



## WYOMING HOUSE DISTRICT 20

### **Statement of Speaker Sommers Dismissing Complaints Against Representative Provenza**

April 12, 2023

As Speaker of the House, I have received signed complaints about images and audio that Representative Karlee Provenza has posted on social media. These social media posts occurred outside of a legislative session or legislative meeting.

Social media has become the preferred platform for political attacks in Wyoming and the Nation. People and politicians no longer have to come face to face with someone to attack them or make a political point. Behavior on the internet has become beyond the pale at times. Social media can be used to spread misinformation, foster polarization, and aggregate tensions, representing the worst in politics and personal behavior. Still, it is imperative to remember that political expression is protected speech under the First Amendment to the United States Constitution and Article 1, Section 20 of the Wyoming Constitution. With this constitutional right also comes personal responsibility. We must remember that even constitutionally protected actions have the potential to deeply hurt others. Free speech is at times a messy thing.

I personally find Representative Provenza's posts on social media to be inappropriate, uncivil conduct for a member of the Wyoming House of Representatives that reflects a discernable lack of judgment. The House has Joint Rule 22-1 to examine ethics complaints made against individual House members. Joint Rule 22-1 only applies to misconduct involving legislative duties. I asked the Legislative Service Office for a legal analysis of misconduct within the scope of legislative duties as well as the protections afforded to legislators under the First Amendment. I am releasing that analysis along with this letter.

Misconduct involving legislative duties is defined in Joint Rule 22-1 as a violation of Article 3 of the Wyoming Constitution; the Ethics and Disclosure Act, W.S. 9-13-101, et seq; any of the Wyoming Conflict of Interest Statutes; violence or disorderly conduct during legislative meetings, sessions, or during the performance of legislative duties; or bribes or offers of bribes. Representative Provenza clearly did not post these images during "performance of legislative duties." Further, Representative Provenza did not appear to violate Article 3 of the Wyoming Constitution or the Ethics and Disclosure Act. Based on my review of the LSO analysis and after having consulted with Majority Floor Leader Chip Neiman, and Minority Floor Leader Mike Yin, I do not believe that Representative Provenza's communications on social media amount to misconduct involving legislative duties that is actionable under Joint Rule 22-1.

The Wyoming Legislature runs on its rules and traditions. Only one Wyoming legislator in recent memory has been completely removed from committee assignments, and that was an action taken by the body for a course of alleged conduct during legislative sessions and legislative meetings. In another instance, a legislator during a legislative session posted a violent meme on social media in response to the body's action on a bill, and no disciplinary action was taken.

As Speaker of the House, I have held that civility towards each other is the mechanism to ensure we can work together. Civility is the basic expectation of how a member of the Wyoming House of Representatives should conduct themselves, both on and off the floor of the House. There is no doubt that social media can have a destructive impact on political discourse in Wyoming. I do believe the Wyoming Legislature needs to examine and debate the issue of social media with respect to legislative decorum. It is my intent that the Management Council's Legislator Ethics Complaint Procedure Subcommittee examine this issue.

Representative Provenza has recognized that her conduct was hurtful and inappropriate. Representative Provenza has written a letter of apology to her legislative colleagues, which I appreciated and accepted. I have written Representative Provenza a private letter of reprimand. If Representative Provenza in the future engages in conduct on the internet or during her performance of legislative duties that fails to meet the decorum of the Wyoming House of Representatives, then I will take further action. I do not believe it is my role as presiding officer to police all legislators' online activity, especially when they are not performing legislative duties. If I become aware of any further escalation of uncivil behavior online by members of the House that breaches the decorum of the Wyoming House of Representatives, I will take appropriate action.

At the end of my acceptance speech for Speaker of the House, I asked members of the 67<sup>th</sup> to show each other some grace in difficult moments because we all make mistakes. I have tried to utilize that philosophy with each representative that has made a mistake during my term as Speaker while ensuring the representative understands the severity of their actions. During the Easter Season, I am particularly reminded of the importance of compassion for one another. In coming to this decision, I was guided by my personal belief in the rule of law and the traditions of the Wyoming Legislature, not what may be politically expedient.

Sincerely,



Representative Albert Sommers



## WYOMING LEGISLATIVE SERVICE OFFICE

# Memorandum

**DATE** April 12, 2023

**TO** Speaker Albert Sommers

**FROM** Matt Obrecht and Tamara Rivale, LSO

**SUBJECT** Analysis of Allegations in Complaints against Representative Provenza

### Introduction

On April 2, 2023 Speaker Albert Sommers in his official capacity as the presiding officer of the Wyoming House of Representatives, began to receive complaints against Representative Karlee Provenza for a post she made on social media. Subsequent complaints also reference a video Representative Provenza posted on her Tik-Tok account after that video was reported by online outlets.

The post in question contains an older woman holding at her hip a scoped black rifle with an external magazine. The wording on the post reads "Auntie Fa<sup>1</sup> Says Protect Trans Folks Against Fascists & Bigots!"<sup>2</sup> The post appears to be shared from the Instagram account "@offcolordecals". The screenshot of the post indicates it was captured from the "stories" of the Facebook account of "Karlee Provenza." What appears to be the original post created by "@offcolordecals" and a screenshot of "Karlee Provenza's" story is replicated in Appendices A and B.<sup>3</sup>

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<sup>1</sup> Many of the complaints allege that "Auntie Fa" is a reference to the loosely organized political movement known as Antifa. See Levy, Rachel, What is Antifa? Wall Street Journal, January 7, 2021, available at <https://www.wsj.com/articles/q-a-what-is-antifa-11598985917> (last accessed on April 6, 2023).

<sup>2</sup> Facebook and Instagram stories remain visible for 24 hours to an account holder's friends and followers. The "share" of another's post to a Facebook story allows viewers to access the original post.

<sup>3</sup> The shared post contained a message concerning current events, reading: "Happy Trans Day of Visibility to all our Trans and Enby comrades! We've been quiet because it's been somber and stressful in TN this week. There were several TDoV and "Drag Ban" related events scheduled for today and Saturday in Nashville that had to be canceled because of the increased anti-trans rhetoric online and throughout the city in general. The conversations in both right-wing and openly fascist spaces have been absolutely horrifying. All our local queer orgs have been on red alert, as I imagine orgs all across the country are. We've been receiving nastygrams on Etsy all week. It's just been exhausting. But it's important to me to take the time to post at least something today to acknowledge our trans comrades. You are seen. You are loved. And so long as we're still breathing, you will be protected. #OffColorDecals #DefendEquality #WeKeepUsSafe #TDoV".

The Tik-Tok clip is short, only 6 seconds of either eels or sea snakes in an aquarium. The audio transposed over this video is, as far as we can discern, the following: The first speaker asks, "Could you give us some of your political beliefs?" and the second speaker states, "Kill everyone now. Condone first degree murder. Advo..." The audio then appears to end or be cut off. Representative Provenza indicated it was posted on June 7, 2022.

Speaker Sommers has asked LSO to provide an analysis of the allegations in the complaints against Representative Provenza and whether those allegations are potentially actionable under Joint Rules of the Wyoming House of Representatives and Senate, Rule 22-1 ("JR 22-1"). For purposes of a probable cause determination to institute a formal investigation under JR 22-1(c) the crucial determination is whether the allegations in the complaint, constitute a factual situation "sufficient to warrant a reasonably prudent person, informed of legislative procedures and duties, to believe that a violation or other misconduct has occurred." The misconduct described in JR 22-1(c) is "misconduct involving legislative duties" as that term is defined in JR 22-1(a)(i).<sup>4</sup>

Before offering an analysis of the allegations in the complaint it is crucial to bear in mind that we are not attempting to supplement our judgment for that of House Leadership. You are free to disagree with both the analysis and any conclusions we arrive at in this memorandum. Also, we analyze this complaint from a legal standard, while you, as members of the House of Representatives, are provided by the Constitution with the duty to potentially discipline your fellow legislators. Article 3, Section 12 provides in part, "Each house shall have power to determine the rules of its proceedings, and [to] punish its members or other persons for contempt or disorderly behavior in its presence . . . and with the concurrence of two-thirds, to expel a member, and shall have all other powers necessary to the legislature of a free state."

This is not a duty to be shared with another branch of government and it is certainly a political function. What that means is that there are items you may consider when rendering your determination of this matter wholly outside of any legal standards we have discussed. With that being stated, it appears that there is scant basis in Wyoming law, or rules governing the Wyoming House of Representatives, to believe that the allegations in the complaints constitute "misconduct involving legislative duties" as that term is used in JR 22-1.

## **Discussion**

### *Procedure under Joint Rule 22-1*

A person who believes that a Wyoming Representative has committed an ethical violation involving legislative duties is given recourse by JR 22-1<sup>5</sup> to lodge a signed, written complaint alleging misconduct. The member against whom a complaint is lodged is entitled to receive a

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<sup>4</sup> There is certainly conduct or actions for which a legislator could be punished by the appropriate house of the Legislature outside of the definition of misconduct involving legislative duties found in Joint Rule 22-1(a)(i). Any member could bring a motion on the floor when the house is in session, calling for punishment against a member.

<sup>5</sup> After the action of the Senate during the 2023 session, only members of the House of Representatives are bound by Joint Rule 22-1. The Senate voted to not adopt Joint Rule 22-1.

copy of the complaint, upon its receipt by the presiding officer. The presiding officer of the member's body reviews the allegation in consultation with the majority and minority floor leaders to determine whether the complaint should be dismissed or forwarded to Management Council for appointment of a subcommittee.

A complaint may be dismissed if the Speaker finds that it is frivolous or filed for any improper purpose. Other presiding officers have also used what is termed a “Motion to Dismiss Standard.” Under Rule 12(b)(6) of the Federal and Wyoming Rules of Civil Procedure, a judge may dismiss a complaint if the facts, as alleged in the complaint are assumed to be true, fail to state a claim on which relief can be granted. In these circumstances, past presiding officers have dismissed complaints if the facts as alleged in the complaint, even if assumed to be true, fail to allege conduct against a member rising to the level of legislative misconduct as that term is defined in JR 22-1.

If the presiding officer does not dismiss a complaint, then a subcommittee, composed of Management Council members of the appropriate house, determines if probable cause exists to believe that misconduct has occurred. If no probable cause is found, the complaint is dismissed, with notice to the complainant and the accused legislator. If probable cause is found, the subcommittee should forward the complaint for formal investigation by a special investigative committee, again comprised of members of the house of the accused legislator. The investigative committee conducts a trial type hearing and determines whether the complaint should be dismissed or referred to the appropriate house with a recommendation. The house of the accused member then takes action it deems appropriate.

If the Council subcommittee determines that a complaint alleges criminal activity, the subcommittee may recommend that further proceedings under the joint rule be held in abeyance pending completion of any criminal investigation.

*Legislative Misconduct under Joint Rule 22-1*

As with any complaint decided under JR 22-1, resolution of the instant complaint hinges on a determination of whether Representative Provenza committed “misconduct involving legislative duties”, which is defined as:

...[A] violation of Article 3 of the Wyoming Constitution; the Ethics and Disclosure Act, W.S. 9-13-101, et seq; any of the Wyoming Conflict of Interest Statutes; violence or disorderly conduct during legislative meetings, sessions, or during the performance of legislative duties; or bribes or offers of bribes;<sup>6</sup>

In this instance, the most relevant violation in the definition is to “violence or disorderly conduct during legislative meetings, sessions, or during the performance of legislative duties.” While the determination of whether “violence or disorderly conduct” occurred is best left to the trier of fact

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<sup>6</sup> Joint Rule 22-1(a)(i).

(the presiding officer, then subcommittee, special investigative committee and finally the entire house), judicial decisions in other states and the past actions of the Wyoming Legislature can help inform and guide decision makers when implementing this provision. Those decisions and precedents are talked about at length in the analysis section of this memorandum.

Summarized, the other violations covered by Article 3 of the Wyoming Constitution appear to be:

Article 3 § 42. Logrolling – offering or agreeing to vote or use influence for a proposed or to be proposed measure in exchange for another member's vote on another measure.

Article 3 § 43. Bribery - Offering, giving or promising anything of value, testimonial, privilege or personal advantage, to an executive or judicial officer or member of the legislature, to influence him in the performance of any of his official duties.

Article 3, § 45. Corrupt solicitation - The offense of corrupt solicitation of members of the legislature or other public officers is to be defined by law. Corrupt solicitation involves influencing official actions.

Article 3, § 46. Conflict of interest - A legislator who has a personal or private interest in any measure or bill proposed or pending before the legislature must disclose the fact to the house of which he is a member, and shall not vote thereon.

Additionally, Article 3 § 12 addresses punishment for corruption and provides that: A member expelled for corruption shall not thereafter be eligible to either house of the legislature, and punishment for contempt or disorderly behavior shall not bar a criminal prosecution for the same offense.

The rule also encompasses violations of the Ethics and Disclosure Act (Act). This Act prohibits nepotism and requires certain financial disclosures. It also addresses a number of situations that involve other misuses of office. The Act prohibits using a public office for private benefit, defined as receipt of a gift.<sup>7</sup> "Gift" is further defined generally as something of value in excess of \$250, with a number of exceptions. The Act also prohibits misuse of office, which includes using public funds, time, etc. for political activities or for the office holder's or another's private benefit.<sup>8</sup> "Private benefit" is not defined in that section, but again, in W.S. 9-13-103, it is equated with receipt of a gift (i.e., over \$250). Finally, the Act contains a conflict of interest provision, prohibiting one covered under the Act from making an official decision or voting if the person has a personal or private interest in the matter.<sup>9</sup>

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<sup>7</sup> W.S. 9-13-103. Use of title and prestige of public office.

<sup>8</sup> W.S. 9-13-105. Misuse of office.

<sup>9</sup> W.S. 9-13-106. Official decisions and votes.

The Wyoming conflict of interest statutes alluded to in JR 22-1, would appear to include W.S. 6-5-106, which is a criminal violation for using a government position to receive an unauthorized pecuniary benefit, the Ethics Act provision mentioned above and W.S. 16-6-118, which prohibits office holders from participating in actions relating to a public contract in which they have an interest.<sup>10</sup> Unlike the other conflict of interest provisions, this provision specifically prohibits participating in consideration of the contract and influencing any vote.

Bribery is the final category covered under the joint rule. It would include the Constitutional provisions set forth above as well as the criminal offense in W.S. 6-5-102 through 6-5-104.<sup>11</sup>

### *Analysis of JR 22-1 and the Applicable Law to these Complaints*

When taking into consideration the description of what constitutes “misconduct involving legislative duties”, and viewing the facts as alleged in the complaints as true and in the light most favorable to the complainants, it does not appear that Representative Provenza violated any of the applicable provisions of Article 3 of the Wyoming Constitution, the Ethics of Disclosures Act, or any of the conflict of interest statutes in her complained of social media posts. It is also doubtful whether those facts allege “violence or disorderly” conduct “involving legislative duties” within the legal understanding of those terms.

The complaints can be read to allege that Representative Provenza acted in “a violent or disorderly manner” by posting the complained of content to social media. For purposes of this analysis, we look to the protections afforded to everyone when they speak, print or post by the First Amendment to the United States Constitution and Article 1, Section 20 of the Wyoming Constitution.<sup>12</sup> Certain disciplinary actions by the Legislature may infringe upon the exercise of a member's First Amendment rights. It is therefore necessary to consider (1) the analysis developed by the courts concerning which expressions constitute protected speech and which expressions fall outside of the protection of the First Amendment; (2) and the disciplinary action that a legislative body may take that would abridge protected speech.

### *Freedom of Speech*

Freedom of speech and freedom of the press are among the fundamental personal rights and liberties which are protected by the Fourteenth Amendment from invasion by state action.<sup>13</sup> State

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<sup>10</sup> W.S. 16-6-118. Unlawful interest of officeholders in public contracts or works; exception.

<sup>11</sup> W.S. 6-5-102 Bribery; penalties.; W.S. 6-5-103 Compensation for past official behavior; penalties; W.S. 6-5-104 Soliciting unlawful compensation; penalties.

<sup>12</sup> Article 1, Section 20, provides in relevant part, “Every person may freely speak, write and publish on all subjects, being responsible for the abuse of that right;”. This provision has been held as affording broader protections than that found in the First Amendment to the United States Constitution in that it also guarantees the right to publish which includes the right not only to speak and to write but also to make the same known. Tate v. Akers, 409 F. Supp. 978, 982 (D. Wyo. 1976).

<sup>13</sup> Chaplinsky v. New Hampshire, 315 U.S. 568, 570-71, 62 S. Ct. 766, 768-69 (1942) (quoting Lovell v. Griffin, 303 U.S. 444, 450, 58 S. Ct. 666, 668 (1938)).

action includes disciplinary proceedings by a legislative body.<sup>14</sup> The First Amendment reflects a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.<sup>15</sup> The Supreme Court has stated that commenting on matters of public concern are classic forms of speech that lie at the heart of the First Amendment and speech in public areas or "public forums" is at its most protected.<sup>16</sup> As a general matter, social media is entitled to the same First Amendment protections as other forms of media.<sup>17</sup>

Further, the political expression of elective officials and candidates for office is afforded broad protection as it allows voters to understand candidates' positions. "In a republic where the people are sovereign, the ability of citizenry to make informed choices among candidates for office is essential, for the identities of those who are elected will inevitably shape the course that we follow as a nation."<sup>18</sup>

The right of free speech is not absolute at all times and under all circumstances. There are certain limited classes of speech, the prevention and punishment of which are not afforded First Amendment protections. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words – those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.<sup>19</sup> While speech that incites violence is not protected by the First Amendment, whether speech does in fact incite violence is a fact-based inquiry. The test is what men of common intelligence would understand would be words likely to cause an average addressee to fight.<sup>20</sup>

The Supreme Court recognizes that the First Amendment permits prohibiting "true threats" even though such a threat may have expressive content.<sup>21</sup> In finding speech made at a Ku Klux Klan rally that advocated political reform through violence as protected, the Court determined that speech may be protected under the First Amendment unless it is directed to incite or produce imminent lawless action.<sup>22</sup> "True threats" encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular

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<sup>14</sup> Bond v. Floyd, 385 U.S. 116, 87 S. Ct. 339 (1966).

<sup>15</sup> Snyder v. Phelps, 562 U.S. 443, 452, 131 S. Ct. 1207, 1215 (2011)(quoting New York Times Co. v. Sullivan, 376 U.S. 254, 270, 84 S. Ct. 710, 721 (1964)).

<sup>16</sup> Schenck v. Pro-Choice Network of W. N.Y., 519 U.S. 357, 377, 117 S. Ct. 855, 867 (1997).

<sup>17</sup> See e.g., Packingham v. North Carolina, 137 S.Ct. 1730, 1735–36, 198 L. Ed. 2d 273 (2019). In some instances, courts have held that government use of social media creates a designated public forum, although an official's campaign social media page may not meet that standard. See e.g., Sammons v. McCarthy, 606 F. Supp. 3d 165, 208 (D. Md. 2022).

<sup>18</sup> Buckley v. Valeo, 424 U.S. 1, 35, 96 S. Ct. 612, 659 (1975). See also Equity Prime Mortg. v. Greene for Cong., Inc., 366 Ga. App. 207, 214, 880 S.E.2d 642, 649 (2022).

<sup>19</sup> Texas v. Johnson, 491 U.S. 397, 430, 109 S. Ct. 2533, 2553 (1989) (quoting Chaplinsky, 315 U.S. at 571–72).

<sup>20</sup> Chaplinsky, 315 U.S.

<sup>21</sup> The Supreme Court will soon consider whether the government must show that the speaker subjectively knew or intended the threatening nature of the statement to establish that a statement is a "true threat" that is not protected by the First Amendment in Counterman v. Colorado, 143 S. Ct. 644 (2023)(Cert. granted). The Ninth and Tenth Circuits currently hold that subjective intent is a necessary element of establishing that speech qualifies as a true threat. The other nine circuits use an objective test.

<sup>22</sup> Brandenburg v. Ohio, 395 U. S. 444, 89 S. Ct. 1827, 23 L. Ed. 2d 430 (1969).

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WYOMING LEGISLATIVE SERVICE OFFICE *Memorandum*



individual or group of individuals. The speaker need not actually intend to carry out the threat. Rather, a prohibition on true threats protects individuals from the fear of violence and from the disruption that fear engenders, in addition to protecting people from the possibility that the threatened violence will occur. Intimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death.<sup>23</sup>

Federal courts have interceded in state legislature determinations of the punishment of its members when that punishment was based on the exercise of a constitutional right. In the seminal United States Supreme Court decision of Bond v. Floyd, the Court held that the insulation from federal judicial review enjoyed by a state when exercising a power wholly within the domain of state interest does not exist when state power is used as an instrument for circumventing a federally protected right.<sup>24</sup> Thus, a legislator's exclusion which is alleged to be on racial grounds or alleged to violate First Amendment rights is properly within the Federal judiciary's jurisdiction.<sup>25</sup>

In a recent case, Oregon's Senator Brian Boquist filed a claim for relief for a retaliatory action based on First Amendment protected conduct against the officers of the Oregon Senate.<sup>26</sup> The facts of the case are as follows: in response to two statements made by Senator Boquist which were perceived by the leadership to be violently threatening, the leaders of the Oregon Senate ordered Senator Boquist not to enter the state capitol without giving them twelve hours advance notice, so that adequate security personnel could be present. The dispute started when Republican senators attempted to leave the floor of the Senate to prevent a quorum from being present and the president of the Oregon Senate threatened to have law enforcement forcibly return the members.

Senator Boquist stated to the president of the Senate on the floor of the Senate—"if you send the state police to get me, Hell's coming to visit you personally." Senator Boquist quickly and publicly apologized for this statement. Senator Boquist also informed a reporter that he had told the police to "[s]end bachelors and come heavily armed" because he was "not going to be a political prisoner in the state of Oregon."<sup>27</sup>

The Ninth Circuit Court of Appeals determined that Senator Boquist's statements were not likely to incite an immediate breach of the peace. Applying an "objective test" for determining when speech is a true threat, the court asked, "whether a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of intent to harm or assault." Even a statement that appears to threaten violence

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<sup>23</sup> Virginia v. Black, 538 U.S. 343, 155 L. Ed. 2d 535, 123 S. Ct. 1536 (2003) The Court considered the long and pernicious history of cross burning as a signal of impending violence and found that a state ban on cross burning carried out with the intent to intimidate was proscribable under the First Amendment.

<sup>24</sup> 385 U.S. 116, 130 n.11 (1966)(citing Gomillion v. Lightfoot, 364 U.S. 339, 347, 81 S. Ct. 125, 130 (1960)).

<sup>25</sup> Id. at 131–32. See also Velez v. Levy, 401 F.3d 75 (2d Cir. 2005)(Elected official cannot be removed or excluded from office for making statements on issues of public interest protected by the First Amendment.); Cf. Warren v. Desantis, 29 Fla. L. Weekly Fed. D 115 (U.S. N.D. Fla. 2023)(The Eleventh Amendment prohibits a federal court from awarding relief for suspension of elected state official based only on a violation of state law.).

<sup>26</sup> Boquist v. Courtney, 32 F.4th 764 (9th Cir. 2022).

<sup>27</sup> Id. at 772.

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WYOMING LEGISLATIVE SERVICE OFFICE *Memorandum*

may not be a true threat if the context indicates that it only expressed political opposition or was emotionally charged rhetoric.<sup>28</sup>

Other examples of speech that was held by reviewing courts not to constitute a "true threat" include a statement made in school hallway by a 15-year-old student six days after 17 high school students were fatally shot that "[h]e wanted to beat the record of 19"<sup>29</sup> and a man's comment on a friend's post he interpreted as advocating against gun control measures inquiring which type of gun he needed to "shoot up a kindergarten."<sup>30</sup> In addition, the Tenth Circuit of which Wyoming belongs, recently recognized, "The task of identifying a true threat has been complicated by the advent of social media. At the same time, the proliferation of online expression has amplified the potential for threatening words to cause harm." This case involved an exchange on Twitter occurring between two students after a shooting at Arapahoe High School that included a photograph of a handgun resting beside approximately fifty cartridges, along with the message, "this all I'm saying[.] We don't want another incident like Arapahoe. My 9 never on vacation." The Tenth Circuit remanded the case for analysis under a framework it developed for potential threats communicated online.<sup>31</sup>

### Disciplinary Action

The type of disciplinary action taken by a body only abridges a member's First Amendment rights if it carries consequences that infringe upon the member's protected speech. The crucial question is whether the government is compelling others to espouse or to suppress certain ideas and beliefs.<sup>32</sup>

Generally, a motion to censure a member for protected speech has been allowed by the courts, because a censure does not prevent an elected official from performing her official duties or restrict her opportunities to speak, such as her right to vote in her official capacity, her ability to speak before the body, or her ability to speak to the public.<sup>33</sup> A legislative body does have the ability to regulate "uncivil behavior" (e.g., confronting fellow members and using profanity and abusive language) which constitutes "personal invective or other offensive remarks that would unleash personal hostility and frustrate deliberative consideration", including the potential of removing the

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<sup>28</sup> Id. at 781 (quoting Thunder Studios, Inc. v. Kazal, 13 F.4th 736, 746 (9th Cir. 2021)).

<sup>29</sup> In the Int. of J.J.M., 265 A.3d 246, 250 (Pa. 2021).

<sup>30</sup> Ross v. City of Jackson, 897 F.3d 916, 918 (8th Cir. 2018).

<sup>31</sup> The Tenth Circuit framework requires consideration to include, but not be limited to (1) the statement's role in a broader exchange, if any, including surrounding events; (2) the medium or platform through which the statement was communicated, including any distinctive conventions or architectural features; (3) the manner in which the statement was conveyed (e.g., anonymously or not, privately or publicly); (4) the relationship between the speaker and recipient(s); and (5) the subjective reaction of the statement's intended or foreseeable recipient(s). People ex rel. R.D., 2020 CO 44, ¶ 66, 464 P.3d 717, 734.

<sup>32</sup> Phelan v. Laramie Cty. Cmty. Coll. Bd. of Trs., 235 F.3d 1243, 1247 (10th Cir. 2000)(citations omitted).

<sup>33</sup> Phelan 235 F.3d.; See also King v. City of N.Y., 581 F. Supp. 3d 559, 571 n.13 (S.D.N.Y. 2022); Peeper v. Callaway Cty. Ambulance Dist., 122 F.3d 619, 623 n.4 (8th Cir. 1997); Danchuk v. Mayor of the Borough of Mount Arlington, No. 2:15-cv-2028 (CLW), 2017 U.S. Dist. LEXIS 141206, at \*17 (D.N.J. Aug. 31, 2017).

offending member from assigned committees.<sup>34</sup> As recently stated by the Supreme Court, "elected bodies in this country have long exercised the power to censure their members."<sup>35</sup>

In the case involving Oregon Senator Boquist, the Ninth Circuit determined the rule imposed by majority party members ordering the Senator not to enter the state capitol without giving them twelve hours advance notice infringed upon the Senator's rights. The court stated that a prohibited adverse action against an elected official for protected First Amendment activities occurred when the adverse action, "prevent[s] [the elected official] from doing his job, deprive[s] him of authority he enjoyed by virtue of his popular election, or otherwise prevents him from enjoying the full range of rights and prerogatives that came with having been publicly elected."<sup>36</sup>

### Past Conduct in the Wyoming House and Senate

This memo next discusses the public actions of the Wyoming Legislature in response to alleged violent or disorderly conduct of members. In the 2022 Budget Session, a senator was publicly disciplined by the Senate and removed from committees "for a continued pattern of intimidating and disorderly conduct and other behavior which is unbecoming of a member of this Senate."<sup>37</sup> At the time the motion was made on the floor of the Senate, the senate president stated the motion was based on the alleged facts that the senator:

- Showed open support for a vulgar and threatening attack on a member of this Senate;
- Continued to support such statements even during this session;
- Used filming as a threatening measure;
- Used intimidating tactics against members of the Senate and members of the public;
- [I]mpugns the integrity of the legislative bodies which leads to a lack of respect for the Senate and House.<sup>38</sup>

Public complaints were made against another senator during the 2021 Special Session for a social media post, which shared a photo of the text "When life gives you lemons FIX BAYONETS" overlaid on a picture of armed soldiers storming trenches. The post included a statement written by the senator including, "We will not lay down..." "...the conservatives will no longer be bullied by the powers that be. Remember it's the 3rd rib..." This post was alleged to insinuate bayonet attacks against other senators for failing to vote on some issues.<sup>39</sup> No formal action was taken against the senator for the post.

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<sup>34</sup> Whitener v. McWatters, 112 F.3d 740, 741 (4th Cir. 1997).

<sup>35</sup> Hous. Cmty. Coll. Sys. v. Wilson, 142 S. Ct. 1253, 1256 (2022).

<sup>36</sup> Boquist at 777 (internal citations and quotations omitted).

<sup>37</sup> "Motion to Remove a Senator from Committees," available at [www.wyoleg.gov/2022/MotionToRemove.pdf](http://www.wyoleg.gov/2022/MotionToRemove.pdf) (last accessed April 11, 2023).

<sup>38</sup> Archived Video of Senate Floor Debate, afternoon of March 10, 2022, available at <https://www.youtube.com/watch?v=lm4jiGDIMkg> (at approximately 2:55 into the video).

<sup>39</sup> Goodrick, Jake, Sen. McKeown's Facebook Post to 'Fix Bayonets' Criticized, Gillette News Recorder, Nov. 2, 2021, available at [https://www.gillettenewsrecord.com/news/local/article\\_4d343b9d-5cb8-51fb-9fd3-b69d767fe591.html](https://www.gillettenewsrecord.com/news/local/article_4d343b9d-5cb8-51fb-9fd3-b69d767fe591.html) (last accessed April 7, 2023).

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### WYOMING LEGISLATIVE SERVICE OFFICE *Memorandum*

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Also during the 2022 Budget Session, a representative was alleged to have threatened to kill a current and a former member of the Wyoming House of Representatives. This incident received coverage in the press.<sup>40</sup> While public records show that the representative was moved from one legislative interim committee to another legislative interim committee during the 2022 interim, no public discipline or action was taken against the representative.

Research has revealed no other incidents where a Wyoming legislator was publicly disciplined in the past for “violent or disorderly conduct.”

*During Legislative Meetings, Sessions, or During the Performance of Legislative Duties*

Finally, if the trier of fact determines that Representative Provenza’s posts were “violent and disorderly conduct” then further determination must be made whether that conduct occurred during the “performance of legislative duties.” Again, guidance, though certainly not a definitive answer, can be gleaned from court decisions. While not squarely on point, there has been a body of jurisprudence that has evolved to determine what is within the “sphere of legitimate legislative activities” for purposes of receiving Speech and Debate Clause Protections. A legislative act is in the sphere of legitimate legislative activity if it is “an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House.”<sup>41</sup> Voting by members, committee reports and a member’s conduct at legislative committee hearings are protected as conduct within the “sphere of legitimate legislative activity.” Activities of a legislator outside of a committee and individual views expressed by a legislator outside of the committee, however, have been found to be outside the legislative sphere. For example, the Fifth Circuit Court of Appeals has held that accusations in a committee hearing, that an officer in the state’s national guard squandered funds, were protected by legislative immunity. The court, on the other hand, suggested that defamatory statements made after the committee was dissolved would be outside the sphere of legitimate legislative activity.<sup>42</sup>

*Analysis of the Complaints*

When court decisions and past precedent of the Wyoming Legislature are applied to the facts of the complaints against Representative Provenza, it does not appear that she committed “violence or disorderly conduct during legislative meetings, sessions, or during the performance of legislative duties.” Representative Provenza’s posts are almost certainly protected expression under the First Amendment and its Wyoming counterpart. The picture of an older woman holding a rifle with the text “Auntie Fa Says Protect Trans Folks From Fascists and Bigots” could not reasonably be characterized as a “true threat of violence” directed towards “a person or group of persons with the intent of placing the victim in fear of bodily harm or death.” The picture and text

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<sup>40</sup> McFarland, Clair, Ethete Legislator Claims Fellow Lawmaker Made Death Threat Against Her, Cowboy State Daily, March 15, 2022.

<sup>41</sup> Gravel v. United States, 408 U.S. 606, 625, 92 S. Ct. 2614, 2627 (1972).

<sup>42</sup> Cole v. Gray, 638 F.2d 804, 811 (5th Cir. 1981).

urge the reader to “protect” not commit acts of violence. As Representative Provenza pointed out in her press release of April 3, 2023, Americans have the constitutional right guaranteed through the Second Amendment to protect themselves from physical threats through the use of reasonable force, including reasonable deadly force with a firearm.

Some complainants have alleged this post will incite further violence, similar to the recent school shooting in Nashville by an individual identified as transgender. While the Nashville school shooting, like all shootings and particularly school shootings, was a grave tragedy, by no reasonable interpretation could it be found that Representative Provenza’s post was exhorting or threatening further school shootings or condoning the Nashville school shooting. Allegations in some complaints that the post prompted swatting incidents in schools in Wyoming lack any cogent argument or relation to the post that we can discern.

The second video with the eels or sea snakes appears to be completely nonsensical and cannot in any reasonable consideration be taken as a true threat under the law to anyone.

Further, the Wyoming Legislature was not in session when Representative Provenza posted the complained of material. Neither was she in a committee meeting or conducting “an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation” when she posted that material. The courts have not included newsletters to constituents and news releases, similar to social media posts, within the sphere of “legislative activity” as that term has been employed by the court.<sup>43</sup> Posting material to her Instagram or TikTok account can reasonably be determined to be a personal or at most a political activity, but either way, such activity cannot be reasonably classified as “legislative” in nature.

## **Conclusion**

Please keep in mind that the ultimate responsibility to determine whether Representative Provenza violated JR 22-1 rests with the trier of fact and certainly not with us. However, we believe it is our role in this instance to provide you with an honest and direct analysis in the determination of whether there is probable cause to believe Representative Provenza’s complained of conduct constitutes “misconduct involving legislative duties.” Our advice is just that; you are of course free to take it or leave it as you deem appropriate.

The complainants may be correct when they state Representative Provenza’s posts were “ill conceived,” “offensive,” or “distasteful.” While her actions in posting the complained of picture or the video may have fallen below the conduct expected of a Wyoming representative by her colleagues, it does not appear to be “misconduct involving legislative duties” as that term is defined in Joint Rule 22-1. From our research and knowledge, the Wyoming House of Representatives has never previously disciplined a member for similar behavior through formal disciplinary procedures.

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<sup>43</sup> United States v. Brewster, 408 U.S. 501, 512–13, 92 S. Ct. 2531, 2537-38 (1972).

Attachment A

Screenshot shared on April 2, 10:12 AM by Greg Price (@greg\_price11) on Twitter available at [https://twitter.com/greg\\_price11/status/1642560685652553728?s=20](https://twitter.com/greg_price11/status/1642560685652553728?s=20) (Last accessed April 10, 2023).



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**Attachment B**

Screenshot taken April 8, 2023 from @offcolordecals on Instagram available at [https://www.instagram.com/p/CqeCi4wOwLa/?utm\\_source=ig\\_web\\_copy\\_link](https://www.instagram.com/p/CqeCi4wOwLa/?utm_source=ig_web_copy_link) (Last accessed April 10, 2023).



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