ROBERT C. JAROSH, #6-3497
ERIN E. BERRY, #7-6063
Hirst Applegate, LLP
P. O. Box 1083
Cheyenne, WY 82003-1083
Phone: (307) 632-0541
rjarosh@hirstapplegate.com
eberry@hirstapplegae.com

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF WYOMING

TODD SCHMIDT, Plaintiff, vs. EDWARD SEIDEL, in his official capacity as the President of the University of Wyoming, and RYAN O'NEIL, individually and in her official capacity as Dean of Students for the University of Wyoming, Defendants.	}	Civil Action No. 23-CV-101-F

DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTIONS, STATUTES & RULES

Defendants, by and through undersigned counsel, hereby respond in opposition to *Plaintiff's Motion for Preliminary Injunction* and supporting memorandum (collectively "*Plaintiff's Motion*," with all citations to the supporting memorandum) [Docs Nos. 8, 9].

INTRODUCTION

Plaintiff's suggestion that this case is so straightforward as to warrant a preliminary injunction against the University of Wyoming (the "University") is misguided. Preliminary injunctions are the exception, not the rule. They are available only under extraordinary circumstances. Here, Plaintiff asks the Court to order the University to set aside the suspension of Plaintiff's ability to reserve a table in the Wyoming Union breezeway. According to Plaintiff, the suspension resulted from an isolated exercise of Plaintiff's free speech that was in no way designed to discriminate against or harass anyone. Plaintiff's assertion is insincere.

Plaintiff's suspension from reserving a table in the breezeway was the culmination of multiple instances of misconduct by Plaintiff. University employees warned Plaintiff to stop, but he continued. Then, on December 2, 2022, from a reserved table in the Wyoming Union breezeway, Plaintiff publicly harassed a student based ***entirely on her membership in a protected class***—transgender female. The transgender female is both a student at the University and an employee who works in the Wyoming Union. Plaintiff's actions constituted discrimination and harassment of the student; they were not protected speech. The University was permitted to respond by suspending Plaintiff's ability to reserve a table in the Wyoming Union breezeway. The University's response was appropriate and lawful, especially considering Plaintiff's prior misconduct and the University's legal obligations.

Plaintiff's request for a preliminary injunction must be rejected. Several of his claims are subject to dismissal, as set forth in the separately filed motion for partial dismissal. For the claims that remain, Plaintiff cannot satisfy the demanding standard for a mandatory injunction in this federal circuit. As a result, and for the reasons set forth herein, Defendants respectfully request that the Court deny *Plaintiff's Motion.*

FACTS

The Parties

Although the University is not a named Defendant, two of its employees are sued in their official capacities (a mechanism to sue the University without naming it). The University is a land grant institution recognized by courts as an arm of the State of Wyoming. It receives federal funding and is therefore subject to Title IX of the Education Amendment Act of 1972 ("Title IX"), which requires the University to protect students from sex-based discrimination, including harassment. The University's mission includes, in relevant part, to provide academic and co-curricular opportunities that will graduate experienced students, cultivate a community of learning, and nurture an environment that values and manifests diversity, internationalization, free expression, academic freedom, personal integrity and mutual respect.[1]

Defendant Dr. Edward Seidel is the University's 28th President. Dr. Seidel is "the chief executive officer of the University and is vested with powers and duties as provided by laws of this State and the Bylaws of the Trustees of the University of Wyoming." University Regulation ("UW Regulation") 1-1(II)(A).[2] Dr. Seidel has the authority to enforce UW Regulations, and is "clothed with all authority requisite to these ends." *Id.* Ryan Dinneen O'Neil,

[1] https://www.uwyo.edu/president/mission-statement/index.html.
[2] All of the UW Regulations are available at https://www.uwyo.edu/regs-policies/index.html.

M.Ed., is the Dean of Students and Associate Vice President for Student Affairs. The Office of Student Affairs is "responsible to the President for the general administrative leadership and coordination of programs and services designed to support the learning and development" of University students. UW Regulation 1-1(II)(I).

Todd Schmidt is not affiliated with the University. According to his *Complaint*, he resides in Laramie and is an Elder at Laramie Faith Community Church. *Compl.* ¶¶ 10, 13.

The University Campus and the Wyoming Union

The nearly 2,000-acre Laramie campus of the University includes a wide variety of buildings, grounds, and services. Use of the buildings, grounds, and services is generally governed by UW Regulation 6-4, which explains use must be "consistent with the University's primary purposes, i.e. instruction, research and public service." UW Regulation 6-4(I). UW Regulation 6-4(I) goes on to state that "the University retains the right to determine which activities are consistent with its primary purposes."

Pursuant to UW Regulation 6-4(II)(A)(2), individuals or organizations not affiliated with the University and "whose activities are consistent with the University's primary purposes" ("external users") may use the buildings, grounds, and services, subject to the University's regulations, policies, and procedures, including UW Regulation 6-4. For example, UW Regulation 6-4(II)(E) provides external users "may only use specifically designated University spaces or locations, and must seek advanced written approval . . .." As a condition of use, "[a]ll persons or groups, whether internal or external, using University buildings, grounds or equipment shall follow all University Regulations and applicable city, county, state or federal ordinances and statutes." UW Regulation 6-4(VI). The University retains the right to impose

requirements on the use of buildings, reassign or substitute buildings or grounds consistent with the best interests of the University, and cancel use or scheduling privileges. UW Regulation 6-4(VI)(F), (VII).

The Wyoming Union is located in the middle of the Laramie campus. While UW Regulation 6-4 applies generally to buildings on campus, UW Regulation 11-7 provides specifics regarding use of the Wyoming Union. UW Regulation 11-7(II) expressly designates the Wyoming Union as a building to be used to "enhance and complement activities in pursuit of the educational purposes of the University." UW Regulation 11-7(II) goes on to state that the Wyoming Union "shall remain student-oriented by providing employment, involvement, and governance opportunities for students, and [by] operating within the physical and financial capabilities of the facilities."

Pursuant to the authority of UW Regulations 6-4 and 11-7, the University operates the Wyoming Union pursuant to the Policies and Operating Procedures FY 2023 (the "Union Policies and Procedures") [Doc. No. 8-2]. According to the Union Policies and Procedures, the Director of the Center for Student Involvement and Leadership ("CSIL") is responsible for ensuring the directives therein are fulfilled. Art. I, § 4. The Union Policies and Procedures state that requests to use Wyoming Union space may be denied "for reasons which include, but may not be limited to, conflict with the mission of the University, conflict with the mission of the Wyoming Union, unfeasible setup/turnaround time, and historic negligence or abuse." Art. II, § 2(B)(4). In addition, the Union Policies and Procedures regulate the use of display cases, advertisements, posters, signs, banners, and bulletin boards. Art. II § 4.

The Union Policies and Procedures also regulate use of tables in the Wyoming Union breezeway. Art. II, § 5. Only a limited group of individuals may reserve or use tables in the breezeway, including student organizations, University departments and organizations, sponsored outside entities, local merchants, vendors, and nonprofit organizations. Art. II, § 5(B)(1). Persons using tables at the Wyoming Union breezeway "must remain behind their respective tables and in no way hinder the flow of traffic through the building." Art. II, § 5(B)(8). In addition, persons must maintain their tables in a "safe and non-threatening environment," and may not "discriminate [against] or harass" others. Art. II, § 5(B)(15). Finally, any individual using a table in the breezeway is "expected to bring their views in a respectful and civil manner." *Id.*

The University's Discrimination and Harassment Regulation

UW Regulation 4-2 establishes the policies and procedures at the University related to discrimination against and harassment of University employees and students based upon their membership in a protected class. *See also, Standard Administrative Policy and Procedure, Equal Opportunity, Harassment, and Nondiscrimination.* Protected classes under UW Regulation 4-2 include "race, gender, religion, color, national origin, disability, age, protected veteran status, sexual orientation, ***gender identity***, genetic information, creed, ancestry, [and] political belief." UW Regulation 4-2(II) (emphasis added). UW Regulation 4-2 specifies the University will not tolerate acts of discrimination or harassment based upon status in a protected class against any student, and explains the University's obligations when it receives a report of discrimination or harassment, including under Title IX. UW Regulation 4-2(III), (V).

As previously stated, use of University buildings and grounds is ***expressly conditioned*** on compliance with all UW Regulations. UW Regulation 6-4(VI).

Plaintiff's History at the Wyoming Union

As explained in his *Complaint*, Plaintiff has used tables in the Wyoming Union breezeway for years to allegedly convey the merits of and his beliefs about Christianity to college students. *Complaint* at ¶¶ 20, 129. In doing so, Plaintiff has made himself subject to the previously set forth regulations, policies, and procedures governing use of a breezeway table. Before becoming the Dean of Students and Associate Vice President for Student Affairs, Dean O'Neil worked in the Wyoming Union Events Office and was responsible for overseeing use of tables in the Wyoming Union breezeway. *Affidavit of Ryan Dineen O'Neil*, attached hereto as **Exhibit A**, ¶ 5. In that role, she became familiar with Plaintiff and his conduct, including leaving his table and confronting students. *Id.* at ¶ 6. On numerous occasions, Dean O'Neil was required to warn Plaintiff that he needed to comply with the University's policies and procedures related to using tables. *Id.* at ¶ 7.

After Dean O'Neil assumed her current position, she heard from then-Director of the Student Union and CSIL, Jeremy Davis, Ph.D., that Plaintiff's misbehavior was continuing. *Id.* at ¶ 9. By 2021, issues with Plaintiff's non-compliance with the Union Policies and Procedures had risen to the level that the University decided it needed to start documenting complaints about Plaintiff. *Id.* at ¶ 10. As a result of those complaints, University employees verbally warned Plaintiff to stay behind his breezeway table and act in a non-confrontational manner toward passersby. *Id.* at ¶ 16. Plaintiff's non-compliance nonetheless continued. For instance, on April 18, 2022, a student complained to the University that Plaintiff "got in people's

faces" while trying to talk to them. *Id.* at ¶ 11. On April 30, 2022, a student complained that Plaintiff ran after him when he refused to talk to him. *Id.* at ¶ 12. On November 11, 2022, a student staff member complained that Plaintiff approached him (i.e., left his table) to confront him about his shirt. *Id.* at ¶ 13. Various individuals have complained about how Plaintiff treats female members of the University community. One staff member reported Plaintiff telling her that he does not respect female authority. *Id.* at ¶ 14.

On December 2, 2022, Plaintiff again engaged in actions that violated the University's regulations, policies, and procedures. On that day, he posted a now well-publicized banner on his Wyoming Union breezeway table directly targeting a transgender female student. *Compl.* at ¶¶ 100-103, 106. The individual Plaintiff directly targeted was both a University student and a University employee who worked in the Wyoming Union. Plaintiff's table caused a disruption in the Wyoming Union breezeway. Several students attempted to create a physical barrier between Plaintiff's banner and those walking past. Some of those students were friends of the targeted student, and began organizing efforts to ensure the student did not walk past the table and directly see the banner.[3] *O'Neil Aff.* ¶¶ 31-32. The interactions between students and Plaintiff were tense and disruptive. *Id.* at ¶ 33. A University employee at the Wyoming Union's Information Desk approached Plaintiff about the objectionable epithet, but Plaintiff refused to remove it. *Id.* at ¶¶ 21-22.

Shortly after Plaintiff began displaying his banner, Dean O'Neil received several messages from employees at the Wyoming Union that there was a commotion in the breezeway

---

[3] The student was in the Wyoming Union that day, at work. Although she did not directly see the banner, she was subjected to it. Specifically, she received calls and texts telling her about it, and she saw pictures of it. She characterized the banner as "appalling."

resulting from Plaintiff's banner. *Id.* at ¶ 17. Dean O'Neil then walked over to the Wyoming Union, observed Plaintiff's banner, and asked him to take it down because it targeted an individual University student in a protected class. *Id.* at ¶¶ 19-20. Plaintiff refused. Dean O'Neil then walked over to the Wyoming Union Information Desk, where she reviewed the Union Policies and Procedures. *Id.* at ¶ 23. Dean O'Neil then approached Plaintiff and again asked him to remove the banner because it violated the University's policies. *Id.* at ¶ 24. After some back and forth between Dean O'Neil and Plaintiff, and shortly before a University police officer arrived, Plaintiff removed the student's name from his banner. *Id.* at ¶¶ 24-30. Plaintiff told Dean O'Neil that he believed his right to free speech was being violated, after which time Dean O'Neil offered to set up meetings with Plaintiff and University leadership to discuss Plaintiff's concerns.[4] *Id.* at ¶ 27. Plaintiff remained at a table in the Wyoming Union breezeway for the rest of the day. According to various student reports, Plaintiff continued to publicly misgender the student from the banner to passersby. *Id.* at ¶¶ 35-36.

In the days that followed, Wyoming Union and CSIL Director Erik Kahl and other Wyoming Union employees met to discuss what happened on December 2, 2022, and what might transpire next. They had received reports from employees who felt unsafe and did not want to come to work, and they discussed various safety concerns and a safety plan.[5] *Id.* at ¶ 37.

The University received numerous complaints about Plaintiff's conduct on December 2, 2022. The University's Equal Opportunity Report and Response Office ("EORR")

---

[4] Plaintiff never followed up. *Id.* at ¶ 28.

[5] Some students also reported feeling unsafe. See, e.g., *'Something needs to change': Students react to string of targeting, mocking of LGBTQ community*, Laramie Boomerang, Dec. 7, 2022, attached hereto as **Exhibit B**.

received at least 19 separate reports, all of which categorized Plaintiff's conduct as "discriminatory, harassing, and/or threatening." *Id.* at ¶ 38. As a result, EORR investigated to determine if Plaintiff violated the University's regulations or policies. On December 7, 2022, EORR issued a report that Plaintiff violated UW Regulation 4-2 by engaging in discriminatory harassment of the student he targeted in the Wyoming Union breezeway. Specifically, EORR found Plaintiff engaged in unwelcome behavior in a highly trafficked area of a student-centered educational building and where the student worked, and that public assertions about the student's gender crossed the line and met the definition of discriminatory harassment. *Id.* at ¶ 40.

EORR shared the report with Dean O'Neil and other members of University leadership. After reviewing the matter, along with the history of complaints against and verbal warnings to Plaintiff, University leadership deliberated whether to take measures against Plaintiff to address his misconduct. *Id.* at ¶ 41. Ultimately, University leadership concluded that a one-year suspension from reserving a table in the Wyoming Union breezeway was appropriate. *Id.* at ¶ 42. Dean O'Neil was tasked with notifying Plaintiff of the decision. *Id.* at ¶ 43. Thereafter, Dean O'Neil notified Plaintiff in writing that the University was "suspending [his] access to reserve a table in the Wyoming Union breezeway for a period of one year." *Id.* at ¶ 44. The suspension was expressly based on multiple prior warnings and the finding of a violation of UW Regulation 4-2 in the EORR report. *Id.* The University took no other action against Plaintiff. *Id.* at ¶ 45. Plaintiff is not prohibited from access to buildings, grounds, or services which he may otherwise access or avail himself to under the UW Regulations. In fact, Plaintiff is not even prohibited from entering or using the Wyoming Union, including sitting at a rented table in the

breezeway.[6] Plaintiff is still free to evangelize and share his message anywhere else on campus other than at a table he reserves in the Wyoming Union breezeway.

Plaintiff continues to unrelentingly target the transgender female student in court filings and the press. In his *Complaint*, Plaintiff describes the student as someone who "largely appeared as a male, not as a female," including because her height and weight "indicated [she] is a male." *Compl.* ¶ 44. Plaintiff discusses whether the student has undergone gender-related surgeries and therapies, explains her facial features suggest she is a male, and explains that her clothing is representative of a male, not a female. *Id.* at ¶¶ 44-47. Plaintiff also gratuitously includes, and ***verifies as true and correct,*** more than a dozen allegations related to the student's interactions with others at the KKG sorority in fall 2022, even though he could not possibly have first-hand knowledge. *Id.* at ¶¶ 48-61.[7] If there was ever a question about Plaintiff's intentions as to the student, the answer became clear after Plaintiff filed his *Complaint*.

LEGAL STANDARD

A preliminary injunction is "'the exception rather than the rule.'" *O Centro Espirita Beneficiente Uniao Do Vegetal v. Ashcroft*, 389 F.3d 973, 999 (10th Cir. 2004). As this

---

[6] He was recently observed sitting at his son's reserved table.

[7] Also on December 7, 2022, the University's Police Department received a report from a female student that Plaintiff pulled his car up next to her and tried to engage her in conversation about whether a "biological male" should be in a sorority. *Id.* at ¶ 47. The student said Plaintiff repeatedly tried to engage her in the conversation, and she repeatedly told him she did not want to talk to him. *Id.* The student reported to the police officer that the way Plaintiff approached and questioned her was unwanted and disturbing. *Id.* That same day, upon the request of the KKG sorority, the University Police trespassed Plaintiff from the KKG house and informed him that he was not welcome there for any reason. *Id.* at ¶ 48. Thereafter, the University had extra police patrols of sorority row. *Id.* at ¶ 49. Although none of this played into Plaintiff's tabling suspension, it is illustrative of his conduct.

Court previously explained in *Frank v. Buchanan,* 2020 U.S. Dist. LEXIS 262260, **3-4, Case No. 20-CV-138-F (D. Wyo., Aug. 25, 2020) (also a First Amendment case):

> A preliminary injunction is an "extraordinary remedy that is granted only when the movant's right to relief [is] clear and unequivocal." *First W. Capital Mgmt. Co. v. Malamed*, 874 F.3d 1136, 1145 (10th Cir. 2017) (internal citation and quotation marks omitted). To prevail on a motion for a preliminary injunction, movants must generally show the following four factors weigh in their favor: "(1) [they are] substantially likely to succeed on the merits; (2) [they] will suffer irreparable injury if the injunction is denied; (3) [their] threatened injury outweighs the injury the opposing party will suffer under the injunction; and (4) the injunction would not be adverse to the public interest." *Brooks v. Colorado Dep't of Corr.*, 730 F. App'x 628, 630 (10th Cir. 2018) (internal quotation and citation omitted).

In addition, as the Tenth Circuit Court of Appeals explained in *Schrier v. Univ. of Colorado*, 427 F.3d, 1253, 1258-59 (10th Cir. 2005) (internal citations omitted):

> Because the limited purpose of a preliminary injunction "is merely to preserve the relative positions of the parties until a trial on the merits can be held," we have "identified the following three types of specifically disfavored preliminary injunctions . . .: (1) preliminary injunctions that alter the status quo; (2) mandatory preliminary injunctions; and (3) preliminary injunctions that afford the movant all the relief that it could recover at the conclusion of a full trial on the merits." . . . Such disfavored injunctions "must be more closely scrutinized to assure that the exigencies of the case support the granting of a remedy that is extraordinary even in the normal course."

ARGUMENT

Plaintiff's Motion asks the Court to set aside the University's suspension and require it to allow Plaintiff to reserve a table in the Wyoming Union breezeway. Plaintiff also seeks an order that the University may not invoke its policies to "censor disfavored views, and, particularly, [Plaintiff's] opinion on the sex status of [a specific student at the University]." *Pl.'s Mot.* 1. As previously explained, the only action that the University has taken is to suspend Plaintiff from reserving a table in the Wyoming Union breezeway until January 2024.

Plaintiff's requested relief is in the nature of a mandatory injunction, one of the types of specifically disfavored injunctions in the Tenth Circuit. *Schrier*, 427 F.3d at 1258-59 ("Mandatory injunctions 'affirmatively require the nonmovant to act in a particular way'" (internal citation omitted)). As such, it is subject not just to the Tenth Circuit's four-part test for a preliminary injunction, but also to exacting scrutiny regarding that test. The following sections apply the *Frank* four-part test and *Schrier*, and demonstrate why the Court should deny *Plaintiff's Motion*: 1) Plaintiff has not made a strong showing of a substantial likelihood of success on the merits; 2) Plaintiff has not made a strong showing that the balance of harms weighs in favor of a preliminary injunction; and 3) Plaintiff has not demonstrated the injunction would not be adverse to the public interest.

I. ***Plaintiff has not made the requisite strong showing of a substantial likelihood of success on the merits.***[8]

A. *Plaintiff's First Amendment Claims (First and Second Cause of Action).*

1. The University had the authority to regulate Plaintiff's conduct and to suspend his ability to reserve tables in the Wyoming Union breezeway.

Plaintiff is well aware of his history of leaving his table and confronting students in violation of the Union Policies and Procedures. Employees warned him on several occasions over the years. Plaintiff cannot dispute the University's authority to regulate his conduct in his use of University buildings under the UW Regulations, including UW Regulation 6-4.

---

[8] Defendants' arguments related to the failure to make a strong showing of a substantial likelihood of success on the merits are presented affirmatively, as an alternative to Plaintiff's interpretation of the law, rather than as a point-by-point rebuttal. Defendants believe they will ultimately prevail on the merits of this case. Nonetheless, Defendants' recitation of the law herein, ***at a minimum***, demonstrates Plaintiff's failure to make the requisite strong showing for a preliminary injunction.

Specifically, Article VII, Section 17 of the Wyoming Constitution provides that the University's Board of Trustees ("BOT") is vested with the management of the University, its land, and its property, with the BOT maintaining custody of all buildings and property. *See also*, WYO. STAT. § 21-17-204(a)(iii), (iv). Pursuant to its authority under WYO. STAT. § 21-17-204(a), the BOT enacted numerous UW Regulations governing the conditions for use of the University's premises and buildings, including UW Regulation 6-4. As previously explained, UW Regulation 6-4 conditions use of University buildings and grounds on various things. Use must be "consistent with the University's primary purposes, i.e. instruction, research and public service," and users must "follow all University Regulations and applicable city, county, state or federal ordinances and statutes." UW Regulation 6-4(I), (II), and (VI). Importantly, failure of an "internal or external user to comply with the provisions of [UW Regulation 6-4] may, at the University's sole discretion, result in a cancellation of authorization to use University buildings, grounds or equipment, in a loss of scheduling privileges, or in disciplinary sanctions pursuant to UW Regulations and policies." UW Regulation 6-4(VII).

On December 2, 2022, UW received reports that Plaintiff committed a direct violation of UW Regulation 4-2, which includes the University's prohibition against ***acts*** of discrimination and harassment of individuals in protected classes. Pursuant to WYO. STAT. § 21-17-204(a) and UW Regulation 6-4, the University had the authority to cancel or suspend Plaintiff's ability to use the University's buildings, including to reserve tables in the Wyoming Union breezeway, if it concluded that any complaint of ***an act*** of discrimination or harassment under UW Regulation 4-2 was substantiated. The University also could have trespassed Plaintiff

from the Union or the entire campus if any report was substantiated.[9] Taking either measure could have been based solely on a violation of UW Regulation 4-2, or based on a history of violating the University's rules related to tabling.

2. The University properly concluded Plaintiff's conduct constituted discrimination and harassment; his conduct did not constitute protected speech.

Ultimately, the University's EORR concluded that Plaintiff's conduct violated UW Regulation 4-2, and University leadership concluded that the violation, coupled with prior transgressions, mandated a suspension of Plaintiff's ability to reserve a table in the Wyoming Union breezeway. Plaintiff's conduct, which he essentially characterizes as harmless with respect to the student he targeted, cannot be viewed in a vacuum. Plaintiff cites dozens of cases in *Plaintiff's Motion*. However, none of those cases are similar to this one, nor do they discuss federal laws intended to prevent discrimination and harassment, including Title VII of the Civil Rights Act of 1964 (Title "VII") and Title IX. ***In 2023, using a student-centered educational facility to repeatedly target a transgender female student—and doing so solely based on her membership in a protected class—is discrimination and harassment.***

Not surprisingly, *Plaintiff's Motion* pays little attention to this issue. That is likely because confronting the issue would require Plaintiff to concede that the legal landscape has changed drastically over the last decade, especially related to the protected class status of the LGBTQI+ population. Most notably, the United States Supreme Court ruled in 2020 that homosexual and transgender individuals are within a protected class, and that employment discrimination against them is therefore illegal under Title VII. *Bostock v. Clayton Cty.*, 140 S.

[9] *See* https://www.uwyo.edu/regs-policies/_files/docs/policies/trespass_sap_8-2-22.pdf

Ct. 1731, 1734 (2020). Although the majority in *Bostock* limited its holding to Title VII, the ramifications are far reaching. Courts regularly hold that Title VII case law guides courts in their evaluation of Title IX. *See, e.g.*, *M.A.B. v. Bd. of Educ.*, 286 F. Supp.3d 704, 713 (D. Md. 2018) (finding gender stereotyping cases are cognizable under Title IX). In addition, after *Bostock,* the United States Department of Justice ("DOJ") issued a letter concluding the best interpretation of Title IX is that it prohibits discrimination based upon sexual orientation and gender identity. *Memorandum from Pamela S. Karlan, Principal Deputy Assistant Attorney General*, Civil Rights Div., U.S. Dep't of Just., to Federal Agency Civil Rights Directors and General Counsels on Application of *Bostock v. Clayton County* to Title IX of the Education Amendments of 1972 2 (Mar. 26, 2021).[10, 11] Even more recently, the DOJ and the Department of Education ("DOE") made it clear that under Title IX colleges and universities have an affirmative obligation to address acts of harassment and discrimination against students based upon their sexual orientation or gender identity. *Confronting Anti-LGBTQI+ Harassment in Schools*, DOJ Civil Rights Division and DOE Office for Civil Rights Factsheet.[12] In compliance with Title IX, the University has an express policy prohibiting acts of discrimination or harassment against University students and employees (the student here was both) based upon sexual orientation and gender identity—UW Regulation 4-2.

---

[10] *See* https://www.justice.gov/crt/page/file/1383026/download

[11] The authors of a recent report by the UCLA School of Law's Williams Institute found that nearly 33 percent of LGBTQI+ college students experienced bullying, harassment, or assault at college, compared to 19 percent of non-LGBTQI+ students. *See*, *Experiences of LGBTQ People in Four-Year Colleges and Graduate Programs*, Williams Institute, found at https://williamsinstitute.law.ucla.edu/publications/lgbtq-colleges-grad-school/

[12] *See* https://www.2ed.gov/about/offices/list/ocr/docs/ocr-factsheet-tix-202106.pdf

Here, Plaintiff's repeated and intentional public targeting of a transgender female student on a banner and to passersby were acts of discrimination and harassment under UW Regulation 4-2. Specifically, and as EORR found, Plaintiff's conduct was "unwelcome by a member or group of the community on the basis of actual or perceived membership in a class protected by policy or law." *O'Neil Aff.* ¶ 40. In this case, the conduct was unwelcome by the targeted student, some passersby, and more than a dozen students who registered complaints with EORR. In addition, and contrary to Plaintiff's assertions, it "was not merely a conversation or debate about gender identity in general, but was a targeted critique of an individual and their membership in a protected class." *Id.* The University therefore had an obligation to act on it under Title VII and Title IX, especially after *Bostock* and the DOJ's pronouncements.

All of this is important because the University was responding to acts of harassment and discrimination—here through the written and spoken word—not to protected speech. *See, e.g.*, *R.A.V. v. St. Paul*, 505 U.S. 377, 389 (1992) ("[S]ince words can in some circumstances violate laws directed not against speech but against conduct . . . a particular content-based subcategory [of speech can] … be swept up incidentally within the reach of a statute directed at conduct rather than speech…."). Indeed, if harassing an individual based upon her status in a protected class was protected speech under the First Amendment, laws like Title VII and Title IX would be unconstitutional. *See also*, *Doe v. Triangle Doughnuts, LLC*, 472 F. Supp. 3d 115, 129 (E. Dist. Penn. 2020) (misgendering may constitute unlawful discrimination); *Kluge v. Brownsburg Cmty. Sch. Corp.*, 542 F.Supp.3d 814 (S.D. Ind. 2021) (teacher's refusal to

refer to student by name and pronouns that correspond with gender identity was not protected by First Amendment).[13] As commentator Luke A. Boso recently explained:

> Some anti-LGBT "speech" might not truly count as speech, thus falling outside of the protections of the First Amendment. Many conflicts between free speech and equality involve speech that may rise to the level of a hostile environment under federal statutes, like Title VII, Title IX, and comparable state and local laws. In those cases, courts have reasoned that the speech in question is tantamount to conduct, and this conduct is unlawful precisely because it directly contradicts statutory equality demands. The line at which otherwise pure speech becomes unlawful conduct is admittedly murky . . .

Anti-LGBT Free Speech and Group Subordination, 63 ARIZ. L. REV. 341, 389-390 (2021).[14]

3. Even under a free speech analysis, Plaintiff's suspension was proper.

Even if the Court is inclined to consider Plaintiff's harassment of a transgender female student under free speech law, Plaintiff still cannot make a strong showing of a substantial likelihood of success on the merits.

a. *The Wyoming Union breezeway is a limited public forum.*

Plaintiff is correct that the Tenth Circuit recognizes four types of fora. *Doe v. City of Albuquerque*, 667 F.3d 1111, 1128 (10th Cir. 2012). However, Plaintiff is incorrect that the tables in the Wyoming Union breezeway are a designated public forum. They are appropriately categorized as a limited public forum. At the very least, the question is open to considerable debate, especially since "the boundary between a designated public forum for a limited purpose . . . and a limited public forum . . . is far from clear." *Id.* at 1129 (quotation omitted). A designated public forum is "public property which the State has opened for use by the public as a place for

---

[13] Other laws would also be unconstitutional. See, e.g., *Prescott v. Rady Child.'s Hosp. San Diego*, 265 F. Supp. 3d 1090, 1098-1100 (SD Cal. 2017) (refusal to use preferred pronoun under Affordable Care Act).

[14] Plaintiff's overly simplistic explanation of the limited exceptions to free speech, including "fighting words," is a straw man argument that misses the mark.

expressive activity," like a public library. *Id.* (quotation omitted). A limited public forum is one which the State has opened for use by limited groups or dedicated solely to discussion of certain subjects. *Id.* at 1128-29.

Here, the tables in the Wyoming Union breezeway are limited in both ways contemplated by the definition of a limited public forum in *City of Albuquerque*. First, the ability to reserve and use the tables is limited to only certain users—student organizations, University departments and organizations, sponsored outside entities, local merchants, vendors, and nonprofit organizations. Union Policies and Procedures Art. II, Section 5(B)(1). The public at large is not free to reserve tables. Second, tables must be used to "enhance and complement activities in pursuit of the educational purposes of the University." UW Regulation 11-7(II).

While the Court need not further analyze this issue, applying the Tenth Circuit's more detailed test from *Summum v. Callaghan*, 130 F.3d 906 (10th Cir. 1997), leads to the same result. First, there is a specific and limited purpose for the forum—to enhance and complement education (it is for "student-centered" activities). Second, use of the forum is limited to certain users—those affiliated with or sponsored by the University, local merchants, and nonprofits. Finally, the University's interest is not in opening the tables up as a public forum (especially a forum where anyone could publicly attack its individual students). The fact that people must receive permission and approval from the Wyoming Union to use breezeway tables is evidence that the tables are a limited public forum. *See, e.g., Alpha Delta Chi-Delta Chapter v. Reed*, 648 F.3d 790, 798 (9th Cir. 2011).

b. *The University's restrictions on using the Wyoming Union breezeway tables are reasonable and viewpoint neutral.*

Because the tables in the Wyoming Union breezeway constitute a limited public forum, the University's restrictions "must only be reasonable in light of the purpose served by the forum and be viewpoint neutral." *Shero v. City of Grove*, 510 F.3d 1196, 1202-1203 (10th Cir. 2007); *see also Reed*, 648 F.3d at 797 (9th Cir. 2011) (citing *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995)). The test is not a difficult one to meet.

Here, Plaintiff challenges the University's application of the Union Policies and Procedures as to his conduct on December 2, 2022. Specifically, he asserts his suspension was because his "remark is supposedly contrary to the university mission." *Pl.'s Mot.* 14. Plaintiff's harassment of a student was not for violating the mission. Rather, as Dean O'Neil's letter states, the suspension was related to the portion of the Union Policies and Procedures that prohibits acts of discrimination or harassment, and that requires civility. The letter explains that Plaintiff violated the policies and procedures by engaging in conduct that resulted in prior complaints and by committing discrimination and harassment under UW Regulation 4-2, as determined by EORR. *O'Neil Aff.* ¶ 44.

As to the reasonableness factor, procedures and policies that prohibit acts of discrimination against and harassment of students and employees in University buildings are reasonable. This is especially true when they are expressly based on broader University regulations that make it clear the buildings are to be used "to enhance and complement activities in pursuit of the educational purposes of the University." UW Regulation 11-7. As the Ninth Circuit explained in examining a policy prohibiting discrimination at San Diego State University:

> We read these "broad statements of purpose" to mean that the purpose of the student organization program was to "advance the school's basic pedagogical goals." We then noted that the Supreme Court had "emphasized that part of a school's mission is to instill in students the

> 'shared values of a civilized social order,' which includes instilling the value of non-discrimination." Thus, we concluded that the school's nondiscrimination policy aligned with the school's pedagogical goals and was a reasonable limitation . . ..

Reed, 648 F.3d at 798 (quoting various cases, including quoting *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 272 (1988)).

In addition, the Union Policies and Procedures, UW Regulation 11-7, and UW Regulation 4-2 as applied to Plaintiff were viewpoint neutral. A restriction is viewpoint-based if it "denies access to a speaker solely to suppress the point of view he espouses on an otherwise includible subject." *Pollak v. Wilson*, 2022 U.S. App. LEXIS 35636, *4 (10th Cir. 2022) (quoting *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 806 (1985)). As with the reasonableness standard, the viewpoint-neutral requirement is less demanding than the test for restrictions in traditional public fora.

Here, the University's non-discrimination and anti-harassment policies, procedures, and regulations, and its application of them, including the Union Policies and Procedures, were viewpoint neutral. *See, e.g., Christian Legal Soc'y Chapter of the Univ. of Cal. v. Martinez*, 561 U.S. 661, 694 (2010) (in a free speech challenge, finding it was hard to imagine a more viewpoint-neutral policy than one that prohibited discrimination and harassment by organizations wishing to be recognized as student groups that could use university facilities). Whatever viewpoint the discrimination and harassment represented or arose from was irrelevant, as the University was not targeting any expressive content of Plaintiff's speech, it was targeting the ***acts*** of discrimination and harassment. *Id.* at 696 (the issue is the conduct, not the perspective). This becomes evident when one considers Plaintiff's comment on the banner immediately preceding the statement about the University student and employee – "God created

male and female." The University did not suspend Plaintiff's ability to reserve a Wyoming Union breezeway table based upon that statement, as it does not, by itself, amount to an act of discrimination or harassment against a student. The EORR report concluded that statement was permissible. Rather, it was Plaintiff's acts of discrimination and harassment of the student that were impermissible. All of this makes perfect sense because, if Plaintiff's statement about the student at issue was somehow protected by a prohibition against viewpoint discrimination, nearly all spoken or written public acts of discrimination and harassment would be protected "viewpoints," and First Amendment protections would invalidate anti-discrimination policies at public colleges and universities, as well as various anti-discrimination laws. *See, e.g., id.* (citing favorably to *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984) for the proposition that a state's anti-discrimination law did not aim to suppress speech or distinguish between permitted and unpermitted conduct based on viewpoint).

B. *Plaintiff's Other Claims (Third, Fourth and Fifth Causes of Action).*

Plaintiff's third and fourth causes are subject to the separately filed motion for partial dismissal. For the reasons set forth therein, Plaintiff has not made a strong showing of a substantial likelihood of success on the merits of those claims. *Plaintiff's Motion* does not include any argument related to his unconstitutional conditions claim, including any assertion that he has a substantial likelihood of success on the merits of that claim. As a result, and for the reasons already stated, Plaintiff has not made the requisite showing on that claim.

II. *Plaintiff has not made the heightened strong showing that the balance of harms weighs in favor of a preliminary mandatory injunction.*

Law from this Court and the Tenth Circuit dictates that for the Court to issue a preliminary mandatory injunction in this case, Plaintiff must make a heightened "strong

showing" that the balance of harms weighs in favor of the injunction. *Frank,* 2020 U.S. Dist. LEXIS 262260, *4; *Schrier*, 427 F.3d at 1261. More specifically, Plaintiff must make a strong showing that his threatened injury outweighs any harm the injunction may cause the University. A failure to carry the burden as to this one factor is enough for the Court to deny a motion for a mandatory injunction, since all four of the preliminary injunction factors must be established. *Denver Homeless out Loud v. Denver*, 32 F.4th 1259, 1277-78 (10th Cir. 2022) (citing *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008)). On the face of *Plaintiff's Motion* alone, Plaintiff failed to make that requisite strong showing. Specifically, *Plaintiff's Motion* simply asserts his harm is irreparable (a separate factor), and then includes a mere three sentences related to the balancing test, summarily stating that the University will suffer no harm if the Court requires it to "refrain from violating constitutional rights." *Pl.'s Motion* 23. Plaintiff's "analysis" of the balancing of harms is perfunctory and conclusory. Because Plaintiff failed to make the heightened strong showing that his threatened injury outweighs the potential harm to the University, the Court should deny *Plaintiff's Motion.*

Even if the Court is inclined to weigh the harms, the alleged irreparable nature of Plaintiff's harm does not somehow change the balancing test. *See, e.g.*, *Frank,* 2020 U.S. Dist. LEXIS 262260, at **8 ("Even considering that Plaintiffs' First Amendment injury might be irreparable, the balance of harms weighs in favor of Defendants"). In *Frank*, this Court recognized the State of Wyoming had a "compelling interest in preserving the integrity of its election process." *Id.* (citation omitted). It then concluded that the State's interest outweighed the potential harm to Plaintiffs in part because Plaintiffs had access to other avenues to share their messages (outside of the statutory buffer zone they were challenging). *Id.* at *9.

The present case is similar. Defendants and the University have a compelling interest in providing a campus that is free from discrimination and harassment. *See, e.g., Board of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 549 (1987) (State has a compelling interest in eliminating discrimination); *see also, O'Neil Aff.* ¶¶ 3-4. This is especially true in workplaces and buildings specifically designated for educational activities. *See, e.g., Abbott v. Pastides*, 900 F.3d 160, 172 (4th Cir. 2018). Amongst other things, Title VII requires the University to provide a workplace free of harassment or discrimination based upon a protected class status, and Title IX requires the University to provide educational programs and activities that are free of sex-based discrimination and harassment. *See EEOC v. R.G.*, 884 F.3d 560, 591 (6th Cir. 2018) (discussing the government's compelling interest in eradicating discrimination via Title VII). If it does not, the University risks litigation and, ultimately, the loss of federal funding. This potential harm is extraordinary, and the University's interest in avoiding violations of federal anti-discrimination laws is significant. *See Willey v. Sweetwater Cnty. Sch. Dist. No. 1 Bd. of Trs.*, 2023 U.S. Dist. LEXIS 113818, **65-66, Case No. 23-CV-069-SWS (D. Wyo. June 30, 2023). The University also has a significant interest in enforcing the Union Policies and Procedures, which Plaintiff seeks to invalidate related to using tables in the Wyoming Union breezeway. *O'Neil Aff.* ¶ 8.

On the other hand, the potential harm to Plaintiff, as in *Frank*, is minimal. Plaintiff's suspension is only as to tabling in the Wyoming Union breezeway. Plaintiff is still free to evangelize and share his message anywhere else on the University campus where it is otherwise permitted—just not at a breezeway table. Indeed, Plaintiff has continued to do so since the suspension of his tabling privilege. *Id.* at ¶ 50. If passersby wish to engage with him, they

may do so. Plaintiff's more than six-month delay in challenging the University's thirteen-month suspension is further evidence that any potential injury to him is minimal compared to the potential harm to the University. *See, e.g., Systemic Formulas, Inc. v. Daeyoon Kim*, 2009 U.S. Dist. LEXIS 116038, *15, Case No. 1:07-CV-159 (TC) (D. Utah Dec. 14, 2009).

III. *Plaintiff has not made the requisite showing that a preliminary mandatory injunction would not be adverse to the public interest.*

This Court and the Tenth Circuit also require *Plaintiff's Motion* to demonstrate that the requested injunction would not be adverse to the public interest. *Frank,* 2020 U.S. Dist. LEXIS 262260, at *3; *Schrier*, 427 F.3d at 1258-59. As with the balancing of harms factor, the failure to carry the burden as to the public interest factor is enough to deny a motion for a mandatory injunction. *Denver Homeless out Loud*, 32 F.4th at 1277-78 (citing *Winter*, 555 U.S. at 20). Once again, on the face of *Plaintiff's Motion*, Plaintiff failed to make the requisite showing. Specifically, the entirety of Plaintiff's argument as to this factor is, "[t]he preliminary relief Schmidt seeks – to enjoin UW's unconstitutional policies – would protect free speech in public fora. 'Vindicating First Amendment freedoms is clearly in the public interest.'" *Pl.'s Mot.* at 23. Without more, Plaintiff failed to satisfy the public interest showing for a preliminary injunction, and *Plaintiff's Motion* must be denied.

Even if the Court wishes to examine the public interest factor, the question is not whether an injunction would serve ***a public interest***. More precisely, the question is whether an injunction would be adverse to the public interest under the specific circumstances of the case. Here, a mandatory injunction would require the University to immediately allow Plaintiff to reserve and use a table in the Wyoming Union breezeway and, presumably, to continue to confront passersby and discriminate against and harass individual University students and

employees. If history is any indicator, Plaintiff's presence would be disruptive and cause safety concerns for students and employees. As such, permitting Plaintiff to return to the Wyoming Union breezeway tables before this case can be fully litigated would be very adverse to the public interest. Specifically, there is a strong public interest in the University (or any school in Wyoming) protecting its students and employees from acts of discrimination and harassment.[15] There is a strong public interest in the University complying with federal and state anti-discriminatory and anti-harassment laws. There is a strong public interest in students and employees knowing that the University will protect them from unwelcome conduct, including harassment. There are also strong public interests in the University being able to maintain order on its campus and sanction individuals who violate its policies and procedures.

CONCLUSION

Imagine the Wyoming Union breezeway lined with tables, with each table manned by a person or entity singling out an individual University student. Imagine that at each such table, the targeted student is harassed solely based upon membership in a protected class—one for her gender, one based on his race, one based on her color, one based on his national origin, one based on a disability, one based on a religion, one based on their sexual orientation, one based on her gender identity. According to Plaintiff, all of that conduct would be protected free speech, and the University would be required to allow it to happen. That is not the law.

Plaintiff's harassment of a student was not protected speech. He has not made the requisite showing for a preliminary injunction. As a result, *Plaintiff's Motion* should be denied.

---

[15] Some courts expressly recognize a strong public interest in schools prohibiting discrimination based on gender identity. *Parents Defending Educ. v. Linn-Mar Cmty. Sch. Dist.*, No. 22-CV-78 CJW-MAR, 2022 U.S. Dist. LEXIS 169459, *40, 2022 WL 4356109 (N.D. Iowa Sept. 20, 2022).

Dated: 24 July 2023.

EDWARD SEIDEL and RYAN O'NEIL,
Defendants

BY: /s/ Robert C. Jarosh

ROBERT C. JAROSH, #6-3497
ERIN E. BERRY, #7-6063
OF HIRST APPLEGATE, LLP
Attorneys for Defendants
P. O. Box 1083
Cheyenne, WY 82003-1083
Phone: (307) 632-0541
Fax: (307) 632-4999
rjarosh@hirstapplegate.com
eberry@hirstapplegate.com

CERTIFICATE OF SERVICE

I certify the foregoing ***Defendants' Opposition to Plaintiff's Motion for Preliminary Injunction*** was served upon all parties to this action pursuant to the Federal Rules of Civil Procedure on 24 July 2023, and that copies were served as follows:

Douglas J. Mason
Mason & Mason, P.C.
26 S. Lincoln Avenue
P. O. Box 785
Pinedale, WY 82941-0785
dmason@masonlawpinedale.com
Attorney for Plaintiff

- ☐ U.S. MAIL
- ☐ FED EX
- ☐ FAX
- ☐ HAND DELIVERED
- ☐ EMAIL
- ☑ E-FILE

Nathan W. Kellum
Center for Religious Expression
699 Oakleaf Office Lane, Suite 107
Memphis, TN 38117
nkellum@crelaw.org
Attorney for Plaintiff

- ☐ U.S. MAIL
- ☐ FED EX
- ☐ FAX
- ☐ HAND DELIVERED
- ☐ EMAIL
- ☑ E-FILE

/s/ Robert C. Jarosh
OF HIRST APPLEGATE, LLP
Attorneys for Defendants