

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 1st day of October, two thousand twenty-six.

Present:

JOHN M. WALKER, JR.,
MICHAEL H. PARK,
EUNICE C. LEE,
Circuit Judges.

WANTAGH UNION FREE SCHOOL DISTRICT,
WANTAGH UNION FREE SCHOOL DISTRICT BOARD OF
EDUCATION, ANTHONY GRECO, IN HIS CAPACITY AS A
WANTAGH BOARD OF EDUCATION MEMBER AND A
RESIDENT OF THE SCHOOL COMMUNITY,

Plaintiffs-Appellants,

v.

25-1136

NEW YORK STATE BOARD OF REGENTS, LESTER W.
YOUNG, JR., IN HIS OFFICIAL CAPACITY AS
CHANCELLOR OF THE NEW YORK STATE BOARD OF
REGENTS, JOSEPHINE VICTORIA FINN, IN HER
OFFICIAL CAPACITY AS VICE CHANCELLOR OF THE
NEW YORK STATE BOARD OF REGENTS, AND ALL
MEMBERS OF THE NEW YORK STATE BOARD OF
REGENTS, IN THEIR OFFICIAL CAPACITIES,

*Defendants-Appellees.**

* The Clerk of Court is respectfully directed to amend the caption accordingly.

FOR PLAINTIFFS-APPELLANTS:

STEVEN C. STERN, Sokoloff Stern LLP, Carle Place, NY.

FOR DEFENDANTS-APPELLEES:

DANIEL S. MAGY, Office of the New York State Attorney General, New York, NY.

Appeal from a judgment of the United States District Court for the Eastern District of New York (Brodie, *C.J.*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the district court is **AFFIRMED** in part and **VACATED** in part, and the case is **REMANDED** for further proceedings consistent with this order.

Plaintiffs-Appellants Wantagh Union Free School District, the Wantagh Union Free School District Board of Education, and Board member Anthony Greco appeal from the district court's April 28, 2025 judgment dismissing their challenge to Part 123 of the Regulations of the New York Commissioner of Education. Part 123 regulates the use of Indigenous names, logos, and mascots in New York public schools. Section 123.2 prohibits public schools from using or displaying such names, logos, or mascots "other than for purposes of classroom instruction." 8 N.Y.C.R.R. § 123.2. Section 123.5 requires schools to bar their officers and employees from "utilizing or promoting" them while on school property or at a school function. *Id.* § 123.5. The District's middle and high school sports teams have competed as the "Wantagh Warriors," using a logo of a Native American man in a headdress. To comply with Part 123, Wantagh planned to retire the logo but keep the "Warriors" name. The New York State Education Department rejected that plan, and this suit followed. As relevant to this appeal, Plaintiffs alleged that Part 123 is void for vagueness under the Fourteenth Amendment, facially overbroad in violation of the First Amendment, and, as applied to Greco individually, an unconstitutional restriction on his expression. The district court concluded that the District, the Board, and Greco in his official capacity lacked capacity to sue the State, and that the amended complaint failed to state any

constitutional claims. We assume the parties' familiarity with the underlying facts, the procedural history of the case, and the issues on appeal, to which we refer only as necessary to explain our decision.

"We review a district court's grant of a motion to dismiss *de novo*, accepting as true all factual claims in the complaint and drawing all reasonable inferences in the plaintiff's favor." *Slattery v. Hochul*, 61 F.4th 278, 285–86 (2d Cir. 2023) (cleaned up). To survive a motion to dismiss, a plaintiff must allege facts sufficient "to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

I. Capacity

Capacity to sue "is determined . . . by the law of the state where the court is located." Fed. R. Civ. P. 17(b)(3). "New York follows the traditional capacity-to-sue rule, which states that municipalities and other local governmental corporate entities and their officers lack capacity to mount constitutional challenges to acts of the State and State legislation." *In re World Trade Ctr. Lower Manhattan Disaster Site Litig.*, 846 F.3d 58, 63 (2d Cir. 2017) (internal quotation marks omitted). There are "four limited exceptions" to this general rule, including when "compliance with the statute would force the municipal challengers to violate a constitutional proscription." *Clarke v. Town of Newburgh*, 45 N.Y.3d 428, 437 (2025).

The district court properly dismissed the claims of the District, the Board, and Greco in his official capacity (the "Municipal Plaintiffs") for lack of capacity. The Municipal Plaintiffs allege that enforcing § 123.5 against their employees and officers "creates an unnecessary risk of chilling [their] speech and expression." But a mere "risk" of chilling speech does not amount to a compelled constitutional violation for purposes of New York's capacity-to-sue rule. Further, the

Municipal Plaintiffs cannot show that “every conceivable application” of § 123.5 compels a constitutional violation. *See Clarke*, 45 N.Y.3d at 437.

II. Standing

Article III limits our jurisdiction “to cases in which the plaintiff can show standing, *i.e.* ‘that she has suffered, or will suffer, an injury that is concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling.’” *Variscite N.Y. Four, LLC v. N.Y. State Cannabis Control Bd.*, 152 F.4th 47, 56 (2d Cir. 2025) (quoting *Murthy v. Missouri*, 603 U.S. 43, 57 (2024)). “[A] plaintiff must demonstrate standing for each claim he seeks to press.” *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006).

Greco has standing to challenge § 123.5 and the sections supplying its definitions (§ 123.1) and exceptions (§ 123.4). His alleged injury is that he is “prohibited from wearing Warriors apparel” while attending games and school functions—not that § 123.5 has been enforced against him. To bring a pre-enforcement challenge, a plaintiff must show “(1) an intention to engage in a course of conduct arguably affected with a constitutional interest; (2) that the intended conduct is arguably proscribed by the challenged regulation; and (3) that there exists a credible threat of prosecution thereunder that is sufficiently imminent.” *Cerame v. Slack*, 123 F.4th 72, 81 (2d Cir. 2024) (cleaned up). Greco meets each requirement.

First, expressive conduct, including the choice of what to wear, may warrant First Amendment protection in some settings. *See Zalewska v. Cnty. of Sullivan*, 316 F.3d 314, 319 (2d Cir. 2003); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 505–06 (1969). Here, Greco has alleged sufficient facts to support that wearing Warriors apparel is a course of conduct “arguably affected with a constitutional interest.” *Cerame*, 123 F.4th at 81. Greco need not

show that he “will win on the merits of [his] constitutional claims” at this stage. *Id.* at 83. Second, wearing Warriors apparel to school events is arguably proscribed by § 123.5, which bars officers and employees from “utilizing or promoting” Indigenous logos. Third, the threat of enforcement is sufficiently imminent where the Board of Regents has explicitly opposed using the Warriors name: a plaintiff challenging a regulation that proscribes certain conduct need not show an “intent by the government to enforce” the regulation against him. *Vitagliano v. Cnty. of Westchester*, 71 F.4th 130, 138 (2d Cir. 2023) (cleaned up).

Greco’s overbreadth claim, however, does not extend his standing to challenge §§ 123.2 or 123.3. Those sections regulate school districts, not board members. The overbreadth doctrine relaxes “the general prudential rule against third-party standing” but it “does not absolve” a plaintiff of his “initial obligation to plead the injury in fact required for standing.” *Hedges v. Obama*, 724 F.3d 170, 204 (2d Cir. 2013); *Brokamp v. James*, 66 F.4th 374, 390 (2d Cir. 2023). We thus limit our review of the constitutional claims to § 123.5.

III. Vagueness

“The void-for-vagueness doctrine derives from the constitutional guarantee of due process.” *Mannix v. Phillips*, 619 F.3d 187, 197 (2d Cir. 2010). A regulation is “unconstitutionally vague if it either ‘fails to provide a person of ordinary intelligence fair notice of what is prohibited,’ or is ‘so standardless that it authorizes or encourages seriously discriminatory enforcement.’” *United States v. Houtar*, 980 F.3d 268, 273 (2d Cir. 2020) (quoting *United States v. Williams*, 553 U.S. 285, 304 (2008)).

Greco’s as-applied challenge fails on both fronts. First, the amended complaint forecloses any lack-of-notice argument by explicitly pleading that Greco understood § 123.5 to

bar him from wearing Warriors apparel at school events and functions. This is fatal to Greco's as-applied challenge, which turns on whether the challenged regulation is vague "with respect to [the litigant's] actual conduct." *VIP of Berlin, LLC v. Town of Berlin*, 593 F.3d 179, 189 (2d Cir. 2010) (internal quotation marks omitted). Second, Greco argues that the "tribal approval" exception in § 123.4 encourages arbitrary and discriminatory enforcement by placing the decision-making authority as to which schools will be exempted in the hands of recognized Indigenous groups. However, nothing in this exception grants the type of "unfettered latitude" the vagueness doctrine seeks to prevent. *VIP of Berlin*, 593 F.3d at 191. Instead, the relevant criteria are objective: there must be a written agreement with a recognized tribal nation before the regulation; signed before the regulation's effective date; and nothing of value may be exchanged. To the extent he instead contends that the Board of Regents arbitrarily enforces § 123.2 by permitting other schools to retain the name "Warriors," he lacks standing to raise that challenge.

IV. First Amendment Free Speech Claim

The district court dismissed Greco's free speech claim, concluding that the amended complaint failed to allege speech on a matter of public concern, as *Pickering* requires. *See Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205*, 391 U.S. 563 (1968). Greco challenges that ruling on two grounds: that the *Pickering* framework does not govern this case at all because it "does not involve . . . an employer-employee relationship," and that, even if it does, he adequately alleged speech on a matter of public concern.

First, Greco's status as a volunteer, elected official raises a threshold question about the reach of *Pickering*. Generally, the government is "severely restricted by the First Amendment from placing restraints on speech." *Scott v. Meyers*, 191 F.3d 82, 87 (2d Cir. 1999). "But when

government acts as an employer, the constraints of the First Amendment are less severe,” *id.*, because public employers need “control over their employees’ words and actions to ensure the efficient provision of public services.” *Long v. Byrne*, 146 F.4th 282, 291 (2d Cir. 2025) (cleaned up). Thus, “[i]n order to bring a First Amendment violation claim, a public employee must first establish that the employee spoke ‘as a citizen on a matter of public concern.’” *Dolce v. Connetquot Cent. Sch. Dist.*, No. 24-CV-00622, 2025 WL 1070079, at *9 (E.D.N.Y. Apr. 9, 2025) (quoting *Garcetti v. Ceballos*, 547 U.S. 410, 418 (2006)), *aff’d*, No. 25-1197, 2026 WL 2560338 (2d Cir. Aug. 31, 2026); *see Pickering*, 391 U.S. at 568. Greco, however, is an elected member of the Wantagh Board of Education. We remand for the district court to consider in the first instance whether the *Pickering* framework applies to Greco as a volunteer, elected school board official.

Second, the district court erred by failing to account for the context of Greco’s speech. Whether speech is on “a matter of public concern” is a question of law “to be answered by the court after examining the content, form, and context of a given statement, as revealed by the whole record.” *Montero v. City of Yonkers*, 890 F.3d 386, 399 (2d Cir. 2018) (internal quotation marks omitted). Speech qualifies when it can “be fairly considered as relating to any matter of political, social, or other concern to the community,” or when it is a subject of legitimate news interest. *Id.* A court may also weigh the speaker’s motive and “the forum and manner in which an employee makes a statement.” *Shara v. Maine-Endwell Cent. Sch. Dist.*, 46 F.4th 77, 84 (2d Cir. 2022). The Board argues that Greco cannot assert that wearing Warriors apparel was an act of protest against Part 123 because the amended complaint does not explicitly allege this expressive purpose. We disagree. A complaint need not plead with detail every possible theory of expression. *See*

Phillips v. Girdich, 408 F.3d 124, 130 (2d Cir. 2005). Here, the amended complaint frames this litigation as a “fight to keep the ‘Warriors’ name”—one that “73.7% of the community members . . . surveyed indicated the district should” pursue. App’x 70, 73. And it alleges that Greco wears Warriors apparel to “support not only student athletes, but the school community as a whole.” *Id.* at 92. These allegations of expressing support for the Warriors, in the context of the ban imposed by Part 123.5 and in light of Greco’s involvement in this litigation, suffice to encompass opposition to Part 123.5 as a message. We thus vacate the dismissal of Greco’s free speech claim and remand for further proceedings.

V. Overbreadth

Under the First Amendment overbreadth doctrine, “a statute is facially invalid if it prohibits a substantial amount of protected speech.” *Williams*, 553 U.S. at 292. Determining whether the “strong medicine” of facial invalidation is warranted requires a two-step inquiry. *Id.* at 293; *see Moody v. NetChoice, LLC*, 603 U.S. 707, 724–26 (2024). First, the court construes the challenged provision to determine what it covers. *Moody*, 603 U.S. at 725. Second, the court must decide which of the regulation’s “applications violate the First Amendment” and measure “them against the rest.” *Id.* The challenger bears the burden at each step. *Id.* at 744.

The district court dismissed Greco’s overbreadth claim because he failed to plead sufficient facts to support that wearing Warriors apparel was expressive conduct on a matter of public concern. Finding that the amended complaint did not allege protected First Amendment activity, the district court did not reach whether Part 123 burdens a “substantial amount” of such activity. For the reasons discussed above, the district court erred in analyzing whether wearing Warriors apparel is expression on a matter of public concern. That error affected the first step of the *Moody*

inquiry, which requires a court to assess the “full range of activities” a regulation covers. *Moody*, 603 U.S. at 724. We thus vacate the dismissal of Greco’s overbreadth claim and remand for further proceedings.

* * *

We have considered Plaintiffs’ remaining arguments and find them to be without merit. For the foregoing reasons, we **VACATE** the dismissal of Greco’s overbreadth challenge to § 123.5 and his free speech claim; **AFFIRM** the April 28, 2025 judgment in all other respects; and **REMAND** for further proceedings consistent with this order.

FOR THE COURT:
Catherine O’Hagan Wolfe, Clerk of Court