UNITED STATES DISTRICT COURT
DISTRICT OF COLORADO

KRISTEN FRY, Plaintiff, v. SCHOOL DISTRICT NO. 1 d/b/a DENVER PUBLIC SCHOOLS, et al., Defendants.	No. 24-cv-02284-DDD-TPO **PLAINTIFF'S OPPOSITION TO THE DISTRICT DEFENDANTS' MOTION TO DISMISS [ECF 35]**

Kristen Fry was the victim of a stunningly brazen conspiracy between School Board members and their consultants to punish criticism and intimidate political opponents. She was criminally prosecuted based on knowingly false allegations by Defendants Shofner and Coates. Her liberty was at risk for months, and she was forced to hire an attorney to defend race-based hate crime charges, and to subpoena evidence from Denver Public Schools ("DPS") that it refused to produce. All of this occurred, she properly pleads, because she stood up to the Board's reckless determination to compromise student safety in the name of "equity."

The District and four current and former members of the Board (collectively the "District Defendants") now move to dismiss the claims against them on the basis that the worst retaliation against Fry was carried out, not by any of them personally, but by Coates and Shofner (collectively the "Private Defendants"), who are not District employees. Yes, it was Coates who filed a false police report, and it was Shofner who gave false witness testimony. According to the District Defendants, that means that the only acts attributable to them were, in their

words, "condemning racism, withholding surveillance video, and revoking [Fry's] volunteer status [at her children's public school,]" ECF 35 ("Br.") at 1-2, none of which, Defendants argue, constitutes actionable retaliation standing alone.

But Defendants are wrong for two reasons. First, these are *not* the only acts attributable to them. Rather, where public officials act in concert with others to advance an unlawful goal, each member of the undertaking is "'liabl[e] for the actions of [the others] performed in the course of the conspiracy.'" *Dixon v. Cty. of Lawton*, 898 F.2d 1443, 1449 n.6 (10th Cir.1990). Defendants do not contest that filing false criminal charges in retaliation for speech—as Fry has properly pleaded—violates the First Amendment. Second, even considered in isolation, Defendants' conceded acts independently violated the First Amendment.

BACKGROUND

I. Defendants' Controversial Policies

Defendants are deeply interconnected political activists, power brokers, and elected officials. First Am. Compl. ("FAC"), ECF 8 ¶¶9-18. Quattlebaum, Gaytan and Esserman are current Board members. *Id.*¶¶10-12. Anderson is a former member. *Id.*¶9. Shofner is their long-time political consultant, who was herself once appointed to the Board, and works so closely with them that she has been deemed their "partner." *Id.*¶16. Coates was deeply involved in their electoral campaigns, with Esserman reciprocating by managing and funding Coates' own campaign. *Id.*¶¶14,17. Coates' entwinement with the Board did not end with elections. He "worked in concert with each of the [District] Defendants...in their...governance of DPS," including "conferr[ing] in private" to set DPS

disciplinary policy. *Id.*¶¶14,18.

Working together, Defendants made major policy changes, purportedly to address racial inequities in school discipline. They removed security officers and required that potentially dangerous students be allowed to attend mainstream school against the advice of law enforcement, leading to shootings at East High School. *Id.*¶¶24-29.

II. As Parents and Educators Began to Speak Out, Defendants Dug in and Silenced Dissent.

The East High shootings caused a firestorm. But rather than meeting the criticism in good faith, Defendants retaliated against anyone who spoke up. The first victim was an educator. After the shootings, principal Kurt Dennis exposed dangerous conditions at his school. *Id.*¶¶30-31. Within days, DPS moved to terminate his employment. *Id.*¶39. To justify their misconduct, Anderson and Esserman secretly enlisted Coates to spearhead an "investigation." *Id.*¶¶51-54. The "investigation" purported to find that Dennis used an "incarceration room" to lock up "students of color." *Id.*¶53. These allegations, repeated in news conferences, were false and retaliatory. *Id.* Anderson even filed a false police report against Dennis. *Id.*¶54.

Meanwhile, parents, including Fry, began to speak out. *Id.*¶¶32-36,40. In response, Coates and Anderson repeatedly smeared them as "white racists" and "the Klan." *Id.*¶¶36, 56, 75, 113-14. Coates doxxed parents' personal information. *Id.*¶56. Shofner, Coates, Esserman, Quattlebaum and Anderson together ran "town halls," that were really public bullying sessions against "white parents." *Id.*¶¶41-

49.

Defendants even retaliated against ten- to twelve-year-old students who sought to read statements by their teachers (who were too afraid to speak) at a public comment session. *Id.*¶¶58-59. Gaytan and Anderson invented a "rule" to silence those children, and Coates and Shofner—seated directly next to the podium—interrupted them with cries of "racist" and "white supremacist." *Id.*¶¶58-60. At the same session, Coates loudly and falsely accused Fry of calling him a "n****er," and assaulting him. *Id.*¶¶68-70. Coates repeated these falsehoods on a political broadcast, via numerous internet postings, and in a false police report that led to Fry's prosecution for a hate crime assault. *Id.*¶¶75-79, 96-98, 100, 103-04, 106, 109, 112-13. As surveillance video evidence wrongfully withheld by DPS for months would eventually show, Coates' allegations were utterly false. *Id.*¶¶71, 101-02, 115-18.

Shofner, who was immediately adjacent to Coates at the meeting, and the District Defendants, who were facing the audience mere feet away, knew that the allegations were false, and that Fry did not commit an assault.[1] *Id.*¶¶72, 79, 87, 93. Nevertheless, Shofner provided a false statement to a police investigator that she "saw Ms. Fry grab Mr. Coates on the shoulder." *Id.*¶99. For their part, Esserman,

[1] Defendants deny Plaintiff's allegations that they knew Coates' assertions were false. Br. at 10-11. On a motion to dismiss, however, the plaintiff, not the defendant, is entitled to all reasonable inferences. It is entirely reasonable to infer that the District Defendants, mere feet away from the alleged hate crime, knew that Coates was lying. The inference is more compelling because Anderson and Esserman previously worked with Coates to gin up a false controversy to justify the termination of Kurt Dennis, including *filing a false criminal charge against him*.

Quattlebaum, and Anderson agreed to provide false testimony to support the criminal charges. *Id.*¶105.[2]

While the prosecution was pending, Fry was prevented from attending Board election events because Coates was present. *Id.*¶108. She was also barred from volunteering at her children's schools. *Id.*¶111. Fry was also repeatedly defamed and publicly shamed. Among other things, Coates, Shofner and Anderson—then a sitting Board member—repeated false allegations against Fry on a political broadcast. *Id.*¶¶76-83. Anderson also spread the same falsehoods on social media. *Id.*¶113. At a public meeting on August 24, 2023, the District Defendants devoted ten minutes to publicly berating Fry, and effectively calling her a racist. *Id.*¶¶89-95. Fry also received an unprompted message that the sender "just got a text from a friend saying ur going around calling people the N.word...Giving u a heads up that ur reputation is going in that direction." *Id.*¶84.

ARGUMENT

I. Defendants Engaged in a Conspiracy to Suppress Dissent. Along the way, they Trampled Kristen Fry's First Amendment Rights.

Fry alleges that Defendants conspired to suppress political opposition, and to retaliate against their opponents. Such a claim is "actionable under § 1983." *Calderon v. Cty. & Co. of Denver*, 2023 WL 5348396, at *12 (D.Colo. Aug.21,2023). In the § 1983 context, a conspiracy is a "legal mechanism through which to impose

[2] It is unknown whether police investigators contacted Esserman, Quattlebaum or Anderson. *Id.* But that is irrelevant. The fact that they *agreed to corroborate false hate crime charges* when objective video evidence proved there was no such crime is highly probative of the existence of a conspiracy.

liability on each and all of the Defendants without regard to the person doing the particular act." *Nesmith v. Alford*, 318 F.2d 110, 126 (5th.Cir.1963). It is therefore incorrect to say the only acts attributable to the District Defendants are the ones they engaged in directly. To succeed on a § 1983 conspiracy claim, "[a] plaintiff must demonstrate: (1) a conspiracy, (2) an actual deprivation of her constitutional rights, and (3) action under color of state law." *Calderon*, 2023 WL 5348396 at *12.

A. Fry Has Adequately Pleaded a Conspiracy.[3]

A § 1983 conspiracy is "a combination of two or more persons acting in concert [toward] a general...objective." *Brooks v. Gaenzle*, 614 F.3d 1213, 1227-28 (10th.Cir.2010), *abrogated on other grounds in Torres v. Madrid*, 592 U.S. 306 (2021). "The participants in the conspiracy...need not know all the details of the plan...or possess the same motives for desiring the intended…result." *Snell v. Tunnell*, 920 F.2d 673, 702 (10th.Cir.1990)(cleaned up). Nor must there be an "express agreement among…conspirators." *Calderon*, 2023 WL 5348396, at *12.

At the pleading stage, "the discrete nature of a conspiracy claim—where '[d]irect evidence of a conspiracy is rarely available, and the existence of a conspiracy must usually be inferred from the circumstances'—requires a somewhat more tolerant posture by courts." *Wilson v. Cty. of Lafayette*, 2008 WL 4197742,

[3] Defendants did not organize and signpost their brief in a manner consistent with DDD Civ. P.S. III(D)(1)(a), complicating Plaintiff's ability to comply with DDD Civ. P.S. III(D)(1)(b). In an effort to comply, Plaintiff notes that each of the issues discussed herein is DISPUTED, except that Defendants do not appear to dispute that filing false criminal charges in retaliation for speech violates the First Amendment.

at.*10 (D.Colo. Sept.10, 2008)(cleaned up). Courts must "grant some leeway to plaintiffs in describing the exact details of the alleged conspiracy." *Id.* "The existence or nonexistence of a conspiracy is essentially a factual issue that the jury, not the trial judge, should decide." *Adickes v. S.H.Kress & Co.*, 398 U.S. 144, 176(1970) (Black, J., concurring).

Keeping in mind these relaxed pleading standards, courts look to various indicia such as:

- Whether the members of the conspiracy had a "common motive [to] retaliate." *Bevill v. City of Quitman,* 2023 WL 3761245, at *11 (E.D.Texas, Jun.1,2023);
- "[T]he sequence of events," *Adickes*, 398 U.S..at.157, and the fact that each member of the alleged conspiracy took discrete actions to further the common goal, *Janny v. Gamez*, 8 F.4th 883, 920 (10th.Cir.2021);
- Whether the members of the conspiracy had a "pre-existing relationship," *U.S. v. Harris,* 932 F.2d 1529, 1534 (5th.Cir.1991), or a "close working relationship," *Bevill*, 2023 WL 3761245, at *11;
- Whether a nominally-private party was allowed to participate in non-public official activities. *Janny*, 8 F.4th at 920 n.7 (a "jury could find…a conspiratorial agreement *in the very fact* [that] a private third party was allowed to sit in on a meeting between a parole officer and his parolee." (cleaned up, emphasis added)).

The allegations in the complaint set forth each of these factors, and more. First, Defendants had a common motive to retaliate. They worked together for years to change policy to conform to their conception of racial "equity." FAC ¶¶9-18, 24-25. To see those policy changes suddenly in jeopardy gave each Defendant a strong, shared motive to retaliate. Moreover, 2023 was an election year for some Board seats, and all Defendants had strong incentives to preserve their ideological dominance.

Second, Defendants' reaction to the public outcry had all the hallmarks of a conspiracy. When Kurt Dennis exposed dangerous conditions at his school, Anderson and Esserman worked in secret with the Private Defendants to respond. *Id.*¶¶18, 30-31, 38-39, 50-53. Anderson filed a false police report against Dennis, *id.*¶54, and the "investigation" ultimately provided cover for Dennis's termination, *Id.*¶¶50-51, 95. And they brought a false criminal prosecution against Fry, which was prolonged for months by improperly withholding exculpatory evidence. *Id.*¶¶68-72, 79, 96-118.

Third, the members of the conspiracy had pre-existing, close relationships. *Id.*¶¶9-18. Indeed, DPS Board even feted Coates and Shofner with an "official[] proclamation," *id.*¶17, extolling their character. *See, Trevino v. Catron Co. Sherriff's Dep't*, 2004 WL 7337998, at *11 (D.N.M.Sept.14,2004) (government actor knew a private conspirator "well enough to comment on his character").

Finally, the fact that Anderson and Esserman secretly enlisted Coates to take a leading role in the Dennis "investigation" is particularly damning. FAC ¶¶51-54. In *Janny*, the mere fact that a private party was "allowed to sit in" on non-public official business was enough to support an inference of conspiracy. 8 F.4th at 920 n.7. Where, as here, a party is not only allowed to *sit in*, but to *direct and take "key responsibility for"* an "investigation" into alleged misconduct by a principal, FAC ¶52 (emphasis added), the inference of conspiracy is strong.

Viewed as a whole, these events are probative of Defendants' "dogged determination born of concerted effort to take action...whatever the means," *Snell*,

920 F.2d at 702, against political opponents. Courts routinely uphold § 1983 conspiracy claims on less robust evidence. *See, e.g.*, *Adickes*, 398 U.S. at 154-158(conspiracy despite plaintiff's lack of knowledge "of any communication" between conspirators); *Trevino*, 2004 WL 7337998, at *11-12(sequence of events and fact that alleged conspirators were "well acquainted"); *Pastore v. Bd.*, 572 F.Supp.3d 1100, 1117-18 (D.N.M.2021)(sequence of suspicious events); *Comer v. Housing Auth.*, 615 F.Supp.2d 785 (N.D.Ind.2009)(board members conspired with political consultant to "threat[en] and intimidate[e]" the plaintiff in retaliation for critical public statements).

The District Defendants do not refute any of this. First, they do not even acknowledge allegations that they engaged in a broad pattern of retaliating against *critics other than Fry*. Br.1-14. But there is no authority for the proposition (and Defendants do not attempt to cite any) that a conspiracy to retaliate against political speech must be limited to a single target.

Defendants also address only a very narrow sliver of time. Defendants' analysis begins on August 21, 2023, when Coates falsely claimed Fry used a racial epithet while assaulting him, and ends a few days later when the District Defendants amplified his claims at a school board meeting and in the media. Br. at 10-11. But as the Tenth Circuit has cautioned, in analyzing conspiracy allegations, it is "erroneous[to] limit [a court's] focus to the date on which [an alleged deprivation] occurred." *Snell*, 920 F.2d at 701. Instead, "proof of an agreement…often will require examination of conduct occurring prior to the

deprivation." *Id.* at 702. As noted above, a mountain of conduct prior to the period Defendants discuss is probative of a conspiracy.

And, crucially, Defendants fail to point to any authority that Fry's conspiracy claim should be dismissed at the pleading stage. The only caselaw Defendants muster is a single summary judgment decision from the Northern District of Illinois. Br.at 11 (citing *Mnyofu v. Bd. of Ed.*, 2007 WL 1308523 (N.D.Ill. Apr. 27, 2007)). But that case is easily distinguishable. In *Mnyofu*, a parent brought First Amendment claims against administrators for restricting his public commentary. In addition, he sought to bring a conspiracy claim against district employees that was "barred by the intracorporate conspiracy doctrine." *Id.* at *13 (citations omitted). To get around the bar, the plaintiff "attempt[ed] to tie [a separate] custody [dispute with his ex-wife] and First Amendment issues together into a single conspiracy." *Id.* The custody dispute involved plaintiff's alleged child abuse, and a resulting bar on visiting his son's school, which allegedly also limited his ability to attend public comment sessions. *Id.* at *3. Unsurprisingly, the court found evidence of a conspiracy "woefully deficient." *Id.* at *12.

Mnyofu has nothing to do with this case. In *Mnyofu*, there were no ties between the plaintiff's ex-wife and school officials, much less deep political connections. The defendants there did not have a personal stake in an issue that gave them common a motive to retaliate. And, unlike the instant matter, in *Mnyofu*, there was no pattern of retaliation by members of the conspiracy against political opponents. Fry has adequately pleaded a § 1983 conspiracy.

B. Fry Has Adequately Pleaded a Deprivation of Her Rights.

To state a First Amendment retaliation claim, a plaintiff must show (1) she was engaged protected activity, (2) the defendant caused her to suffer an injury that would chill a person of ordinary firmness from continuing, and (3) the defendant's action was substantially motivated by the activity. *Collopy v. Cty. of Hobbs*, 27 Fed. App'x 980, 985 (10th.Cir.2001).

(1) ***Acts Within the Scope of the Conspiracy Violated Fry's First Amendment Rights.***

In their motion to dismiss, the District Defendants ignore Coates' and Shofner's conduct. As discussed above, however, they do not have the luxury of disowning the acts of their co-conspirators. There is no dispute that bringing false criminal charges in retaliation for speech violates the First Amendment. For this reason alone, the motion fails.

(2) ***The District Defendants' Shaming and Condemnation of Fry During a School Board Meeting Was Retaliatory.***

Even standing alone, the District Defendants violated the First Amendment when they "publicly shamed and rebuked Fry for an alleged 'racist' incident that, in fact, never took place." FAC ¶89. Defendants counter that their conduct was so mild it would not chill a person of "ordinary firmness...from continuing to engage in public comment." Br. at 6. Defendants base this extraordinary conclusion on the premise that because the Board members did not use Fry's name, the "condemnation...was ***anonymous***." *Id.* (emphasis in original). But this argument simply ignores allegations that must be taken as true. As alleged, given the recent condemnation of Fry by Coates at a heavily-attended board meeting, and the public

repetition of various slurs against her, "reasonable observers in the community would have understood quite clearly that the person being referred to...was Fry." FAC ¶91. Not only that, but "members of the community *did, in fact*, understand that the [District] Defendants were referring to Fry....Fry and her family *received multiple messages from parents and others alerting them that the* [*District*] *Defendants were specifically targeting Ms. Fry in their public comments.*" *Id.*¶92 (emphasis added). These allegations are sufficient to make out a retaliation claim. *See, e.g.*, *Comer*, 615 F.Supp.2d at 787 (campaign of "public humiliation" and "ridicule[]" supports claim); *Neuberger v. Gordon*, 567 F.Supp.2d 622, 637 (D.Del. 2008) (government condemnation actionable when it "humiliat[ed the plaintiff,] injur[ed] his reputation..., and exposed him to public contempt and ridicule"); *cf. Collopy*, 27 Fed.App'x at 985-86 (portraying plaintiff and his children as criminals sufficiently chilling). To say otherwise would *reward* school board members for coyly avoiding naming names, when it hardly matters, because the public knows exactly whom they are discussing.

Defendants assert that their "own First Amendment speech rights are implicated," and that therefore, the public shaming session cannot give rise to liability unless it was "egregious." Br. at 6-7. But the conduct here easily met that standard. In the year 2023, spending ten minutes of public meeting time to assert over and over again that a member of the school community engaged in an "unspeakable act of racism," while knowing those charges to be false (and while never even bothering to ask the target for her version of events) is egregious. The

case on which Defendants principally rely, V*DARE Found. v. City of Colorado Springs*, 11 F.4th 1151 (10thCir.2021) is easily distinguished. There, the expression of general views against bigotry did *not* include any false statements attributing racist acts to a specific (even if unnamed) person or any other egregious conduct on the part of the government speaker.[4]

(3) ***Wrongfully Prolonging Fry's Criminal Prosecution by Withholding Exculpatory Evidence Was Retaliatory.***

Defendants next assert, without authority, that refusing to produce exculpatory surveillance video evidence for months until finally forced to do so in response to a criminal subpoena would not "chill[] a person of reasonable firmness." Br.at 9. Defendants proceed on the unsupported assertion that "Fry had no right to have her [open records request] granted." *Id.* But that is not true. The Colorado Open Records Law (CORA) *requires* government custodians to make records available to the public. As alleged in the complaint, Fry submitted a request, but the District *wrongfully and without legal justification* refused to turn over the videos. FAC ¶¶101-02. Nor does the fact that Defendants eventually turned over the records under the compulsion of a criminal subpoena "render implausible any retaliatory motive." Br.at 9.

[4] Plaintiff also requests that if the Court is inclined to grant Defendants' motion to dismiss on this point, she be afforded leave to amend. Plaintiff's complaint is sufficient, but there are additional facts she would add, including that Board of Education members stated during the meeting that Fry (not identified by name, but understood by the audience) was not fit to raise children, and that the DPS superintendent falsely stated that he personally witnessed the "physical" aspects of the alleged hate crime assault (that never happened).

C. Fry Has Pleaded Action Under Color of State Law.

The District Defendants unquestionably acted under color of state law, and they hardly challenge this element. So too did the Private Defendants, because they engaged in joint action with the District Defendants. *See, e.g.*, *Anaya v. Crossroads Managed Care Sys., Inc.*, 195 F.3d 584, 596-97 (10th.Cir.1999).

In passing, the District Defendants assert that Anderson was acting in a non-state capacity when he defamed Fry during a broadcast and on social media. Br. 7-8 citing *Buentello v. Boebert*, 545 F.Supp.3d 912, 916-17 (D.Colo.2021). The argument ignores that Anderson was a member of a conspiracy with the other Defendants and that, even if his specific conduct in defaming Fry on the broadcast and social media was in a private capacity, as discussed at length above, a putatively private act becomes a public act when in furtherance of a § 1983 conspiracy. Indeed, in the very case Defendants cite, the Court recognized that if the act taken in the defendant's private capacity had been pursuant to a government-involved conspiracy, the outcome would have been different. *Buentello*, 545 F.Supp.3d at 920-21 (citing the "joint action test").

II. Municipal Liability

The District does not deny that members of the Board of Education are final policymakers, or that decisions of final policymakers are the policies of the body itself sufficient for liability under *Monell v. Dep't of Social Servs.*, 436 U.S. 658 (1978). Yet the District asserts (without authority) that because the Board Members acted without a formal vote of the body as a whole, there can be no municipal liability. Br.at 12. This is incorrect. Municipal liability is available for

official acts, even though they have "not received formal approval through the body's official decisionmaking channels." *Monell*, 436 U.S. at 690–91.

III. The Individual Defendants are Not Entitled to Qualified Immunity.

Defendants argue the law did not put them on notice that their conduct violated the First Amendment. Br. at 12-13. This argument fails because, as before, Defendants have ignored the elephant in the room: their primary constitutional violation was engaging in a conspiracy to retaliate against political opponents, including by bringing false criminal charges against Fry. No one could argue (and Defendants do not) that a reasonable public official would have been surprised that such conduct was unconstitutional. Defendants are therefore not entitled to qualified immunity.[5]

IV. The State Law Claims Should Not Be Dismissed.

Anderson is not entitled to immunity under the Colorado Governmental Immunity Act because his acts were "willful and wanton." The Complaint pleads that he engaged in a wide-ranging conspiracy with the other Defendants to intimidate political opponents into silence, secretly enlisted Coates to fabricate an "investigation," filed a false police report against Dennis, participated in public

[5] Moreover, qualified immunity is unsupported by § 1983, *Oliver v. Arnold*, 19 F.4th 843, 852 (5th Cir.2021) (Ho, J. concurring in denial of reh'g *en banc*), and should be overruled. If not, it should be limited to the context of split-second decisions by law enforcement. *Hoggard v. Rhodes*, 141 S.Ct. 2421, 2422 (2021) (Thomas, J. statement regarding denial of certiorari). Plaintiff recognizes the Court is required to reject both arguments but respectfully raises them here to preserve the issues for possible Tenth Circuit and Supreme Court review.

intimidation and bullying of parents, helped invent a "rule" to silence children attempting to speak at a school board meeting, and lied on public broadcasts and in social media that Fry assaulted Coates (which he knew was false, because he was facing Fry when she did *not* assault Coates).

CONCLUSION

The Court should deny the motion. If the Court disagrees, Plaintiff requests leave to amend.

DATED this 20th day of December 2024.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing complies with the type-volume limitation set forth at DDD Civ. P.S. III(A)(1).

CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of December 2024, I caused true and correct copies of PLAINTIFF'S OPPOSITION TO THE DISTRICT DEFENDANTS' MOTION TO DISMISS [ECF 35] to be served via CM/ECF filing and service:

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I further certify that on this 20th day of December 2024, I caused true and correct copies of PLAINTIFF'S OPPOSITION TO THE DISTRICT DEFENDANTS' MOTION TO DISMISS [ECF 35] to be served via the United States Postal Service and via email delivery to the following:

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