to speak freely. *See, e.g.*, *id.* ¶¶ 42, 61-62, 72, 106, 119-123.

Lowery has offered evidence supporting these allegations. *See, e.g.*, Dkt. 134-3 at 190:8-191:16; Dkt. 134-4 at 87:6-14, 93:2-23; Dkt. 134-6. For example, Defendant Burris' notes for his August 26 meeting with Carlos Carvalho discuss the allegedly "uncivil tone" and "uncivil rhetoric" of Lowery's tweets and "recommend[ed] that the

tone and interactions could improve in its civility." Dkt. 134-9. Similarly, Sheridan Titman testified that "[a]s department chair, I have explicitly said to Richard to try not to be rude" because Titman "do[es]n't think rude comments are acceptable" and stressed that "if I have to evaluate somebody and he's on my faculty . . . if they are doing something that I find rude and potentially dangerous I will talk to them about that." Dkt. 134-2 at 145:18-146:9, 212:19-213:22.

Unconstitutional policies need not be written; implicit policies can be enough. *Jackson v. Wright*, Civil Action No. 4:21-CV-00033, 2022 U.S. Dist. LEXIS 8684, at *20-21 (E.D. Tex. Jan. 18, 2022). And if those policies—written or unwritten—make speech unacceptable because it is "rude," "uncivil," or "offensive" then those vague standards proscribe vast amounts of First Amendment protected speech. *See Speech First*, 979 F.3d at 330, 334, 337; *see also* Dkt. 51 at 16-17. Thus, evidence tending to show that Defendant Hartzell engaged in nepotism and was offended and embarrassed by Lowery's criticism of hypocrisy directly relates to Defendants' motive for singling out Lowery's speech for selective enforcement.

III. DEFENDANTS HAVE SUPPLIED NO EVIDENCE THAT DISCOVERY INTO NEPOTISM IS UNDULY BURDENSOME

Discovery into Defendant Hartzell's alleged nepotism is proportional to the needs of the case. Courts determine proportionality on a balancing test that considers "the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit." FED. R. CIV. P. 26(b)(1). "Once the party seeking discovery establishes that the materials requested are within the scope of permissible discovery, the burden shifts to the party resisting discovery to show why the discovery is irrelevant, overly broad,

unduly burdensome or oppressive, and thus should not be permitted." *Medina*, 2022 U.S. Dist. LEXIS 106547, at *3. As the party opposing discovery, UT must show "the necessity of [the protective order's] issuance, which contemplates a particular and specific demonstration of fact as distinguished from stereotyped and conclusory statements." *In re Leblanc*, 559 F. App'x 389, 392 (5th Cir. 2014) (cleaned up).

UT has supplied no evidence of burden whatsoever. *See* Dkt. 103 at 2-6; Dkt. 88 at 3-5. The exhibits in its motion for a protective order were emails among counsel, and the discovery requests themselves. *See, e.g.*, Dkt. 103-1; Dkt. 88-1. UT never submitted, for instance, numerical information calculating the expense that Lowery's request for a few emails would cause or witness declarations about the supposed oppression UT officials would experience by answering fifteen minutes of deposition questions. *See* Dkt. 89 at 4. Because UT has offered only stereotyped and conclusory statements about burden, the balancing test tilts overwhelmingly in favor of permitting discovery.

And if Hartzell did not use his position to benefit a member of his family, then the evidence will bear that out. But Lowery should be allowed to conduct targeted discovery into this topic.

CONCLUSION

This Court should dissolve the protective order concerning allegations of Jay Hartzell's nepotism and permit targeted discovery requests about nepotism as well as questions on this matter at the future depositions of Hartzell and others. Additionally, this Court should order Lillian Mills and Carlos Carvalho to submit to a brief second deposition about these nepotism allegations within 30 days of its decision. Finally, this Court should resolve this motion along with other motions on September 25, 2024, in order to allow the parties to complete discovery within 60 days after its ruling.

Respectfully submitted,

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