UPPER MIDWEST LAW CENTER

February 10, 2025

VIA EMAIL

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Re: Demand for Rescission of Discipline & Public Apology for Brooke Zahn

Dear Board Members, Superintendent Thomas, and Principal Glynn:

I write on behalf of Brooke Zahn, a teacher employed by Prior Lake-Savage Area Schools – District 719 (the "District"). We represent Ms. Zahn in this dispute over the District's disciplinary actions against her for a social media post she made on her personal Facebook page and in a private Facebook group.

This letter is to demand that you immediately rescind all disciplinary actions against Ms. Zahn, remove all information related to the discipline and its underlying basis from her personnel file (pursuant to Minn Stat. § 181.962, subd. 1), reimburse her for the 7 days you suspended her without pay, and issue a formal public apology in all forums in which you have reported on this incident, on the home page of the District website, and orally through an individual designated by the District at the beginning of the next regular Board meeting, all no later than March 7, 2025.

This offer is time-limited. Notably, it does not include a demand for the reasonable value of attorney fees for our firm's representation of Ms. Zahn. If the District does not accept the offer by Friday, February 28, 2025 at 5:00 PM, it is rescinded. Also, if the District does not accept the offer, Ms. Zahn has authorized us to file suit in federal court to vindicate her First Amendment rights. Ms. Zahn would prevail in any such suit, as discussed more below.

Background

On December 11, 2024, Emily Herman, Executive Director of Administrative Services, sent Ms. Zahn a letter (the "Letter") on District letterhead accusing Ms. Zahn of violating District policies and notifying her of disciplinary actions following a District investigation.

The Letter claimed that the District investigation concerned a social media post made on Ms. Zahn's personal Facebook account. The social media post in question contained an image with the text "A Family That Is Deported Together Stays Together" (the "Meme"). This is the Meme:

No reasonable person could possibly believe this Meme is not speech on a matter of public concern. More specifically, no reasonable person could possibly believe that it was not related to the public matter of former Immigration and Customs Enforcement (ICE) Director Tom Homan's comments in response to questions from *60 Minutes* on November 11, 2024, which has been rebroadcast thousands of times. *See, e.g.*, WSYZ ABC 6, *Trump's new 'Border Czar': "Families can be deported together"*, https://www.youtube.com/watch?v=yvCUBIkJv6c (Nov. 11, 2024).

The Letter noted that Ms. Zahn also published the Meme in a private Facebook group titled "Prior Lake Light Hearted Conservative Group." In other words, the District knew, when it unjustly punished Ms. Zahn, that she published the Meme from her *personal* Facebook page in a *private* Facebook group.

Yet the Letter alleged that this post violated the District's Employee Use of Social Media Policy (Policy 428) and "prior directives," "conflict[ed] with the District's strategic plan," and also violated District Policy 413 ("Harassment and Violence") because it "targets individuals based on their national origin and your conduct has had the effect of substantially or unreasonably interfering with other employees' work."

This accusation is truly absurd and betrays that *the District* is race-motivated in its actions: a comment about enforcing federal immigration law related to family separation is not national-origin discrimination. Even if Ms. Zahn were an employer, her comments would not be actionable as such. *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 95 (1973) ("Aliens are protected from illegal discrimination under [Title VII], but nothing in the Act makes it illegal to discriminate on the basis of citizenship or alienage.").

And the District's assumption that Ms. Zahn was discriminating based on national origin, when commentary on immigration is *not* that, under black-letter law, shows that *the District* was motivated by unspoken beliefs about the race of immigrants to this country.

The Letter also recounted what it claimed as "significant educational disruption across the District": "numerous emails, phone calls, media inquiries, public comments at the December 9, 2024 School Board meeting by students and parents, and direct concerns from staff and families"; inquires from "several families" "about the possibility of removing their children from your classroom this year or have requested written assurance that their children will not be placed in your class in the future"; a "support group" for District staff members "to address the harm from [the post]."

Like most claims made by the District against Ms. Zahn, there is no legitimate basis for a claim of substantial disruption. The District has essentially tried to create its own "heckler's veto" related to speech it does not like and has targeted for punishment.

The Letter then detailed Ms. Zahn's punishments, which included:

- Seven-day suspension without pay;
- Prohibition, while suspended, "from entering District property without the written permission of Principal Glynn or Superintendent Thomas, unless you are attending a public meeting of the School Board," and from "access[ing] any District electronic systems during your suspension, except you may access your email for the limited purpose of communicating with Prior Lake - Savage Education Association representatives or to request a hearing as indicated below";
- Prohibition "from posting content that could reasonably be perceived as inconsistent with your role as a District employee, that violates District policy, or that disrupts the educational or work environment";
- Prohibition "from posting content that could reasonably be perceived as inconsistent with your role as a District employee, that violates District policy, or that disrupts the educational or work environment"; and, among others,
- Mandatory training in the form of "cultural competence and inclusion professional development training."

In other words, retaliation against Ms. Zahn's past political speech and a prior restraint against her future political speech.

The Letter also warned Ms. Zahn that "[i]f you fail to follow any of these directives, it will be considered insubordination and may result in discipline, up to and including the immediate termination of your employment." The letter promised that "[t]hese directives will remain in effect unless and until you receive written notice that they no longer apply." This creates a further unconstitutional ongoing chilling effect on Ms. Zahn's personal political speech.

The Law

The District's disciplinary actions against Ms. Zahn for posting the Meme in a private Facebook group from her personal Facebook account raise serious First Amendment issues, including but not limited to retaliation.

To plead a claim of First Amendment retaliation, a plaintiff "must allege that (1) [s]he engaged in activity protected by the First Amendment; (2) the defendants took an adverse employment action against [her]; and (3) the protected conduct was a substantial or motivating factor in the defendants' decision to take the adverse employment action." *Lyons v. Vaught*, 781 F.3d 958, 961 (8th Cir. 2015).

If a plaintiff makes this prima facie showing, and the defendant's adverse action was predicated on a content-based restriction on speech, then the burden shifts to the defendant to show "that its restrictions on the plaintiff 's protected rights serve a compelling interest and are narrowly tailored to that end." *See Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 532 (2022).

Here, Ms. Zahn can easily establish the District's content and viewpoint-based First Amendment retaliation against her. And the District does not have a compelling interest in regulating the private speech of its employees. Nor were its policies or actions narrowly tailored to any legitimate end. Therefore, the District's interests do not outweigh Ms. Zahn's interests, "as a citizen, in commenting upon matters of public concern." *Lyons v. Vaught*, 875 F.3d 1168, 1172 (8th Cir. 2017) (quoting *Pickering v. Bd. of Educ*., 391 U.S. 563, 568 (1968)).

I. Ms. Zahn engaged in activity protected by the First Amendment.

When Ms. Zahn posted the Meme in the private Facebook group and on her personal Facebook account, she was speaking as a citizen on a matter of public concern.

The District's Letter appears to suggest that Ms. Zahn was acting in her role as District teacher when she posted the Meme. The District's "Response to Grievance" letter on January 24, 2025, makes this even more explicit, stating:

> [Ms. Zahn] was not disciplined for engaging in political activity or for actions she took purely in her personal life. [She] identified [herself] as a Prior Lake-Savage Area Schools (PLSAS) teacher on the social media platform in question. The post was consistently recognized as originating from a PLSAS teacher.

This is an outrageous assertion: because Ms. Zahn posted content that identified her as a "PLSAS teacher" on her personal Facebook page on October 14, 2024, therefore, her posting the Meme to a private Facebook group on December 1, 2024, was subject to District punishment because the October 14 post was accessible to those who saw the December 1 post.

As the District's Letter acknowledges, the "Intro" section of Ms. Zahn's personal Facebook page contains the express disclaimer that "The views I share are mine & mine alone and only represent me." Anyone who viewed the Meme, as well as the October 14 post, would have had access to Ms. Zahn's Facebook page "Intro" section. The Letter's suggestion that Policy 428 requires District employees like Ms. Zahn to provide a disclaimer on *every* social media post is an onerous burden on her First Amendment rights, and any interest the District might have in requiring such a disclaimer is satisfied by the less restrictive means of a general disclaimer on her social media profile, as the Letter acknowledges Ms. Zahn provided. It is also satisfied by the District's counterspeech, so long as it is not defamatory against Ms. Zahn.

Ms. Zahn spoke as a citizen and not pursuant to her official responsibilities as a District teacher when she posted the Meme because her Facebook page contained a disclaimer and, moreover, making social media posts to private Facebook groups is not "ordinarily within the scope of [her] duties" as an elementary school teacher. *Lane v. Franks*, 573 U.S. 228, 240 (2014); *see Garcetti v. Ceballos*, 547 U.S. 410, 423 (2006) ("Employees who make public statements outside the course of performing their official duties retain some possibility of First Amendment protection because that is the kind of activity engaged in by citizens who do not work for the government."); *Lyons*, 781 F.3d 958, 961 (8th Cir. 2015) ("The critical question under *Garcetti* is whether the speech at issue is itself ordinarily within the scope of an employee's duties, not whether it merely concerns those duties.").

As the District's Letter also acknowledges, Ms. Zahn posted the Meme in a private Facebook group. This private group's posts and membership list are not visible to members of the broader public *unless* they are granted access *after* requesting to join the private group, or, as the Letter suggests, unless a third party independently chooses to disseminate outside the private group something posted inside the private group. In other words, Ms. Zahn could not have found a less conspicuous public forum for sharing the Meme, and she is not responsible for third parties disseminating her posts to cause mischief. Prohibiting Ms. Zahn from sharing the Meme in a private group would effectively "limi[t] [her] opportunities to contribute to public debate." *Garcetti*, 547 U.S. at 419 (quoting *Pickering*, 391 U.S. at 573) (second bracket added).

Finally, the Meme speaks to a matter of public concern. "Speech involves matters of public concern 'when it can be fairly considered as relating to any matter of political, social, or other concern to the community, or when it is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public.'" *Lane*, 573 U.S. at 241 (quoting *Snyder v. Phelps*, 562 U. S. 443, 453 (2011)). Here, Ms. Zahn's post concerned the hotly debated issue of immigration and border policies. *See* "Ex-Trump ICE chief: 'Families can be deported together,'" The Hill, October 28, 2024, *available at* https://thehill.com/blogs/blog-briefing-room/news/4957180-former-ice-director-thomas-homan/ (last accessed 12/31/2024); WSYZ ABC

6, *Trump's new 'Border Czar': "Families can be deported together"*, https://www.youtube.com/watch?v=yvCUBIkJv6c (Nov. 11, 2024).

The Letter's assertion that because the Meme "was posted in a group with 'lighthearted' in the title[, this] suggests the intent was to mock these sensitive issues rather than engaging in dialogue about misinformation" has no legal basis, let alone a factual one. *See Snyder*, 562 U. S. 443 at 453 ("The arguably 'inappropriate or controversial character of a statement is irrelevant to the question whether it deals with a matter of public concern.'" (quoting *Rankin v. McPherson*, 483 U.S. 378, 387 (1987)); *Parents Defending Educ. v. Linn Mar Cmty. Sch. Dist*., 83 F.4th 658, 667 (8th Cir. 2023) ("it is 'certainly not enough that the speech is merely offensive to some listener.' *Saxe v. State Coll. Area Sch. Dist*., 240 F.3d 200, 217 (3d Cir. 2001). A school district cannot avoid the strictures of the First Amendment simply by defining certain speech as 'bullying' or 'harassment.'"); *see also Dodge v. Evergreen Sch. Dist. #114*, 56 F.4th 767, 777 (9th Cir. 2022) (finding that a teacher's hat bearing the phrase "Make America Great Again" constituted speech on "issues such as immigration, racism, and bigotry, which are all matters of public concern").

The District's "Response to Grievance" letter on January 24, 2025, reprises this facile assertion, claiming that "[t]he post was in a group called 'Prior Lake Light Hearted Conservative Group,' indicating that [Ms. Zahn] did, and expected others, to find the post 'light hearted.' Joking about protected classes is not protected political activity."

Whether or not "light hearted" means what the District asserts in its letters, or whether Ms. Zahn's post was "joking," First Amendment protections do in fact "apply to jokes, parodies, satire, and the like, whether clever or in poor taste." *Bailey v. Iles*, 87 F.4th 275, 283 (5th Cir. 2023) (citing, *e.g., Hustler Mag., Inc. v. Falwell*, 485 U.S. 46, 54 (1988)); *Hustler*, 485 U.S. at 54 ("Despite their sometimes caustic nature, from the early cartoon portraying George Washington as an ass down to the present day, graphic depictions and satirical cartoons have played a prominent role in public and political debate."). The District has zero non-frivolous grounds to assert otherwise.

The District's false assertion that "joking" about immigration issues is unprotected, as well as the District's race-driven imposition of "cultural competence and inclusion professional development training," shows that the District targeted Ms. Zahn's speech because of its viewpoint and content.

Ms. Zahn's post was easily protected First Amendment activity.

II. The District took an adverse employment action against Ms. Zahn.

The District took an adverse employment action against Ms. Zahn when it suspended her without pay for seven days and forced her into re-education classes on "cultural competence" that others are not required to attend as part of their jobs. *See Charleston v. McCarthy*, 926 F.3d 982, 989 (8th Cir. 2019) ("a suspension can constitute an adverse employment action" (citing *Shockency v. Ramsey Cty*., 493 F.3d 941, 948 (8th Cir. 2007)); *Harper v. City of Cleveland*, 781 F. App'x 389, 394 (6th Cir. 2019) ("A suspension is an adverse-employment action." (citation omitted)); *Campbell v. Hawaii Dep't of Educ*., 892 F.3d 1005, 1016 (9th Cir. 2018) ("for purposes of a First-

Amendment retaliation claim, being placed on involuntary paid leave can *itself* be an adverse employment action.") (emphasis in original).

III. The District was motivated by Ms. Zahn's protected activity in its decision to suspend her.

The District's Letter irrefutably shows that Ms. Zahn's Facebook post was a substantial or motivating factor in the District's decision to suspend her: the District's Letter states that Ms. Zahn's Facebook post was the subject of the District's investigation and subsequent interview with her, and the first two pages of the Letter are dedicated to expounding the alleged negative effects of Ms. Zahn's Facebook post. The District's "Response to Grievance" letter on January 24, 2025, further substantiates this.

Moreover, the Letter expressly states that the District was not disciplining Ms. Zahn for her October 14, 2024 Facebook post, only for the Meme. But neither post contained the in-post disclaimer the District's Letter asserts is necessary—clearly contradictory to *National Institute of Family and Life Advocates v. Becerra*, 585 U.S. 755 (2018)—under Policy 428. Yet only in the October 2024 post did Ms. Zahn identify herself as a "PLSAS teacher." Thus, the District's selective enforcement of Policy 428 in this instance demonstrates that its actual motivation for its punishment was the content and viewpoint of Ms. Zahn's Meme.

IV. The District's interests do not outweigh Ms. Zahn's interest in speaking as a citizen on a matter of public concern.

Since Ms. Zahn can make a prima facie showing of First Amendment retaliation, the District has the burden to show "that its restrictions on the plaintiff's protected rights serve a compelling interest and are narrowly tailored to that end." *Kennedy,* 597 U.S. at 532. The District cannot meet this burden.

The District's Policy 428 imposes a content- and viewpoint-based restriction on its employees' speech by imposing rules on its employees whenever employee speech "refer[s] to the District, its schools, students, programs, activities, employees, volunteers and communities on any social media networks." Policy 428 (III.B). Ms. Zahn's Meme did not "refer to" any of those groups, but the District disciplined her under this policy anyway, and its discipline was a viewpoint- and content-based adverse action.

The District has no compelling interest in stifling its employees' speech in private Facebook groups. Even if it did, the District has a less restrictive means of addressing Ms. Zahn's speech: the District's counterspeech, which it has been employing.

The District's Letter's allegations of disruptions are not substantial, nor do they individually or collectively give rise to a compelling interest in a viewpoint- and content-based restriction. "[A] public employer must, with specificity, demonstrate the speech at issue created workplace disharmony, impeded the plaintiff's performance or impaired working relationships." *Lindsey v.*

City of Orrick, 491 F.3d 892, 900 (8th Cir. 2007) (citing *Washington v. Normandy Fire Prot. Dist*., 272 F.3d 522, 527 (8th Cir. 2001)). "Mere allegations the speech disrupted the workplace or affected morale, without evidentiary support, are insufficient." *Id*. (citing *Belk v. City of Eldon*, 228 F.3d 872, 881 (8th Cir. 2000); *Sexton v. Martin*, 210 F.3d 905, 912 (8th Cir. 2000)).

One District assertion of disruption, that of "public comments at the December 9, 2024 School Board meeting by students and parents," is demonstrably misleading: review of that board meeting shows that the only people who commented were two *high school* students, *one* District parent, and one community activist by the name of Megan American Horse—none of whom claimed to have children in Ms. Zahn's class. This paltry public response shows a manufactured crisis.

The District's Letter also claims that "several families have inquired about the possibility of removing their children from your classroom this year or have requested written assurance that their children will not be placed in your class in the future." Even if that were true, which we cannot say at this point, "several" families exercising a "heckler's veto" is not enough to show a substantial disruption. *See Riley's Am. Heritage Farms v. Elsasser*, 32 F.4th 707, 726-27 (9th Cir. 2022) (finding that "only a handful of parent requests that a child be excused from a single field trip" in response to "controversial tweets [] made on [plaintiff's] personal Twitter account [that] did not mention or reference the School District or field trips to Riley's Farm in general" "do not evidence the substantial disruption that may arise from a large number of parents threatening to remove their children from school."); *Berger v. Battaglia*, 779 F.2d 992, 1001 (4th Cir. 1985) ("[T]hreatened disruption by others reacting to public employee speech simply may not be allowed to serve as justification for public employer disciplinary action directed at that speech.").

The District's Letter further claims that Ms. Zahn's posting a Meme has "so affected" staff "that the District convened a support group to address the harm from it" and that the Meme "has had the effect of substantially or unreasonably interfering with other employees' work." Beyond absurdly portraying the District's other employees as so fragile that they cannot bear to hear political viewpoints with which they disagree, these vague claims do not indicate any substantial disruption. *See Dodge,* 56 F.4th at 782 (stating that "Speech that outrages or upsets co-workers without evidence of 'any actual injury' to school operations does not constitute a disruption," (citation omitted), and finding that "evidence that teachers and staff felt 'intimidated,' 'shock[ed],' 'upset,' 'angry,' 'scared,' 'frustrated,' and 'didn't feel safe' after learning about [plaintiff's] MAGA hat," which he wore at a teacher session, did not amount to "evidence that [plaintiff's] hat 'interfered with h[is] ability to perform h[is] job or the regular operation' of the school…or that its presence injured any of the school's legitimate interests 'beyond the disruption that necessarily accompanies [controversial] speech.'") (internal quotations and citations omitted).

The District's Letter also claims that Ms. Zahn's posting the Meme "significantly undermined trust and relationships within the Jeffers Pond community, raising serious concerns about your educational effectiveness especially in your classroom." "Overall," the Letter stated, Ms. Zahn's "decision to post [the Meme] and refusal to acknowledge any harm it caused is conduct unbecoming a teacher." Again, this is just speech-targeting attempting to give the District's actions cover as related to enforcing District policy. As a matter of law, private speech in a private online group far from the school building has zero impact on "educational effectiveness," period. *See*

Dodge, 56 F.4th at 782. Ms. Zahn continues to perform her duties as a District elementary teacher, and her posting the Meme has not negatively affected her ability to effectively provide the high-quality and compassionate instruction that the District has employed her to perform for the last nine years.

Collectively, the District's allegations of disruption do not come close to meeting its heavy burden of supporting a compelling interest in disciplining Ms. Zahn's political speech on a matter of public concern. *Connick*, 461 U.S. at 145 ("the Court has frequently reaffirmed that speech on public issues occupies the 'highest rung of the hierarchy of First Amendment values,' and is entitled to special protection." (quoting *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982)) (internal quotations omitted); *see also id.* at 150-51; *Buckley v. Valeo*, 424 U.S. 1, 14 (1976) ("The First Amendment affords the broadest protection to . . . political expression."); *Dodge*, 56 F.4th at 782 ("The more tightly the First Amendment embraces the speech the more vigorous a showing of disruption must be made." (quoting *Hyland v. Wonder*, 972 F.2d 1129, 1139 (9th Cir. 1992) and citing *Connick*, 461 U.S. at 150-52)).

The punishment of Brooke Zahn is thus a controversy imagined by the District and pure "astroturfing"—a crisis manufactured by a few "squeaky wheels" to stifle political speech like Ms. Zahn's. It is one of the central components of the modern "cancel culture." *See* Greg Lukianoff and Jonathan Haidt, *The Coddling of the American Mind: How Good Intentions and Bad Ideas Are Setting Up a Generation for Failure*, Penguin Press (2018). The District is failing this generation by punishing Ms. Zahn and coddling those who disagree with her politically.

The First Amendment's strongest protection for political speech and the context of Ms. Zahn's speech (*i.e.,* personal account (with disclaimer), private group, and outside scope of employee duties), overwhelmingly support Ms. Zahn against the District's viewpoint- and content-based adverse action. *See Riley's Am. Heritage Farms*, 32 F.4th at 726 ("we give less weight to the government's concerns about the disruptive impact of speech outside the workplace context." (citing *Rankin*, 483 U.S. at 388-89; *Clairmont v. Sound Mental Health*, 632 F.3d 1091, 1107 (9th Cir. 2011))).

* * *

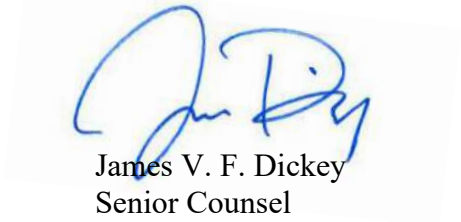
First Amendment retaliation is but one of several claims Ms. Zahn can bring against the District for discriminating against and seeking to stifle her protected speech. The District's letters and the facts both paint a picture of discriminatory enforcement of vague policies against Ms. Zahn.

As noted on the first page, the District has the opportunity to accept Ms. Zahn's modest offer until February 28, 2025. Absent acceptance of Ms. Zahn's offer, we expect to promptly move forward with a lawsuit.

Finally, while we are hopeful that this matter may be resolved without recourse to the courts, litigation is reasonably foreseeable. Therefore, the District must implement a litigation hold and preserve all records and electronically stored information relating to this matter and Brooke Zahn generally.

If you have any questions or need clarification, please contact me. I can be reached at james.dickey@umlc.org.

Very truly yours,



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