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UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

PORTLAND DIVISION

GLENDA SCHERER, Plaintiff, v. GLADSTONE SCHOOL DISTRICT, BOB STEWART, in his official capacity as Superintendent of Gladstone School District, TRACY OBERG GRANT, in her official capacity as Board Chair, Defendants.	Case No. 3:24-cv-00344-YY DEFENDANTS' REPLY TO MOTION FOR SUMMARY JUDGMENT

Defendants Gladstone School District ("District"), Bob Stewart, and Tracy Oberg Grant respectfully submit the within reply memorandum in further support of their motion for summary judgment against all claims in plaintiff Glenda Scherer's complaint.

Incorporation

Defendants incorporate the arguments and evidence submitted in support of their separately filed opposition to plaintiff's motion for summary judgment.

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Argument

I. Defendants Stewart and Grant should be dismissed because the claims against them are official capacity claims which are duplicative of the claims against the defendant District.

Defendants Stewart and Grant should be dismissed. Defendants' opening motion explained that Stewart and Grant have been sued in their "official capacities" only. Where, as here, municipal officials have been sued in their official capacities only and the government entity is also named as a defendant, the claims are duplicative and the individual defendants should be dismissed. Motion at 8; *see also Center for Bio-Ethical Reform, Inc. v. Los Angeles Sheriff Dept.,* 533 F.3d 780, 799 (9th Cir. 2008).

Scherer makes two arguments in response. First, she relies on *Larez v. City of Los Angeles,* 946 F.2d 630 (9th Cir. 1991) for the proposition that courts uphold jury verdicts against individual municipal officials in their official capacities and municipal entities. Response at 12. But in *Larez*, the municipal official – the police chief – was sued in both his official and individual capacities and the plaintiff obtained a verdict in both capacities. *Id.* at 640 ("The second phase also was properly initiated to adjudicate the individual liability and punitive damages claims against [the police chief].") Here, in contrast, Scherer does not make any individual capacity claims. Further, in *Larez*, the parties did not argue that substitution issue (nor would it have made sense since a verdict was rendered against the chief in his individual capacity).

Moreover, *Larez* pre-dates *Center for Bio-Ethical Reform* and *Vance*, and many cases in the District of Oregon, which repeatedly dismiss official capacity claims against individual municipal officers in their official capacities as duplicative as claims against the municipal entity

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itself. *E.g., Wolfe v. City of Portland,* 556 F.Supp.3d 1069, 1089-90 (D. Or. 2021); *Rosenthal v. Johnston,* 2025 WL 1993632, *6 (D. Or. July 17, 2025).

Second, Scherer argues in a footnote that ORS 332.072 authorizes her suit against the Board members. Response at 12 n. 17. Neither ORS 332.072 nor any other state law has any bearing on whether municipal officials sued in their individual capacities under 42 U.S.C. § 1983 should be dismissed where, as here, identical claims are asserted against the municipal entity.

The law in this circuit is clear. Stewart and Grant should be dismissed.

II. Plaintiff's claims are time-barred to the extent she relies on anything that occurred prior to February 26, 2022.

Defendants' opening motion explained that plaintiff's claims are time-barred by the two-year statute of limitations to the extent she relies on actions occurring prior to February 26, 2022. Motion at 9.

Scherer concedes this timeframe applies but asserts that her claims are not based on activity outside of it. Response at 12. However, in her motion for summary judgment, docket number 32, on page 23, Scherer explicitly relies on time-barred actions to support her claims. Defendants are entitled to an order granting summary judgment in their favor for any claim based on actions occurring prior to February 26, 2022.

III. Scherer lacks standing to challenge the policies that have not been applied to her. (First, Second, Fourth, and Fifth Claims for Relief)

Scherer lacks standing to challenge the portions of the District's policies which require individuals to treat each other with "respect" and the provision that provides that commenters

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"may offer objective criticism[.]" Motion at 9-10.

In arguing to the contrary, Scherer first ignores the fact that she failed to allege that she has *ever* been interrupted for allegedly violating these provisions of the District policy during Board meetings. *See generally* First Amended Complaint ("Complaint"). A complaint must include the "necessary factual averments…with respect to each material element of the underlying legal theory[.]" *Wasco Prods., Inc. v. Southwall Techs., Inc.,* 435 F.3d 989, 992 (9th Cir. 2006). Where a plaintiff's complaint fails to include such factual averments, a plaintiff cannot "flesh out inadequate pleadings, *id.,* by "rais[ing] allegations for the first time in her response to a summary judgment motion," *Karnes v. Regence Bluecross Blueshield of Or.,* 2011 WL 1402825 at *1 (D. Or. Apr. 12, 2011) (Haggerty, J.); *see Navajo Nation v. U.S. Forest Serv.,* 535 F.3d 1058, 1079-80 (9th Cir. 2008).

The Board meetings at issue are described on pages 7 through 10 of Scherer's response. Response at 7-10. There are only three meetings during which Scherer claims she was stopped from speaking, and Scherer describes that the personnel restriction is the reason she was stopped:

- November 8, 2023: Scherer alleges she was told she was prohibited from naming names by Chair Grant. Response at 7.
- January 10, 2024: Scherer alleges she was not permitted to discuss an off-campus incident regarding a specific staff member by Chair Grant. Response at 7-8.
- March 13, 2024: Scherer was told that her comments were violating the policy which prohibits complaints against specific personnel. Response at 9.

Scherer has never been stopped from speaking for allegedly violating the "respect" and "objective criticism" provisions.

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Instead, Scherer points to opinion testimony by current Board Chair Donna Diggs about whether Scherer had ever violated the "respect" provision. Response at 13. Whether Scherer has ever potentially violated a school district provision regarding respect is, of course, a different question than whether Diggs or anyone has ever *enforced* that provision against Scherer. There is no evidence of that. Scherer, in fact, identifies no instances wherein she was not allowed to complete her comments during Diggs' tenure as chair.

Scherer also points to opinion testimony by former superintendent Stewart and current superintendent Patterson regarding their beliefs about whether Scherer has violated the "respect" and "objective criticism" portions of the policy. Response at 13. Their opinions, however, are just that. Board members, specifically former Chair Grant and current Chair Diggs, run the meetings and manage enforcement of the District's public comment policies. Third Vickers decl. Ex. 1 (Diggs14:23-15:3); Ex. 2 (Stewart Depo 41:21-42:7); Ex. 3 (Patterson Depo 30:2-9). The record lacks any allegation or evidence that the "respect" and "objective criticism" provisions have ever been applied to Scherer. She lacks standing to challenge them.

Scherer is a frequent commenter at Board meetings. For several years she has commented at nearly every Board meeting. There is no evidence that the respect or objective criticism provisions have ever been applied to her. Nor is there any evidence that she intends to violate those provisions. She lacks standing to challenge them.

IV. The temporary ban on in person attendance at board meetings did not violate Scherer's rights. Regardless, the ban was withdrawn before this lawsuit was filed and it has not been re-implemented. (Sixth Claim for Relief)

Defendants' opening motion explained that the Property Directive did not violate Scherer's rights, and in any event, the claim is moot because the Directive was withdrawn before

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this lawsuit was filed. Motion at 11-12.

In response, plaintiff relies exclusively on *Walsh v. Enge,* 154 F. Supp.3d 1113 (D. Or. 2015). Response at 22-23. However, as defendants have explained, Scherer is not similarly situated to the *Walsh* plaintiff because the Property Directive here did not contain an outright ban. Defs' Response to Plt's MSJ at 10-12. Rather, as in *Mead v. Gordon*, 583 F.Supp.2d 1231 (D. Or. 2008), Scherer was permitted to attend meetings with prior permission. Additionally, due to changes in Oregon's Public Meetings Law and District policy, and unlike the plaintiff in *Walsh*, Scherer was able to fully participate in remote meetings during the brief period the Property Directive was in place. Defs' Response at 12.

Regardless, the claim is moot because the Property Directive was withdrawn *before this suit was filed* and it has not been reinstated over the last 19 months. Defendant Stewart, who issued the Property Directive, retired from the District at the end of the 2023/2024 school-year. Jeremiah Patterson, the current superintendent, has no plans to reinstate the Property Directive. Dkt. 42, Declaration of Jeremiah Patterson ¶ 5.

Given the pre-filing withdrawal of the Property Directive, the significant time that has passed without its reinstatement, and the lack of any plan to reinstate the Property Directive, Scherer's claim arising out of the Property Directive is moot. *See Presier v. Newkirk,* 422 U.S. 395 (1975) (finding inmates claim was moot where no further action had been taken against him during a prior 10-month period).

Summary judgment should be granted to defendants on the Property Directive claim.

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V. The Board's enforcement of its policy against discussion of personnel matters is constitutional. (First, Second, Fourth and Fifth Claims for Relief)

The Board's policies restricting discussion of personnel matters during public comment and its enforcement thereof comport with the First Amendment. Motion 13-17.

a. The policy is facially constitutional.

The parties appear to agree that restrictions during the public comment period of school board meetings are analyzed under the standards for limited public forums. In limited public forums, the government can establish time, place and manner restrictions that are reasonable and not an effort to suppress expression due to the viewpoint expressed. Motion at 14.

The restriction on discussion of personnel matters at issue in this case is reasonable and viewpoint neutral. Motion at 14-15. In arguing to the contrary, Scherer principally relies on *Acosta v. City of Costa Mesa,* 718 F.3d 800, 806 (9th Cir. 2013). Response at 16-17. However, as described in defendants' opposition to Scherer's motion for summary judgment at page 7, *Acosta* is distinguishable.

Specifically, Scherer ignores the District's policy language, not present in *Acosta,* which provides that the restriction on comments regarding individual staff members applies to both complaints *and* commendations. Scherer's reliance on *Moms for Liberty, Baca,* and *Leventhal* fairs no better, as none of those cases involved neutral restrictions. Defs' Response to Plt's MSJ at 7-8. Scherer has failed to cite a single case where a court has invalidated a policy that restricts *both* personnel complaints and commendations during the public comment portion of school board meetings, as the District's policy does here.

Scherer's facial challenge to the "objective criticism" provision also fails. As set forth in defendants' opening brief, the "objective criticism" provision does not limit an individual's

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comments to "objective criticism." Motion at 16-17. That portion of the policy is stated in permissive language. Scherer's response makes does not address this construction of the policy.

b. Scherer's as-applied challenge fails.

Scherer appears to now limit her as-applied challenge to instances where she referenced concerns about the qualifications of administrators without referencing their names or titles. But her brief is non-specific about when exactly she believes these violations occurred. The citations she relies on appear to reflect instances where she discussed or wanted to discuss specific school administrators. *Compare* Response at 20 to Defs' Response to Plt's MSJ at 9.

The record reflects that Scherer has been permitted to criticize District operations and programs generally, which is consistent with the purpose of a school board meeting. The District has not, however, allowed her to engage in discussion about personnel matters of identifiable staff members. There are appropriate avenues for addressing those concerns, which Scherer uses liberally. The as-applied challenge fails.

VI. Scherer is not blocked from tagging the District on social media. (Seventh Claim for Relief)

Scherer is tagging the District in social media posts which show up on the District's Mentions page. Motion at 12; Defs' Response to Plt's MSJ at 14-15.

As explained in the opening motion and in response to Scherer's motion, Scherer is not prohibited from doing so. Scherer argues that some of her posts have not shown up and provides what she claims are four such posts, none of which have been produced in discovery. *See* Response at 16. Facebook is a third-party application. Defendants are not blocking plaintiff's access and Scherer has produced no evidence that they are. Summary judgment should be

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granted in favor of defendants.

VII. The First Amendment free speech and First Amendment petition claims are analyzed the same way. (Fourth and Fifth Claims for Relief)

The First Amendment Petition claims should be resolved in the same manner as the First Amendment Speech claims. Motion at 17.

In response, Scherer appears to both concede the issue and suggest that a different, higher standard might apply to her petition claims. Response at 20-21. Scherer, however, provides the Court with no standard which she applies, nor does she explain how or why defendants allegedly violated it.

Instead, she cites *Borough of Duryea, PA. v. Guarnieri,* 564 U.S. 379 (2011). That case, however, illustrates the dangers of deviating from traditional First Amendment principles. In *Borough of Duryea*, a former employee sued his former public entity employer, alleging that he was terminated in retaliation for protected petitioning activity – filing a lawsuit. *Id.* 383-84. The former employee made a First Amendment petition claim. He asserted that given the importance of petitioning activity, the traditional elements of an employee First Amendment speech claim did not apply. *See id.* 384. Specifically, he asserted that because his employment was impacted for petitioning activity, he need not prove that the subject of the petition – a lawsuit – was a matter public concern. *Id.* at 393-94. The Supreme Court rejected his argument, holding that the public employee was required to establish all of the traditional elements of a First Amendment speech retaliation claim in order to prevail on his claims. *Id.* at 399.

The Court should decline Scherer's invitation to create and apply new standards here. For the reasons given with respect to the First Amendment speech claims, summary judgment

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should be granted to defendants on the First Amendment petition claims.

VIII. The District does not require pre-submission of comments. (Third Claim for Relief)

As explained in the opening brief, the District is not requiring pre-submission of comments. Motion at 17. That practice arose during the COVID-19 pandemic and was stopped prior to the initiation of the litigation and has not been reinstated. *Id.* The claim is moot.

Further, the claim is time-barred. As explained above and in defendants' opening brief, the statute of limitations on Scherer's claims is two years. And as argued in the opening memorandum, Scherer's operative complaint does not allege a timely instance wherein she claims she was prohibited from speaking because she either deviated from or failed to submit her comments in advance. Motion at 17. Scherer's response does not address this issue. Response at 21-22. Summary judgment should be granted in favor of defendants.

Conclusion

For the reasons given in defendants' opening brief and above, defendants request that the Court grant their motion for summary judgment against all claims in plaintiff Glenda Scherer's complaint.

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DATED: August 18, 2025.

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s/ Karen M. Vickers

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