

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

Civil Action No. _____

CLIFTON WILLMENG;
EDWARD ASHER,

Plaintiffs,

v.

CITY OF THORNTON, COLORADO;
JAN KULMANN, in her individual capacity,

Defendants.

COMPLAINT

Plaintiffs Clifton Willmeng and Edward Asher, by and through their attorneys Andy McNulty and Tania Valdez of KILLMER, LANE & NEWMAN, LLP, respectfully allege for their Complaint as follows:

INTRODUCTION

1. In 2018, social media platforms, like Facebook, provide “perhaps the most powerful mechanisms available to a private citizen to make his or her voice heard.” *Packingham v. North Carolina*, 137 S. Ct. 1730, 1737 (2017). Facebook allows any person with an internet connection to “become a town crier with a voice that resonates farther than it could from any soapbox.” *Reno v. American Civil Liberties Union*, 521 U.S. 844, 870 (1997). Defendant Jan Kulmann, Mayor *Pro Tem* and City Councilperson for Thornton, Colorado, has misused this powerful tool to stifle the voice of those who wish to speak out against fracking in Colorado and, in turn, to misrepresent that public opinion supports Colorado Proposition 112.

2. Plaintiffs Clifton Willmeng and Edward Asher are concerned citizens who have posted on Defendant Kulmann's official Facebook page about the dangers of fracking. Defendant removed Plaintiffs' comments and "banned" them from posting any further messages. Defendant's practice of censoring Plaintiffs' viewpoint is unconstitutional, and this suit seeks to end it.

JURISDICTION AND VENUE

3. This action arises under the Constitution and laws of the United States and is brought pursuant to 42 U.S.C. § 1983. Jurisdiction is conferred on this Court pursuant to 28 U.S.C. § 1331.

4. Jurisdiction supporting Plaintiffs' claim for attorney fees and costs is conferred by 42 U.S.C. § 1988.

5. Venue is proper in the District of Colorado pursuant to 28 U.S.C. § 1391(b). All of the events alleged herein occurred within the State of Colorado, and all of the parties were residents of the State at the time of the events giving rise to this Complaint.

PARTIES

6. At all times relevant to this complaint, Plaintiff Clifton Willmeng was a citizen of the United States of America and a resident of the State of Colorado.

7. At all times relevant to this complaint, Plaintiff Edward Asher was a citizen of the United States of America and a resident of the State of Colorado.

8. At all times relevant to this Complaint, Defendant City of Thornton, Colorado ("Thornton") was a Colorado municipal corporation.

9. At all times relevant to this Complaint, Defendant Jan Kulmann was a citizen of the United States and a resident of the State of Colorado. At all relevant times, Defendant

Kulmann was acting within the scope of her official duties and employment and under color of state law in her capacity as a city councilmember and Mayor *Pro Tem* for Thornton.

FACTUAL ALLEGATIONS

Plaintiff Clifton Willmeng is a well-known, outspoken activist against fracking.

10. Plaintiff Cliff Willmeng is a father of two, a husband, and registered nurse who lives and works in Lafayette. Mr. Willmeng moved to Lafayette eight years ago to raise a family in a place that is safe for people and children and that would allow a healthy and secure upbringing. One year after moving to Lafayette, Mr. Willmeng learned about the massive oil shale that exists under much of the northern front range when he read in the local paper about a protest taking place in his neighboring town of Erie, Colorado against hydraulic fracturing in that community.

11. The protest Mr. Willmeng learned of was being conducted by the parents of students at Red Hawk Elementary School. At that time, Encana Corporation was planning to drill a well pad adjacent to the school for purposes of conducting hydraulic fracturing operations. Mr. Willmeng felt that the parents were reasonably concerned for the safety of their children.

12. Hydraulic fracturing, or “fracking,” is the process of injecting liquid at high pressure into subterranean rocks so as to force open existing fissure and extract oil or gas.

13. Mr. Willmeng’s concerns about fracking extend beyond his community. Mr. Willmeng believes that the proliferation of fracking effects all of Colorado’s citizens negatively.

14. And Mr. Willmeng’s concerns about fracking are based in scientific evidence. Last year, a study by the Colorado Department of Public Health and Environment found that within 500 feet of some fracking wells in Colorado there were increased air concentrations of

benzene, acetaldehyde and formaldehyde. The study found that those increased concentrations also carried with them increased cancer risks.

15. Fracking has also been associated with increased seismic activity. Research has shown a demonstrable link between wastewater injection, a process that's used to dispose of waste fluids from fracking, and the incidence of earthquakes in a region. One study in particular has shown that there is a direct correlation between the depth of wastewater injection sites in a region and the magnitude of earthquakes in that region.

16. Moreover, fracking uses huge amounts of water, which must be transported to the fracking site, at significant environmental cost. Preliminary studies have demonstrated that there is a risk that carcinogenic chemicals used during the fracking process may escape and contaminate groundwater around the fracking site.

17. Mr. Willmeng has also seen the tangible consequences of allowing fracking in Colorado. In April 2017, a home in Firestone, Colorado exploded, killing two men and seriously injuring one woman. The explosion was caused by a gas leak from a fracking well, owned by Anadarko Petroleum Corporation, that was less than two hundred feet away from the home.

18. Eventually, Mr. Willmeng discovered that drilling operations were moving toward Lafayette. Mr. Willmeng, along with many other people within the community, began organizing to prevent oil and gas drilling in Lafayette. Since that time, Mr. Willmeng has regularly seen reports of fires, explosions, spills, release of toxic chemical emissions, pipeline leaks and ruptures, flaring, and hazardous material vehicle accidents and/or spills associated with fracking in his community. Mr. Willmeng truly believes, and has seen evidence that, oil and gas drilling is a life and death threat to his children, the local environment, the global climate, and every person in the area.

19. Mr. Willmeng, in coordination with many other concerned citizens, has been compelled to engage in political life as a result of the threats posed by oil and gas expansion in Colorado. Mr. Willmeng has, in coordination with many other concerned citizens, attended city council meetings, created local and state ballot initiatives, organized educational forums, and attempted to make his and his community's concerns known to government in every imaginable way. Mr. Willmeng is one of the founders of East Boulder County United, a group that advocates against oil and gas expansion in Boulder county and neighboring counties (including Weld and Adams counties).

Plaintiff Edward Asher is a citizen concerned about the environmental, and political, impacts of fracking.

20. Mr. Asher is United States Marine Corps reservist who is currently serving and has been for the past fifteen years.

21. Mr. Asher first became engaged with the issue of oil and gas expansion in Colorado in 2012, while on deployment in Eastern Europe. Mr. Asher read about the current, and pending, encroachment of oil and gas development on his community back home in Colorado.

22. Upon return home, Mr. Asher joined a number of grassroots organizations that were organizing against oil and gas expansion. While initially these groups had some success in stopping the expansion of oil and gas into their communities, Mr. Asher noticed that local officials began to slowly but surely be coopted by oil and gas companies, and their lobbyists.

23. Mr. Asher soon learned that the individual citizen had very little, if any, influence over public policy in Colorado. That, however, did not stop Mr. Asher from continuing to advocate against oil and gas expansion. As a member of the military, Mr. Asher believed strongly in exercising the freedoms and rights that he was serving to defend. Mr. Asher knew

that he had to alter his strategy and engage local politicians in forums where they would be more accountable.

Colorado Proposition 112

24. In an effort to protect themselves, their families, their friends, their neighbors, and all Coloradoans, Mr. Willmeng and Mr. Asher have been ardent supporters of, and advocates for, Colorado Proposition 112.

25. Colorado Proposition 112 is a 2018 statewide ballot measure to protect public health and safety from fracking by establishing safety zones of 2,500 feet between oil and gas operations and occupied buildings, such as homes and schools, and other vulnerable areas, such as water sources and playgrounds. Proposition 112 is a controversial measure that is generally supported by those opposed to oil and gas expansion. Conversely, it is ardently opposed by the oil and gas industry. As of September 4, 2018, oil and gas companies had spent \$21 million fighting Proposition 112.

26. In Boulder County, Mr. Willmeng is a particularly well-known advocate for Colorado Proposition 112. He is outspoken on the issue.

Defendant Kulmann is a well-known supporter of oil and gas expansion in Colorado.

27. Defendant Kulmann has spent her entire non-political career in the oil and gas industry. Defendant Kulmann has worked for various energy companies for the past nineteen years, and a majority of that time she has worked for oil and gas companies. Defendant Kulmann has worked for Shell, Encana, and Noble Energy.

28. Defendant Kulmann has received sizeable contributions from oil and gas companies, and executives, to her campaign committee.

29. Defendant Kulmann has used her position on the Thornton City Council to consistently vote in favor of granting oil and gas companies greater access to drilling opportunities in Thornton. She has also consistently voted to stifle opposition to oil and gas expansion.

30. Specifically, Defendant Kulmann voted against the Thornton City Council sending a letter in support of Colorado House Bill 17-1256, which aimed to clarify that the statewide setback law requires oil and gas operations to be set back at least 1,000 feet from the property line of a school, rather than from the school building.

31. Currently, and in addition to her official role as Mayor *Pro Tem* and City Councilmember for Thornton, Defendant Kulmann is employed by Noble Energy. Defendant Kulmann works in the health, safety, and regulatory standards department of Noble Energy. It is Defendant Kulmann's job to manage relationships with governmental agencies relating to regulations. In other words, it is Defendant Kulmann's job to lobby against any governmental health and safety regulation that would impact Noble Energy's bottom line.

32. Should Proposition 112 pass, it would likely have a direct negative economic impact on Defendant Kulmann and Noble Energy.

Mr. Willmeng and Mr. Asher turn to Facebook to better advocate against fracking.

33. Despite efforts to engage with government officials in-person, and through calls and emails, Mr. Willmeng and Mr. Asher came to the conclusion a few years ago that when they undertook these efforts to reach their representatives, their concerns were at times outright ignored or met with evasive answers. Because of this, Mr. Willmeng and Mr. Asher began using social media platforms, including Facebook, to interact with local officials. Mr. Willmeng and Mr. Asher noticed that social media allowed for discussions to be transparent, recorded, and to

progress in real time. Mr. Willmeng and Mr. Asher believe that social media remains the most efficient expression of political debate on the issue of oil and gas expansion in Colorado.

34. Mr. Willmeng and Mr. Asher began commenting on the official Facebook pages of multiple local government officials. One of those officials was Defendant Kulmann.

Facebook is a public forum in which political speech is engaged in, disseminated, and debated.

35. Facebook is a social media platform with more than 2.23 billion monthly active users, as of June 30, 2018. In the United States, approximately two-thirds of adults are Facebook users. Facebook allows its users to publish messages of any length (or publish Facebook “posts”), to republish other users’ posts, and to respond to (or “comment on”) other users’ posts. Speech on Facebook ranges from birthday wishes to heartfelt reconnections to political discourse. Particularly relevant to this lawsuit is the amount of speech by, to, and about the government at all levels that occurs on Facebook on a daily basis.

36. Facebook users are those with an account that has been created on the platform. A Facebook user’s “profile” includes the user’s name, a description of themselves, biographical information, work history, and other web pages maintained by the user. A Facebook “profile” is a personal account on Facebook.

37. In contrast, a Facebook “page” is a user account created by a public figure. Many public officials create Facebook user “pages” that represent their official capacity as a government, or public, official. These pages are called “Community or Public Figure” pages and differ from personal Facebook user profiles in appearance and content. Facebook users who maintain “pages” often describe their official position on their page.

38. By default, Facebook profiles and pages are visible to everyone with internet access. Although non-users can view users' Facebook webpages, they cannot interact with users on the Facebook platform without an account.

39. A Facebook user's webpage displays all posts generated by the user, with the most recent posts appearing at the top of the page. This display is known as a user's "timeline." When a user posts on Facebook, the user's timeline immediately updates to include that post. Anyone who can view a user's public Facebook page can see the user's timeline.

40. A user can post on their own timeline, or on another user's timeline. Facebook posts can include photographs, videos, and links. Users can post links to news articles.

41. By default, any Facebook user can comment on any other user's posts or timeline. Any Facebook user can also reply to another user's comment on a third user's post. The collection of replies and replies-to-replies is sometimes referred to as a "comment thread." Facebook's comment threads are a large part of why it is a social media platform. Comment threads reflect multiple overlapping conversations among and across a group of users.

42. Facebook users are able to post and comment on public figure pages freely, unless they are "banned."

43. Defendant Kulmann maintains an official Facebook page in her official capacity as Mayor *Pro Tem* and City Councilmember for Thornton.

44. Defendant Kulmann is identified as "Councilmember Jan Kulmann" on her official Facebook page. Defendant Kulmann presents her page to the public as one she operates in her official capacity rather than her personal capacity. Defendant Kulmann's page is generally accessible to the public at large without regard to political affiliation or any other limiting criteria. Any member of the public can view her posts. Any Facebook user who wants to follow

Defendant Kulmann's page can do so and her page has 396 followers. Any Facebook user can also comment on Defendant Kulmann's post or post on her timeline, unless they have been banned. Defendant Kulmann uses her page to promote official government business and she uses the account to directly communicate with her constituents in her official capacity as both a City Councilperson and Mayor *Pro Tem* of Thornton.

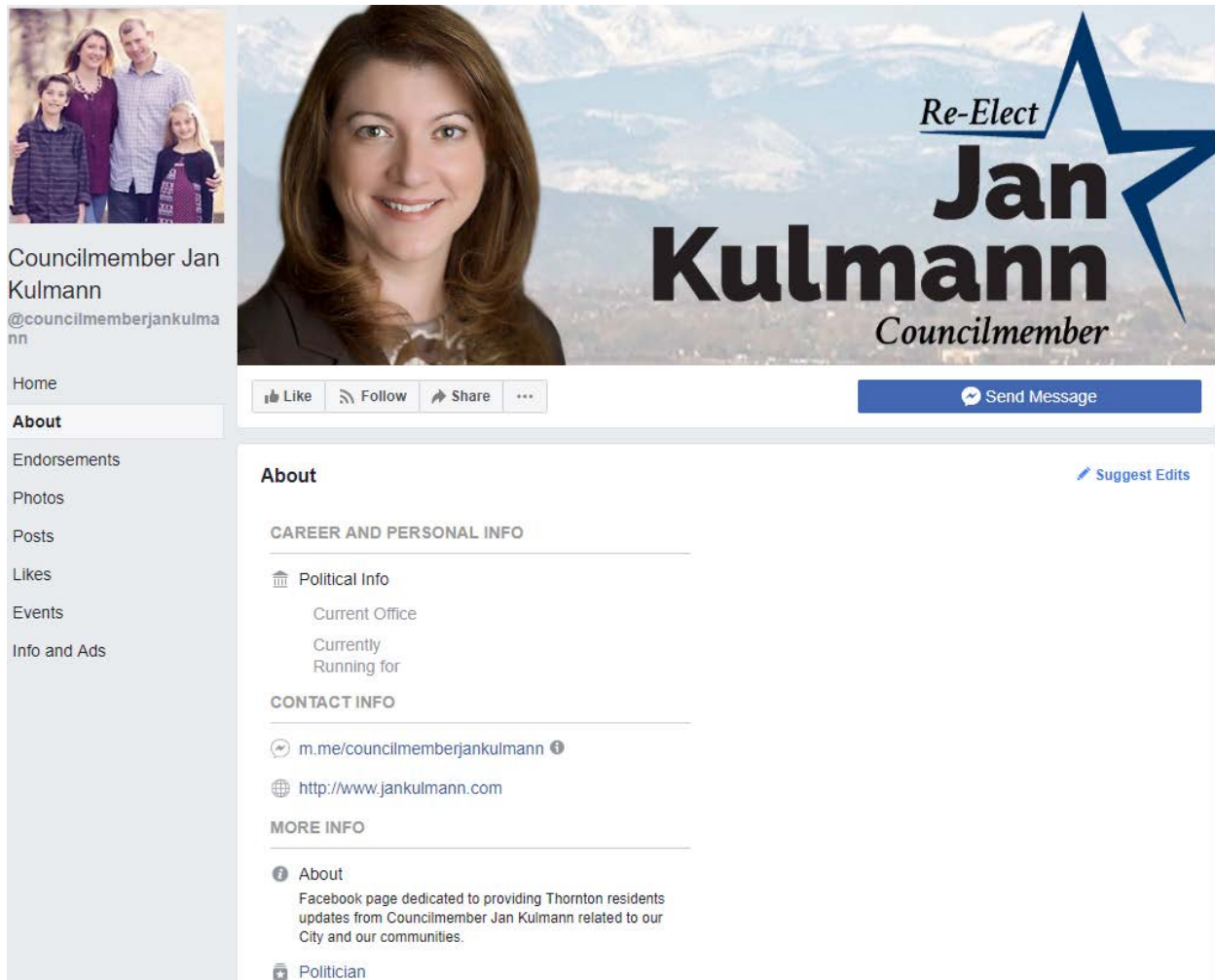
45. Defendant Kulmann's Facebook page is controlled completely by her in her official capacity as City Councilperson and Mayor *Pro Tem* of Thornton. Defendant Kulmann controls who can comment on her timeline and who may comment on her posts.

46. Below is a screenshot of Defendant Kulmann's official Facebook page:

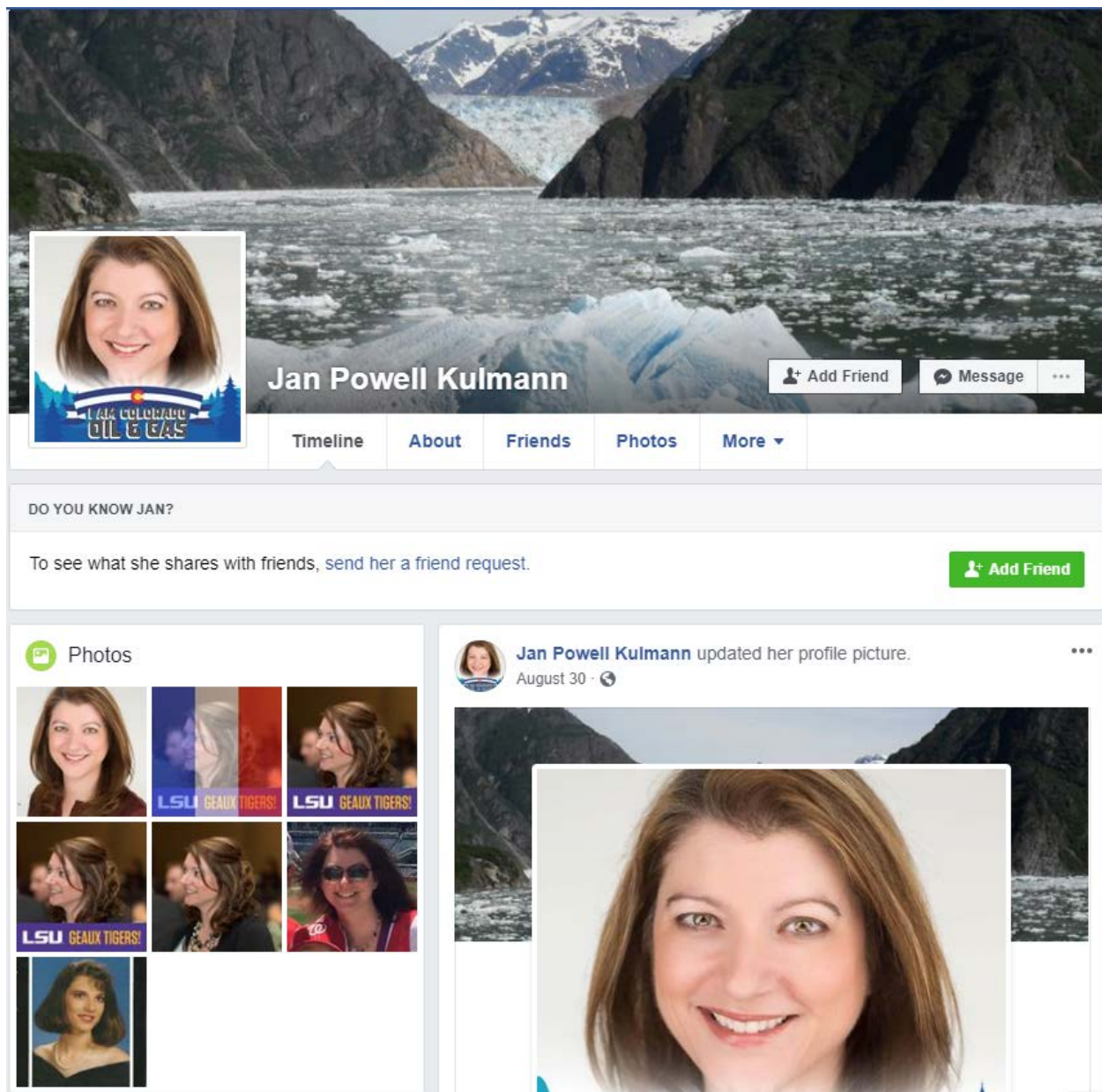


47. Defendant Kulmann's official Facebook page also has an "About" section. In the "About" section, Defendant Kulmann states that her official Facebook page is "dedicated to providing Thornton residents updates from Councilmember Jan Kulmann related to our City and

our communities.” Below is a screenshot of the “About” section of Defendant Kulmann’s official Facebook page:



48. Defendant Kulmann also maintains a personal Facebook profile that is separate and distinct from her official Facebook page. Below is a screenshot of Defendant Kulmann’s personal Facebook profile:



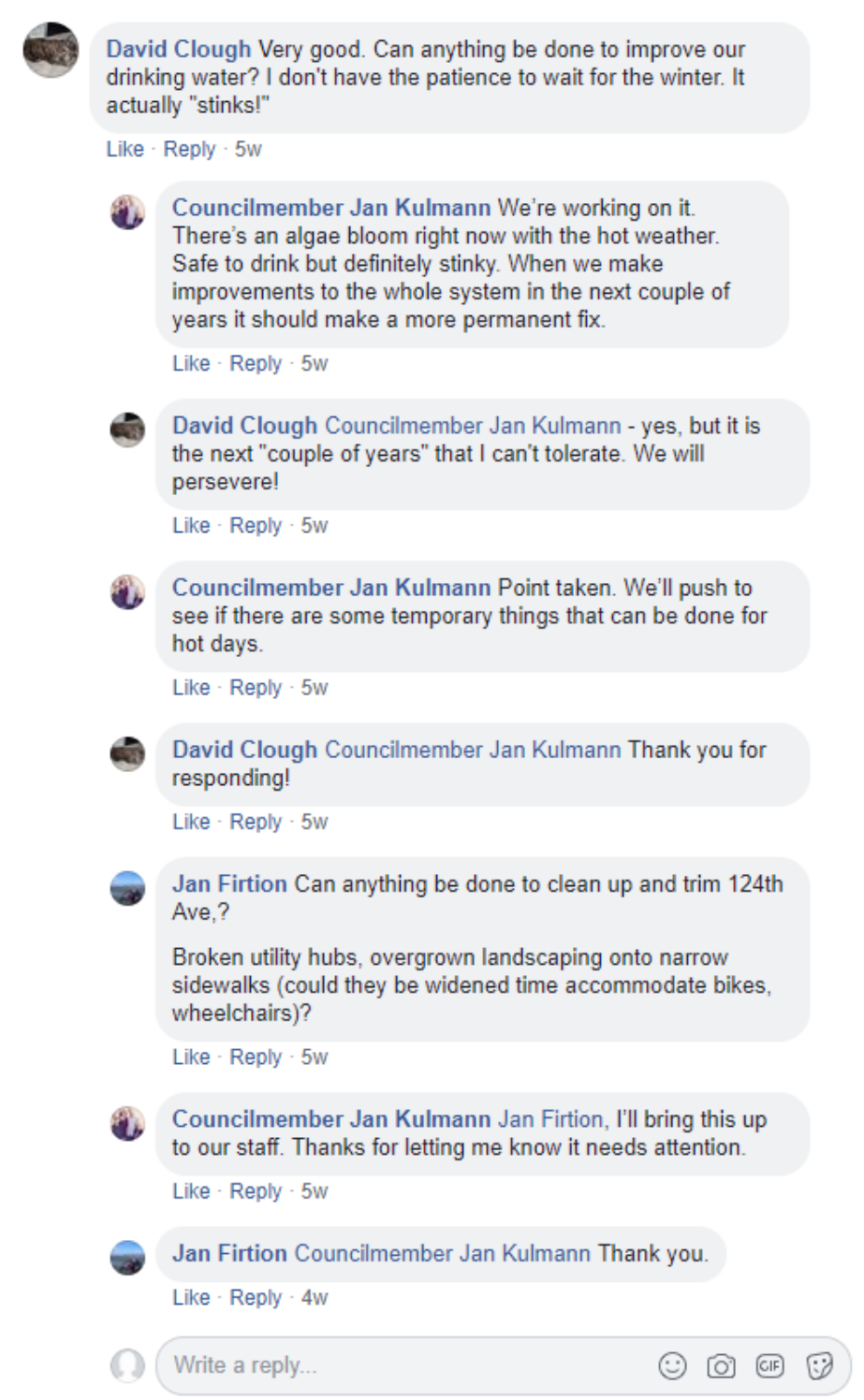
49. The comment threads associated with the posts on Defendant Kulmann's official Facebook page are important forums for discussion and debate about government policy. Her page functions as a digital town hall in which Defendant Kulmann communicates official Thornton news and information to the public, and members of the public can comment on that news and information to both respond to Defendant Kulmann and to exchange views with other members of the public.

50. Below are screenshots of posts that appeared on the timeline associated with Defendant Kulmann's page, providing information to members of the public:





51. Defendant Kulmann regularly interacts with her constituents on her official Facebook page in the comment section of her posts. Below is an example of a recent comment thread from one of Defendant Kulmann's recent posts:



52. Defendant Kulmann also uses her Facebook page to distribute information to, interact with, and answer the questions of members of the public. Below are screenshots of a recent post, including comments and replies, that illustrates that Defendant Kulmann uses her page in performing her official duties as City Councilmember and Mayor *Pro Tem* of Thornton:





53. While Facebook profiles can be “protected” by users, which results in limits on who can see the user’s timeline and who can search for their posts, Facebook pages cannot be limited in this way. Facebook pages are inherently open to the public.

54. Users and creators of Facebook’s pages, however, can “ban” individuals. When a user with a Facebook page “bans” an individual, that individual can no longer comment on the user’s Facebook page.

55. If the banned user attempts to comment on a Facebook page that she or he has been banned from, she or he will only be given the opportunity to share the post and not be allowed to comment on the post. Banned users also cannot see other users' comments on a post.

56. Users and creators of Facebook's pages also have the ability to delete other users' posts on their timeline and other users' comments on their posts.

Defendant Kulmann banned Plaintiffs from her official Facebook page and removed Plaintiffs' comments.

57. Plaintiffs Clifton Willmeng and Edward Asher are Facebook users who have been banned by Defendant Kulmann from commenting on her official Facebook page because they posted messages that were critical of fracking and Defendant's support of fracking in Colorado. Defendant's banning of Mr. Willmeng and Mr. Asher prevents them from commenting on Defendant's posts and from participating in comment threads.

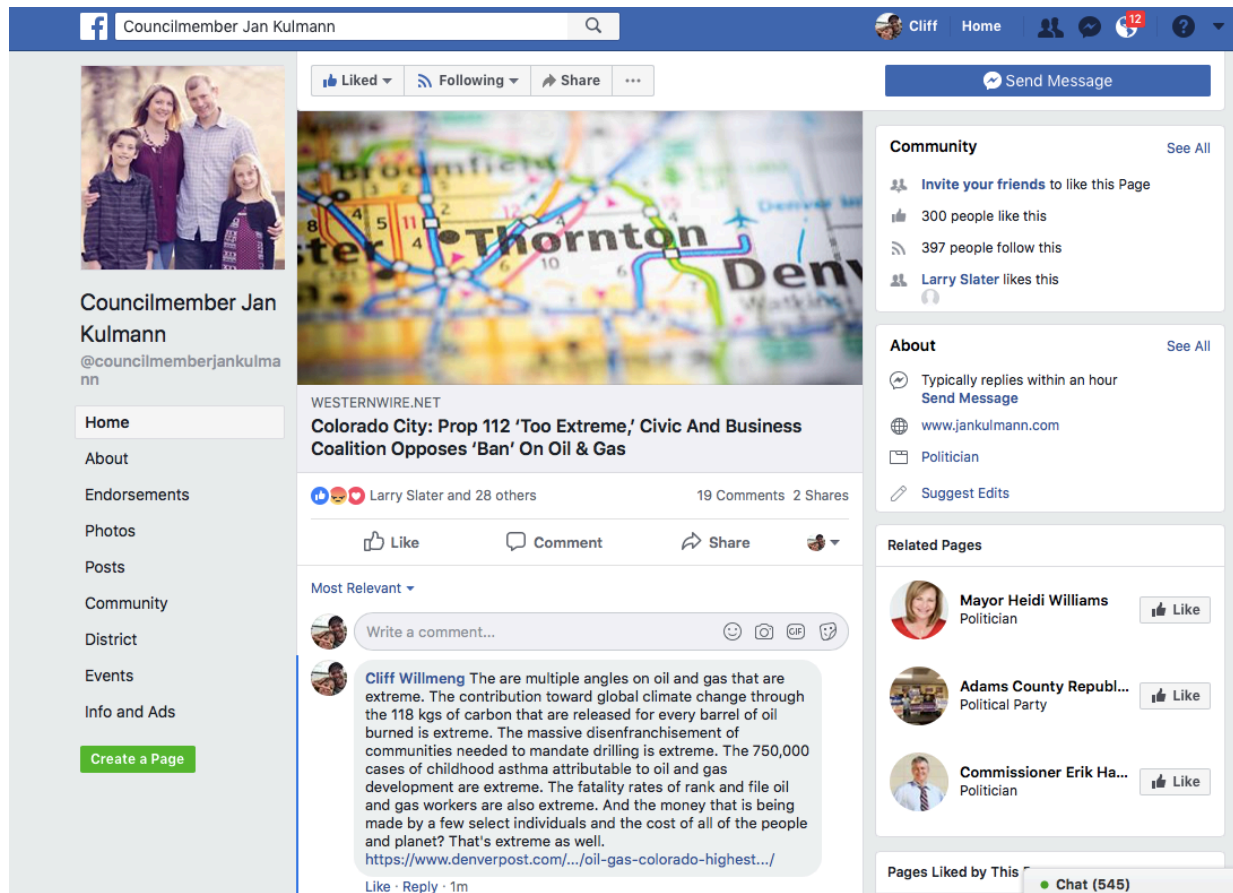
58. On September 18, 2018, Defendant Kulmann posted on her official Facebook page: "It's not often that I am vocal about state initiatives on this page. It's time to be bold. Proposition 112 is bad for [*sic*] Thornton and bad for Colorado. Thornton stands to lose jobs, not just in the energy sector but across hotels, restaurants, retail, and schools if this measure passes. There are better ways to partner with energy companies than to ban it's [*sic*] activity altogether and suffer the long term economic consequences." Included in her post, Defendant Kulmann linked to a news article that reported on the City of Thornton's City Council passing of a resolution opposing Proposition 112 entitled "Colorado City: Prop 112 'Too Extreme,' Civic and Business Coalition Opposes 'Ban' On Oil & Gas."

59. On October 6, 2018, Mr. Willmeng read Defendant Kulmann's September 18, 2018, post on her official Facebook page. Mr. Willmeng is a political candidate and activist against fracking. He has campaigned in favor of Proposition 112. As a registered nurse, Mr.

Willmeng has training and experience that has led him to believe that fracking has serious and irreversible health consequences for Coloradoans.

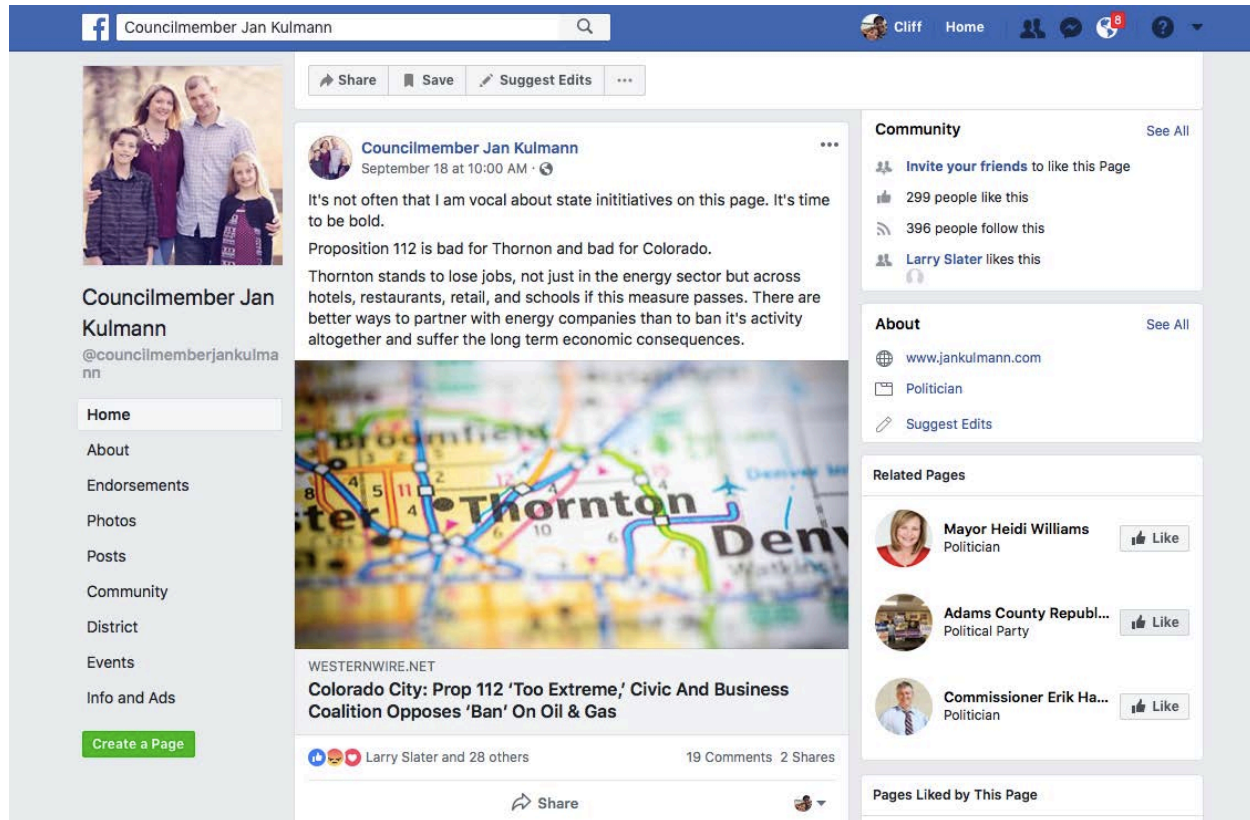
60. At 6:45 p.m., Mr. Willmeng commented on Defendant Kulmann's Facebook September 18, 2018, post, stating (and playing off the news article she posted, which stated that Proposition 112 is "Too Extreme"): "There are multiple angles on oil and gas that are extreme. The contribution toward global climate change through the 118 kgs of carbon that are released for every barrel of oil burned is extreme. The massive disenfranchisement of communities needed to mandate drilling is extreme. The 750,000 cases of childhood asthma attributable to oil and gas development are extreme. The fatality rates of rank and file oil and gas workers are also extreme. And the money that is being made by a few select individuals and the cost of all of the people and the planet? That's extreme as well." Mr. Willmeng's comment also linked to a Denver Post article entitled "Colorado's oil and gas executives push their way onto highest-paid list."

61. A screenshot of Mr. Willmeng's comment is below:



62. Less than forty minutes later, Defendant Kulmann deleted Mr. Willmeng's comment and banned him from commenting on her official Facebook page.

63. A screenshot of Defendant Willmeng's view of Defendant Kulmann's official Facebook page (captured at 7:25 p.m. on October 6, 2018) is below:



64. Defendant Kulmann banned Mr. Willmeng, and deleted his comment, in retaliation for his comment on her post. Particularly, Defendant Kulmann retaliated against Mr. Willmeng because he posted a comment that was pro-Proposition 112 and anti-fracking.

65. While browsing Facebook, Mr. Asher also read Defendant Kulmann's post. He sincerely believes that Proposition 112 will protect Coloradoans, his family, his neighbors, and his friends from significant harm.

66. On or about September 24, 2018, Mr. Asher commented on Defendant Kulmann's post expressing his opinion that Proposition 112 should be enacted into law. He also expressed alarm at the dangers of fracking in Colorado communities, the dangers associated with oil and gas extraction, and that communities of color and low-income communities were, more often than not, the ones being exposed to the dangers of fracking. Defendant Kulmann initially responded to Mr. Asher's comments and made statements that fracking cleans the air.

67. When Mr. Asher commented, he noticed that there were a number of other people's comments on Defendant Kulmann's post that were anti-fracking, in support of Proposition 112, and generally critical of Defendant Kulmann's opposition of Proposition 112.

68. Soon after Mr. Asher posted his comment and Defendant Kulmann responded, Defendant Kulmann deleted his comment (and her own comment about fracking cleaning the air) and banned him from commenting on her official Facebook page.

69. Defendant Kulmann banned Mr. Asher, and deleted his comment, in retaliation for his comment on her post. Particularly, Defendant Kulmann retaliated against Mr. Asher because the viewpoint of his posted comment was pro-Proposition 112 and anti-fracking.

70. Defendant Kulmann deleted every single comment that laid out facts demonstrating the dangers of fracking to Colorado communities. Defendant Kulmann did not delete any comments that supported her position. On October 8, 2018, the comments on Defendant Kulmann's post were nearly unanimous in support of her position in favor of Proposition 112:



Councilmember Jan Kulmann

September 18 at 10:00 AM · 🌐

It's not often that I am vocal about state initiatives on this page. It's time to be bold.

Proposition 112 is bad for Thornton and bad for Colorado.

Thornton stands to lose jobs, not just in the energy sector but across hotels, restaurants, retail, and schools if this measure passes. There are better ways to partner with energy companies than to ban it's activity altogether and suffer the long term economic consequences.



WESTERNWIRE.NET

Colorado City: Prop 112 'Too Extreme,' Civic And Business Coalition Opposes 'Ban' On Oil & Gas



30

19 Comments 2 Shares



Like



Comment



Share

All Comments ▾



Write a comment...



Press Enter to post.



Jay Winkelhake The local economy is a very important topic with respect to 112. But let's not forget national security and energy poverty around the world. Limiting domestic energy production will raise prices around the world and hurt many poor people. A vote for 112 hurts my family, your family, Thornton families, Colorado families, American families, and families all over the world. #NoOn112

Like · Reply · 2w



3



Jeremy T. Newton Thanks for supporting Colorado jobs! No on 112

Like · Reply · 2w



4



Therese Morin Colorado employs a tremendous number of energy jobs.

Good, high paying jobs - not Amazon at \$11 an hour.

Jobs for people that aren't college educated, which shouldn't be the only path to a decent living. Thousands of jobs will be lost if this nonse... See More



COMMONSENSEPOLICYROUNDTABLE.ORG

Increasing the Oil and Gas Setback Requirement to 2,500-feet in...

Like · Reply · 2w



4



Pam Woods Proposition 112 will create many unintended consequences, that will negatively impact all Coloradans. The industry can and should continue to operate responsibly for all of our benefit. Vote NO on 112!

Like · Reply · 2w



1



Jolene Gonzales Proposition 112 puts jobs at risk, makes about 85% of the state off limits to drilling, and threatens the \$31.4 billion a year to CO economy & \$1.2 billion in public revenue. If it passes, there will be trickle down affecting others industries due to t... See More



COLORADOSUN.COM

Proposition 112 and Amendment 74: Ballot measures respond to pitched...

Like · Reply · 2w



2



Heather Brainerd Hicks Colorado's constitution provides opportunity for out of state interests to use us as a testing ground without having to live with the consequences as we Coloradans surely will. This measure neither provides the safety communities are concerned about nor the balance in economic concerns that will greatly impact all sectors of Colorado, not just energy and energy workers.

Like · Reply · 2w

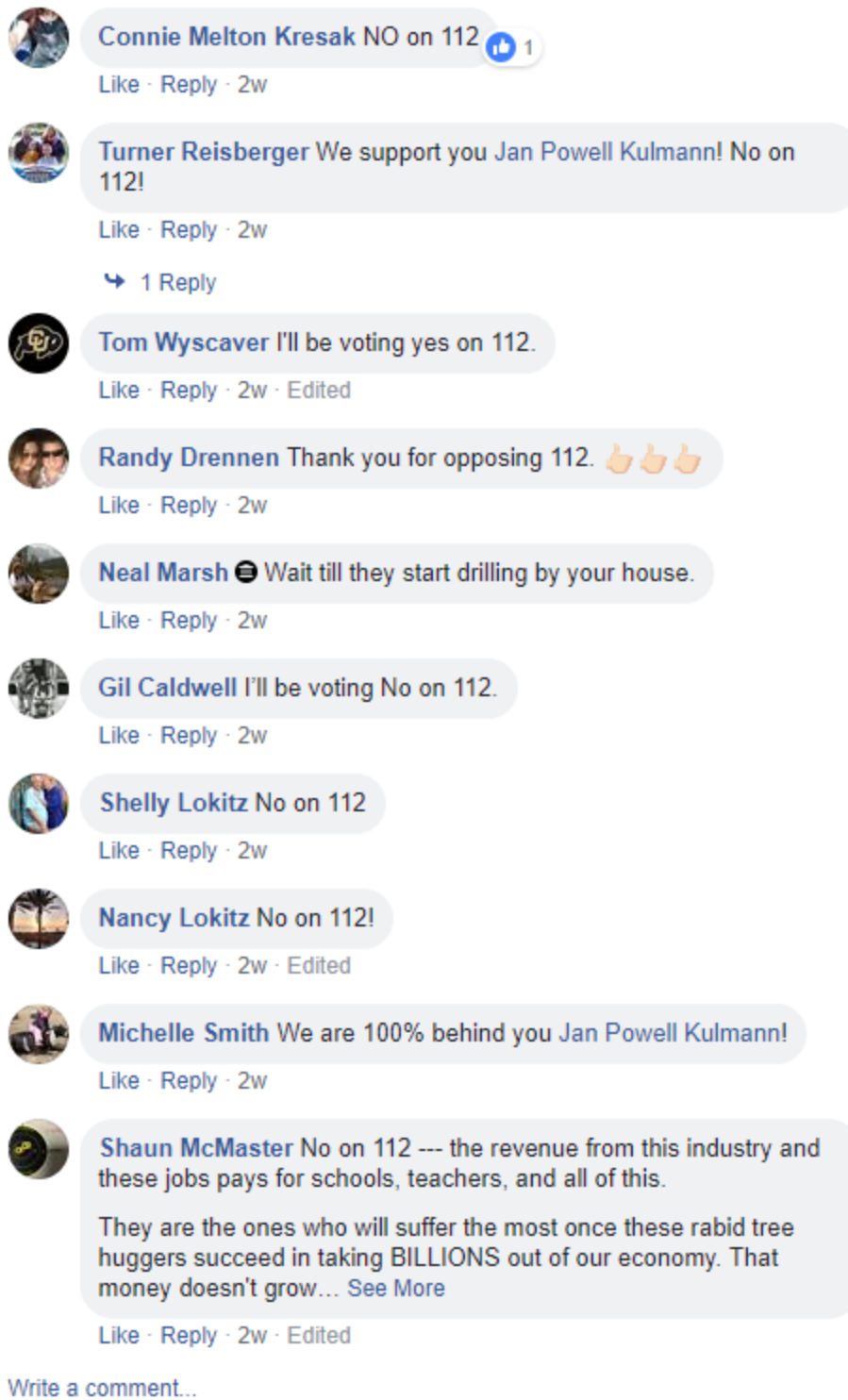


Steve Nelson No on 112



1

Like · Reply · 2w



71. Mr. Willmeng and Mr. Asher can no longer comment on posts of Defendant Kulmann's official Facebook page. They can no longer interact with other users in comment

threads. Each new Facebook post by Defendant represents another discussion Mr. Willmeng and Mr. Asher are foreclosed from participating in.

72. Defendant's banning of Mr. Willmeng and Mr. Asher, and the deletion of their comments and posts, is viewpoint-based censorship. The banning of Mr. Willmeng and Mr. Asher imposes an unconstitutional prior restraint on their participation in a designated public forum and their right to petition the government for redress of grievances.

STATEMENT OF CLAIMS FOR RELIEF

FIRST CLAIM FOR RELIEF

42 U.S.C. § 1983 – First Amendment

Free Speech Violation

(All Plaintiffs Against All Defendants)

73. Plaintiffs hereby incorporate all other paragraphs of this Complaint as if fully set forth herein.

74. At all times relevant to this Complaint, Defendant Kulmann was acting under the color of law.

75. Plaintiffs were engaged in First Amendment-protected speech in their commenting on Defendant Kulmann's official Facebook page.

76. Plaintiffs' speech was on a matter of public concern and did not violate any law.

77. By banning Plaintiffs from her official Facebook page, and deleting their comments, Defendant Kulmann prevented Plaintiffs from exercising their First Amendment rights, including their right to speak freely.

78. Defendant Kulmann's banning of Plaintiffs from commenting on posts on her official Facebook page, and the deletion of their comments, was a viewpoint-based restriction on speech.

79. Defendant Kulmann's official Facebook page is a designated public forum.

80. Defendant Kulmann's conduct violated clearly established rights belonging to Plaintiffs of which reasonable persons in Defendant Kulmann's position knew or should have known. Viewpoint-based prior restraint on speech has been widely known as being unconstitutional for more than eight decades. *See Near v. Minnesota*, 283 U.S. 697 (1931).

81. Defendant Kulmann engaged in this conduct intentionally, knowingly, willfully, wantonly, maliciously, and in reckless disregard of Plaintiffs' constitutional rights.

82. Defendant Kulmann, as Mayor *Pro Tem* and City Councilmember, is a final policymaker for Thornton, and her actions in this matter have the effect of Thornton custom, policy, and practice.

83. Defendant Kulmann's actions and/or omissions caused, directly and proximately, Plaintiffs to suffer damages. The acts and inactions of Defendant Kulmann caused Plaintiffs damages in that they were prevented from speaking freely on a matter of public concerns, among other injuries, damages, and losses.

SECOND CLAIM FOR RELIEF
42 U.S.C. § 1983 – First Amendment
Right to Petition the Government Violation
(All Plaintiffs Against All Defendants)

84. Plaintiffs hereby incorporate all other paragraphs of this Complaint as if fully set forth herein.

85. At all times relevant to this Complaint, Defendant Kulmann was acting under the color of law.

86. Plaintiffs were engaged in First Amendment-protected petitioning in their commenting on Defendant Kulmann's official Facebook page.

87. Plaintiffs' petitioning was on a matter of public concern and did not violate any law.

88. By banning Plaintiffs from her official Facebook page, and deleting their comments, Defendant Kulmann prevented Plaintiffs from exercising their First Amendment rights, including their right to petition the government for redress of grievances.

89. Defendant Kulmann's banning of Plaintiffs from commenting on posts on her official Facebook page and the deletion of their comments was a viewpoint-based restriction on their right to petition.

90. Defendant Kulmann's conduct violated clearly established rights belonging to Plaintiffs of which reasonable persons in Defendants' position knew or should have known.

91. Defendant Kulmann engaged in this conduct intentionally, knowingly, willfully, wantonly, maliciously, and in reckless disregard of Plaintiffs' constitutional rights.

92. Defendant Kulmann, as Mayor *Pro Tem* and City Councilmember, is a final policymaker for Thornton, and her actions in this matter have the effect of Thornton custom, policy, and practice.

93. Defendant Kulmann's actions and/or omissions caused, directly and proximately, Plaintiffs to suffer damages. The acts and inactions of Defendant Kulmann caused Plaintiffs damages in that they were prevented from petitioning their government for redress of their grievances, among other injuries, damages, and losses.

THIRD CLAIM FOR RELIEF
42 U.S.C. § 1983 – First Amendment
Retaliation
(All Plaintiffs Against All Defendants)

94. Plaintiffs hereby incorporate all other paragraphs of this Complaint as if fully set forth herein.

95. At all times relevant to this Complaint, Defendants were acting under the color of law.

96. Plaintiffs were engaged in First Amendment-protected speech and petitioning in their commenting on Defendant Kulmann's official Facebook page.

97. Plaintiffs' speech was on a matter of public concern and did not violate any law.

98. Defendant Kulmann responded to Plaintiffs' First Amendment-protected activity with retaliation, including but not limited to deleting their comments and banning them from commenting on Defendant Kulmann's official Facebook page.

99. Defendant Kulmann's retaliatory actions were substantially motivated by Plaintiffs' exercise of their First Amendment rights.

100. By banning Plaintiffs and deleting their comments, Defendant Kulmann sought to punish Plaintiffs for exercising their First Amendment rights, to silence their future speech, to stop them from petitioning, and to restrict their freedom of expression, along with the future speech and expression of others. Defendant Kulmann's retaliatory actions would chill a person of ordinary firmness from engaging in First Amendment-protected activity.

101. Defendant Kulmann's conduct violated clearly established rights belonging to Plaintiffs of which reasonable persons in Defendant Kulmann's position knew or should have known. Viewpoint-based prior restraint on speech has been widely known as being unconstitutional for more than eight decades. *See Near v. Minnesota*, 283 U.S. 697 (1931). Retaliation against an individual based on their First-Amendment-protected speech has been clearly established in the Tenth Circuit for almost two decades. *Worrell v. Henry*, 219 F.3d 1197, 1212 (10th Cir. 2000).

102. Defendant Kulmann, as Mayor *Pro Tem* and City Councilmember, is a final policymaker for Thornton, and her actions in this matter have the effect of Thornton custom, policy, and practice.

103. Defendant Kulmann engaged in this conduct intentionally, knowingly, willfully, wantonly, maliciously, and in reckless disregard of Plaintiffs' constitutional rights.

104. Defendant Kulmann's actions and/or omissions caused, directly and proximately, Plaintiffs to suffer damages. The acts and inactions of Defendant Kulmann caused Plaintiffs damages in that they were prevented from petitioning their government for redress of their grievances and were prevented from speaking freely on a matter of public concerns, among other injuries, damages, and losses.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that this Court enter judgment in their favor and against Defendants, and award them all relief as allowed by law and equity, including, but not limited to the following:

- a. Declaratory relief and injunctive relief;
- b. Compensatory damages as allowed by law, including, but not limited to those for past and future pecuniary and non-pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, medical bills, and other non-pecuniary losses;
- c. Punitive damages for all claims as allowed by law in an amount to be determined at trial;
- d. Pre-judgment and post-judgment interest at the highest lawful rate;
- e. Attorney's fees and costs; and
- f. Such further relief as justice requires.

DATED this 16th day of October 2018.

KILLMER, LANE & NEWMAN, LLP

s/ Andy McNulty

Andy McNulty
Tania Valdez
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