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JEREMY S. BREON
PROTHONOTARY
CENTRE COUNTY, PA

IN THE COURT OF COMMON PLEAS OF CENTRE COUNTY, PENNSYLVANIA
CIVIL ACTION-LAW

BARRY J. FENCHAK, Plaintiff,	)	
v.	)	No. 2025-CV-0882-CI
THE PENNSYLVANIA STATE UNIVERSITY BOARD OF TRUSTEES, and DAVID KLEPPINGER, IN HIS OFFICIAL CAPACITY AS CHAIRMAN Defendants.	)	

Attorney for Plaintiff: *Terry L. Mutchler, Esq.*
Erika L. Silverbreit, Esq.

Attorney for Defendants: *Andrew R. Stanton, Esq.*
Susan E. Kessler, Esq.

OPINION AND ORDER

Marshall, J.

Presently before the Court are the Preliminary Objections to Plaintiff's Complaint, filed by the Pennsylvania State University Board of Trustees and David Kleppinger, in his official capacity as Chairman (collectively, "Defendants") on May 1, 2025. In deciding the preliminary objections, this Court considered, *inter alia*, (*i*) the aforementioned Preliminary Objections, (*ii*) Defendants' Brief in Support of Preliminary Objections, filed on July 11, 2025, and (*iii*) the Brief in Opposition to Preliminary Objections, filed by Barry J. Fenchak ("Plaintiff") on August 11, 2025. A hearing on the matter was held on August 14, 2025. Upon consideration of the filings and arguments of the parties, the Court enters the following Opinion and Order:

BACKGROUND

Plaintiff is a former member of the Pennsylvania State University Board of Trustees (hereinafter, the "Board"), having served as a Trustee from June 2022 until the expiration of his

term in June 30, 2025. Plaintiff is one of nine voting members elected by the alumni to serve on the 36-person Board. The Board is the corporate body established by the University's Charter and serves as the governing body of the University. The Board delegates day-to-day management of the University to the President, with certain reserved powers set forth in the bylaws. On or about July 30, 2024, the Board adopted the Amended and Restated Bylaws (the "Amended Bylaws") presently at issue.

Plaintiff filed a Complaint on April 1, 2025, seeking declaratory judgment pursuant to 42 Pa. C.S.A. §7531 *et seq.*[1] Specifically, Plaintiff asks this Court to declare that Sections 2.01, 2.02, 2.03, 2.04, and 2.05 of the Amended Bylaws were adopted in violation of 15 Pa. C.S. §5504, on the basis that those sections of the Amended Bylaws are "inconsistent with law." *See* 15 Pa. C.S. §5504(a) ("The members entitled to vote shall have the power to adopt, amend and repeal the bylaws of a nonprofit corporation…The bylaws may contain any provisions for managing the business and regulating the affairs of the corporation not inconsistent with law or the articles…") (emphasis added).

The parties have stipulated that Plaintiff is a "Director" of the Board, as that term is used by the Pennsylvania Nonprofit Corporations law, 15 Pa. C.S. §§5101–6162. *See* 15 Pa. C.S. §5103 ("**Directors.**" Individuals designated, elected or appointed, by that or any other name or title, to act as members of the board of directors, and their successors. The term does not include a member of an other body, unless the person is also a director. The term, when used in relation to any power or duty requiring collective action, shall be construed to mean "board of directors.").

[1] Plaintiff's Complaint also contains two prayers for relief that have been mooted by Plaintiff's removal from the Board at the expiration of his term on or about June 30, 2025. *See Compl.* (Apr. 1, 2025) ("(b) The Nominating Subcommittee's vote of February 26, 2025, deeming Plaintiff "unqualified" as an alumni candidate and precluding him from election the ballot is hereby overturned; (c) Plaintiff is henceforth deemed "qualified" as an alumni candidate for the Pennsylvania State University Board of Trustees and shall be eligible to be on the ballot as an alumni candidate.")

Defendants bring a single preliminary objection in the nature of a demurrer pursuant to Pa.R.C.P. No. 1028(a)(4). Defendants argue that the Amended Bylaws are lawful and inside the bounds of the Board's inherent authority to govern itself. The parties agree that Plaintiff's instant challenge to the Amended Bylaws is a facial challenge, which requires Plaintiff to show that there are "no circumstances" under which the Amended Bylaws would be valid. *Germantown Cab Co. v. Phila. Parking Auth.*, 206 A.3d 1030, 1041 (Pa. 2019).

DISCUSSION

"Preliminary objections may be filed by any party to any pleading." Pa. R.C.P. No. 1028. Answers and preliminary objections are among the pleadings allowed by the Pa. R.C.P. No. 1017. The grounds for a preliminary objection are limited to:

> (1) lack of jurisdiction over the subject matter of the action or the person of the defendant, improper venue or improper form or service of a writ of summons or a complaint;
> (2) failure of a pleading to conform to law or rule of court or inclusion of scandalous or impertinent matter;
> (3) insufficient specificity in a pleading;
> (4) legal insufficiency of a pleading (demurrer);
> (5) lack of capacity to sue, nonjoinder of a necessary party or misjoinder of a cause of action;
> (6) pendency of a prior action or agreement for alternative dispute resolution;
> (7) failure to exercise or exhaust a statutory remedy; and
> (8) full complete and adequate non-statutory remedy at law.
> Pa. R.C.P. No. 1028.

When considering preliminary objections in the nature of a demurrer, all material and relevant facts set forth in the pleading and all inferences reasonably deducible therefrom must be admitted as true. *Hess v. Fox Rothschild, LLP.*, 925 a.2D 798, 805 (Pa. Super. Ct. 2007). The court is to resolve the issues solely on the basis of the pleadings without considering testimony or other evidence outside the complaint. *Cardenas v. Schober*, 783 A.2d 317, 321 (Pa. Super. Ct. 2001). The objection may only be granted when the case is clear and free from doubt. *D'Elia v. Folino*,

933 A.2D 117 (Pa. Super. Ct. 2007). To be free and clear from doubt, the complaint must appear with certainty that the law will not permit recovery by the plaintiff upon the facts averred. *Burgoyne v. Pinecrest Cmty. Ass'n.*, 924 A.2d 675 (Pa. Super. Ct. 2007). Where doubt exists as to whether a demurrer to the complaint should be sustained, it should be resolved in favor of overruling the preliminary objection. *Haun v. Cmty. Health Systems Inc.*, 14 A.3d 120,123 (Pa. Super. Ct. 2011).

The parties agree that Plaintiff's challenge to the Amended Bylaws is a "facial challenge." *See Def. Brief in Support* (Jun. 11, 2025), p. 9; *see also Brief in Opposition* (Aug. 11, 2025); *Compare Clifton v. Allegheny County*, 600 Pa. 662, 969 A.2d 1197, at 1223 n. 37 (Pa. 2009) ("...a statute is facially invalid when its constitutional deficiency is so evident that proof of actual unconstitutional applications is unnecessary.") *with Diop v. Bureau of Professional and Occupational Affairs*, 272 A.3d 548 (Commw. Ct. 2022) ("[h]ere, Henry is asserting that the Law's licensing requirements are unconstitutional as applied to her.") (emphasis added). A statute is facially unconstitutional only where there are "no circumstances under which the statute would be valid." *See Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 (2008); *Clifton v. Allegheny Cty.*, 600 Pa. 662 (Pa. 2009).

The Pennsylvania Supreme Court has repeatedly recognized the Pennsylvania Constitution to be an alternative and independent source of individual rights. *See Willing v. Mazzocone*, 393 A.2d 1155 (Pa. 1978); *Commonwealth v. Triplett*, 341 A.2d 62 (Pa. 1975). It is also well settled that a state may guarantee rights and liberties of its citizens independent from those provided by the Federal Constitution, and that the rights so guaranteed may be more expansive than their federal counterparts. *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 80-82 (1980); *Oregon v. Hass*, 420 U.S. 714, 719 (1975).

The Pennsylvania Constitution of 1776 was the first Constitution in the country to protect "freedom of speech and of writing." *Oberholzer v. Galapo*, 322 A.3d 153, 177 (Pa. 2024) (citation omitted). The Constitutional Convention of 1790 rewrote the provision to state: "The free communication of thoughts and opinions is one of the invaluable rights of man; and every citizen may freely speak, write and print on any subject, being responsible for the abuse of that liberty" which is the formulation that remains today. Pa. Const. Art. I, § 7. ("The printing press shall be free to every person who may undertake to examine the proceedings of the Legislature or any branch of government, and no law shall ever be made to restrain the right thereof. The free communication of thoughts and opinions is one of the invaluable rights of man, and every citizen may freely speak, write and print on any subject, being responsible for the abuse of that liberty..."). Article I, §7 has been "routinely recognized as providing broader freedom of expression than the federal constitution." *Uniontown Newspapers, Inc. v. Roberts,* 839 A.2d 185, 193 (Pa. 2003).

While the right to freedom of speech and freedom of the press are recognized as fundamental rights in the Pennsylvania Constitution, they are not absolute rights. *Andress v. Zoning Bd. Of Adj.City of Phila.*, 410 Pa. 77 (Pa. 1963). For example, while the state cannot bring a prosecution simply because someone yells "fuck the police" (*Com. v. McCoy*, 69 A.3d 658 (Pa. Super. 2013) (finding the phrase to be neither obscene nor fighting words)), the state can, for example, place reasonable restrictions on the time, place and manner of expression. *S.B. v. S.S.*, 243 A.3d 90, 105 (Pa. 2020) (finding content-neutral speech restrictions to be justified by the important governmental interest of protecting the psychological and emotional well-being of a child.). Further, when a citizen enters government service, the citizen by necessity must accept certain limitations on his or her freedom. See, *e.g., Waters v. Churchill,* 511 U.S. 661, 671, 114 S.Ct. 1878, 128 L.Ed.2d 686 (1994) ("[T]he government as employer indeed has far broader

powers than does the government as sovereign"). Like any organization, the University has an interest in its "effective functioning," *Rankin v. McPherson*, 483 U.S. 378, 388 (1987), and may restrict speech when it acts in its employer role, but the restrictions it imposes must be directed at speech that has some potential to affect its operations. *Garcetti v. Ceballos*, 547 U.S. 410 (2006). The burden of caution employees bear with respect to the words they speak will vary with the extent of authority and public accountability the employee's role entails. *Rankin*, 483 U.S. at 390.

Section 2.03(c) of the Amended Bylaws is the crux of this matter, with Plaintiff characterizing it as a "draconian gag order," *Compl.* ¶70, and provides as follows:

> "**Meetings and Other Responsibilities.** Trustees must prepare diligently, attend required meetings of the Board (as set forth in Section 2.04), and assigned committees, and participate constructively in all Board of Trustees meetings and related activities by reading the agenda and supporting materials. Trustees shall speak openly, freely, and candidly within the Board, while being mindful that any public dissent from Board decisions must be done as trusted stewards of a public institution. Because a university is a free marketplace of competing ideas and opinions, its governance mandates open communications as well as principled, civil, and respectful debate. At the same time, Trustees must always protect and act in the best interest of the University, being cognizant that the tone and substance of their words whether in the board room or in public, including on social media platforms, reflect on the University that they are entrusted to serve and can adversely affect its wellbeing. While Trustees think independently and make informed individual decisions about what they feel is in the best interests of the University, they shall support majority decisions of the Board and work cooperatively with fellow Board members and the Administration to advance the University's goals. Negative or critical public statements about the Board, the University or its students, alumni, community, faculty, staff, and other stakeholders do not serve the University's interests and are inconsistent with a Trustee's fiduciary obligation to act always in the best interests of the University. Trustees shall extend goodwill to one another and to all members of the University community in board sessions and in public forums, including social media."
>
> *Amended Bylaws*, §2.03(c).

Section 2.03(c) is undoubtedly a restriction on the speech of Trustees, providing, among other things, that "[n]egative or critical public statements about the Board, the University or its

students, alumni, community, faculty, staff, and other stakeholders do not serve the University's interests." This is seemingly inconsistent with the Pennsylvania Constitution's broad guarantee that every citizen may freely speak, write and print on any subject, as the free communication of thoughts and opinions is recognized as one of the "invaluable rights of man." Pa. Const. Art. I, § 7, *supra* (emphasis added). However, the freedom of speech is not absolute; for example, "[w]hen close working relationships are essential to fulfilling public responsibilities, a wide degree of deference to the employer's judgment is appropriate." *Connick v. Myers*, 461 U.S. 138, 151-52 (1983).

The Board is vested with the "power to pass all such by-laws, ordinances and rules as the good government of the institution shall require." 24 P.S. §2541. The business judgment rule statutorily applies to directors of nonprofit corporations and dictates that courts must "presume that [directors] pursue the best interests of their corporations," and should not "second-guess[]" their business decisions. 15 Pa. C.S. §5712(d); *Cuker v. Mikalauskas*, 692 A.2d 1042, 1046 (Pa. 1997). The Board duly enacted the Amended Bylaws in July 2024, passing by a vote of 27-6.

This Court maintains that the challenged Amended Bylaws are "inoffensive and are likely not inconsistent with law." *Opinion and Order* (Apr. 14, 2025). Plaintiff has failed to demonstrate that there are "no circumstances" in which the Amended Bylaws are valid. *Germantown Cab Co. v. Phila. Parking Auth.*, 206 A.3d 1030, 1041 (Pa. 2019). The Amended Bylaws represent the Board's right to self-governance, which the Board determined to be necessary to operate efficiently and effectively. It should be no surprise that "when a citizen enters government service," he necessarily "must accept certain limitations on his … freedom." *Garcetti,* 547 U.S. at 418. The burden of caution employees bear with respect to words they speak will vary with the extent of authority and public accountability the employee's role entails. *Rankin*, 483 U.S. at 390. Logically,

then, a Trustee – holding a position that carries more authority and public accountability than any other – should be held to the highest standard.

Accordingly, the Court enters the following Order:

ORDER

AND NOW, this 24th day of August 2025, Defendant's Preliminary Objection in the form of a demurrer is hereby SUSTAINED. Plaintiff's Complaint is hereby DISMISSED WITH PREJUDICE.

BY THE COURT:

Brian K. Marshall, Judge