UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

JOELLE SILVER,

Plaintiff, Case No. 1:13-cv-00031

v.

CHEEKTOWAGA CENTRAL SCHOOL DISTRICT;
BRIAN J. GOULD, in his official capacity as President,
Board of Education, Cheektowaga Central School District;
and **DENNIS KANE**, individually and in his official capacity
as Superintendent of Schools, Cheektowaga Central School
District,

Defendants.

PLAINTIFF'S SUR-REPLY IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

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INTRODUCTION

Pursuant to this court's Decision and Order of April 26, 2013 (Doc. No. 15), Plaintiff, through counsel, hereby respectfully submits this sur-reply in further opposition to Defendants' motion to dismiss.

In their reply, Defendants decry Plaintiff's claims as "fanciful," asking this court to follow cases that do not present facts similar to those presented here. Indeed, no other court has "encountered similar facts."[1] (*Compare* Defs.' Reply at 2 [Doc. No. 11]).

Here, you have a school district that has created a forum for the non-curricular, personal speech of its teachers, but yet seeks to punish Plaintiff's speech based on its religious viewpoint—the most egregious form of content-based discrimination, *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829 (1995), that is impermissible in any forum, *Perry Educ. Ass'n v. Perry Local Educators*, 460 U.S. 37, 46 (1983), including a non-public forum, *see generally Nieto v. Flatau*, 715 F. Supp. 2d 650 (E.D.N.C. 2010) (holding that a speech restriction on a military base, a nonpublic forum, was viewpoint based as applied to the plaintiff's speech in violation of the First Amendment). Moreover, unlike the cases cited by Defendants, *none* of the speech at issue in this lawsuit was expressed as part of Plaintiff's instructional program. *See Marchi v. Bd. of Coop. Educ. Servs. of Albany*, 173 F.3d 469, 477 (2d Cir. 1999) (upholding restriction on teacher speech that "sufficiently intruded religious content into a curricular matter"). Moreover, because Defendants' compliance-with-the-Establishment-Clause-defense

[1] For example, even in *Roberts v. Madigan*, 921 F.2d 1047, 1059 (10th Cir. 1990), a case involving elementary school students and in which the court found that the offending actions and materials were used as part of the teacher's instructional program, the dissenting judge made this observation, which is particularly relevant here in light of the facts of *this* case: "[Defendants'] actions forbidding Mr. Roberts from reading his Bible during his fifth grade class' 15-minute silent reading period and ordering the removal of the two challenged books from his classroom library were acts of intolerance, lack of accommodation and hostility toward the Christian religion." *Id*. at 1059 (Barrett, J., dissenting)

presents a "constitutional justification," "a claim that this [court] is well-equipped to evaluate, [the court need] not accord [Defendants] the same deference as in other cases involving issues that school officials are uniquely qualified to handle." *Roberts*, 921 F.2d at 1057. Consequently, when Plaintiff's speech is viewed through the proper legal prism of the Establishment Clause—and not the hostile-toward-anything-religious Freedom From Religion Foundation lens, which apparently Defendants share—it is evident that no *reasonable* person would conclude that Plaintiff's personal, non-curricular postings violate the Establishment Clause. Indeed, to hold these remarkably innocuous (as well as personal and discreet) postings unlawful would turn the First Amendment on its head, requiring the government to be openly hostile toward *anything* religious. *See Capitol Square Rev. & Adv. Bd. v. Pinette*, 515 U.S. 753, 760 (1995) ("[P]rivate religious speech, far from being a First Amendment orphan, is as fully protected under the Free Speech Clause as secular private expression."); *see also Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.,* 508 U.S. 384, 400 (1993) (Scalia, J., concurring in the judgment) ("What a strange notion, that a Constitution which *itself* gives 'religion in general' preferential treatment (I refer to the Free Exercise Clause) forbids endorsement of religion in general.").

In sum, while Defendants do not want to directly admit it, what they nonetheless argue is that public school teachers such as Plaintiff have absolutely <u>*no*</u> constitutional right to freedom of speech while they are on school property. Plaintiff rejects this argument and respectfully urges the court to do the same. *See, e.g., Marchi*, 173 F.3d at 475 ("The directive is unquestionably a restraint on [the plaintiff teacher's] First Amendment rights."); *Perry Educ. Ass'n*, 460 U.S. at 44 (stating that "[t]he First Amendment's guarantee of free speech applies . . . within the school"). Indeed, Defendants' argument, which would force teachers (and school administrators as well) to surrender their constitutional right to freedom of speech upon accepting government

employment, is contrary to established law. *See Garcetti v. Ceballos*, 547 U.S. 410, 413 (2006) ("It is well settled that 'a State cannot condition public employment on a basis that infringes the employee's constitutionally protected interest in freedom of expression.'" (quoting *Connick v. Myers*, 461 U.S. 138, 142 (1983))); *Rankin v. McPherson*, 483 U.S. 378, 383 (1987) ("[A] State may not discharge an employee on a basis that infringes that employee's constitutionally protected interest in freedom of speech."); *City of San Diego v. Roe*, 543 U.S. 77, 80 (2004) (same).

In the final analysis, this case presents a unique set of facts that when viewed in light of the relevant constitutional principles at issue demonstrate that Defendants violated Plaintiff's fundamental rights through the enforcement of their draconian restrictions on Plaintiff's personal, non-curricular speech.

ARGUMENT

I. Plaintiff's First Amendment Claim.

Defendants assert that Plaintiff's characterization of her speech as "personal, non-curricular" is a legal conclusion and thus urge this court to conclude that <u>*anytime*</u> a teacher speaks in a school (whether the speech is part of her instructional program or not) the government has the authority to regulate that speech, including restricting the speech on the basis of its *viewpoint*. (*See* Defs.' Reply at 1 [Doc. No. 11]). But that is not the law (nor should it be).[2] *See, e.g., Roberts,* 921 F.2d at 1056 (discussing the applicable law and "noting that 'neither

[2] In their reply, Defendants accuse Plaintiff of "mis-stating" what the Fourth Circuit stated in footnote 10 of *Lee v. York Cnty. Sch. Divs.*, 484 F.3d 687 (4th Cir. 2007), and making the further impertinent assertion that Plaintiff's "use of legerdemain speaks volumes." (Defs.' Reply at 5-6 [Doc No. 11]). But here is what the Fourth Circuit said in that footnote:

> Under *Tinker*, the School Board would not be able to regulate Lee's speech if it was unrelated to the curriculum and did not "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school." *Tinker*, 393 U.S. at

students nor teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.'" (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969))).

Consider further the implications of the rule of law that Defendants urge this court to adopt. Pursuant to Defendants' legal theory, during the election season, for example, the School District could permit teachers to display campaign posters in their classrooms endorsing their favorite Democrat candidate for public office, but prohibit teachers from displaying similar posters of Republican candidates. Under Defendants' proposed theory of the Constitution, what would prevent this government speech restriction? The answer: nothing. *But see W.V. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) ("If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion.") (emphasis added). And if teachers have absolutely *no* right to freedom of speech while on school property and there is *no* constitutional prohibition on the government conveying a message of hostility toward religion, as Defendants also suggest (*see* Defs.' Reply at 3 [stating that the "fallacy of [Plaintiff's] position is exposed when we recognize that *all* corrective actions taken to assure that individual teachers do not teach religion must be aimed at specific religions or value systems being taught" (emphasis

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> 509, 89 S. Ct. 733 (internal quotation marks omitted). Because, as explained *infra,* Lee's speech *in this dispute was curricular in nature*, we are obliged to apply the *Pickering-Connick* standard as articulated in *Boring v. Buncombe County Board of Education,* 136 F.3d 364 (4th Cir.1998) (en banc).

Lee, 484 F.3d at 694, n.10 (emphasis added). And the point the Fourth Circuit is making here is precisely the point for which it was cited by Plaintiff. (Pl.'s Opp'n at 13-14 [Doc. No. 10]); *see also Roberts*, 921 F.2d at 1057 ("[I]f the speech involved is not fairly considered part of the school curriculum or school-sponsored activities, then it may only be regulated if it would 'materially and substantially interfere with the requirements of appropriate discipline in the operation of the school.'" (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 509 (1969))).

added)] [Doc. No. 11]), then what would prevent a public school district from requiring its teachers, under penalty of dismissal, to respond to any student inquiry about religion as follows: "*The school district, as a government entity, does not believe that religion has anything beneficial to contribute to your education so even the word 'religion' is banned during the school day. I would ask that you refrain from asking any more questions that reference religion.*" Indeed, that is essentially what Defendants have done here.[3]

Consider also some of the *offending* postings at issue in this case: a small poster that says, "Be on guard. Stand true to what you believe. Be courageous. Be strong. And everything you do must be done in love"; a *very small* posting of a famous quote from President Ronald Reagan that mentions "God"; and small, handwritten "sticky notes" containing inspirational Bible quotes that Plaintiff discreetly displayed on the back side of her desk. (*See* Compl. at ¶¶ 25, 27, 31). Is there anyone other than perhaps the Freedom From Religion Foundation and Defendants that would *seriously* consider these items to be an impermissible, government-endorsement of religion? *See, e.g., ACLU v. Mercer Cnty.,* 432 F.3d 624, 638 (6th Cir. 2005) (upholding the public display of the Ten Commandments and stating that the court's "concern is that of the reasonable person. And the ACLU, an organization whose mission is 'to ensure that . . . the government [is kept] out of the religion business,' does not embody the reasonable person").

In the final analysis, there is no basis for this court to conclude as Defendants' motion suggests that Plaintiff surrenders her right to freedom of speech upon accepting employment with the School District. Additionally, there is no basis for this court to conclude that Plaintiff's

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[3] In Defendants' "counseling letter," Defendant Kane stated, "I am also directing you to refrain from all other forms of communication with students during the school day (whether verbal, email, texting, written, etc.) that would conflict with your duty to show complete neutrality toward religion and to refrain from promoting religion or entangling yourself in religious matters." (Compl. at ¶ 36).

postings constitute the impermissible teaching of religion in a public school such that they violate the Establishment Clause.[4]

II. Plaintiff's Equal Protection Claim.

Defendants assert that Plaintiff's "reliance upon Mosley is misplaced and her failure to bring Bronx Household of Faith to this Court's attention is likely sanctionable." (Defs.' Reply at 3 [Doc. No. 11]). As noted in Plaintiff's Sur-Reply Motion, there is a significant problem with Defendants' bold assertion (and accusation) regarding the Second Circuit's holding in *Bronx Household of Faith v. Cmty. Sch. Dist. No. 10*, 127 F.3d 207, 217 (2d Cir. 1997). And that problem is the U.S. Supreme Court's holding in *Good News Club v. Milford Cent. Sch. Dist.*, 533 U.S. 98 (2001).

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[4] This is a conclusion that this court can and should reach without deference to Defendants' misguided view of the Establishment Clause. *See Roberts*, 921 F.2d at 1057. As noted in Plaintiff's motion for leave to file this sur-reply (Doc. No. 13) (hereinafter "Sur-Reply Motion"), Defendants made the following impertinent—and factually incorrect—assertion in their reply:

> Mr. Muise appears to have cut-and-pasted from another brief. Indeed, he decries "Defendants' invocation of the oft-repeated reference to 'the separation of church and state'" – even though Defendants' papers *do not even once use that phrase*.

(Defs.' Reply at 3 [Doc. No. 11]) (emphasis added). As noted in the Sur-Reply Motion, Defendants invoke this extra-constitutional phrase *repeatedly* in their "counseling letter," including in the letter's *opening* paragraph:

> This counseling letter touches upon your rights and responsibilities under the First Amendment of the U.S. Constitution, especially as they relate to the expression of your religious beliefs and the competing requirement that government (made up of government employees) maintain a *separation of church and state*.

(Counseling Letter [Doc. No. 8-3] at 1[emphasis added]; *see also* Counseling Letter at 2 ["Since *Everson,* the Supreme Court has consistently interpreted the Establishment Clause . . . as requiring the *separation of church and state* . . . ."] [emphasis added]; Counseling Letter at 3 [referring to "the required *separation of church and state*"] [emphasis added]). In their opposition to Plaintiff's Sur-Reply Motion, Defendants graciously "accept this clarification." (Defs.' Opp'n at p. 2 of 5 [Doc. No. 14]). But just "accepting" the "clarification" does not change the fact that Defendants have a distorted view of the Establishment Clause, *ACLU v. Mercer Cnty.,* 432 F.3d at 638-39 ("[T]he ACLU makes repeated reference to 'the separation of church and state.' This extra-constitutional construct has grown tiresome. The First Amendment does not demand a wall of separation between church and state.") (citations omitted), and it was this distortion that was the motiving factor for the draconian and unconstitutional speech restrictions at issue here.

In *Bronx Household of Faith*, the Second Circuit dismissed the equal protection argument advanced by a religious organization that was excluded from a forum based on the religious nature of its speech because the court concluded (incorrectly) that "[t]here is no fundamental right of freedom of speech in a limited forum from which various types of speakers and subjects are properly excluded." *Bronx Household of Faith,* 127 F.3d at 217. In *Good News Club*, the Supreme Court noted that "[t]here is a conflict among the Courts of Appeals on the question whether speech can be excluded from a limited public forum on the basis of the religious nature of the speech," citing *Bronx Household of Faith* as supporting the position that "a ban on religious services and instruction in the limited public forum was constitutional." *Good News Club*, 533 U.S. at 105-06. The Supreme Court resolved the conflict by disagreeing with and overruling the position held by the Second Circuit. *See id*. at 120. Consequently, the assertion by the Second Circuit in *Bronx Household of Faith* that no "fundamental right" was implicated by the speech restriction was incorrect, and so too then was its conclusion that there could be no equal protection violation in light of the principle announced in *Police Dep't of the City of Chi. v. Mosley*, 408 U.S. 92, 96 (1972) ("[U]nder the Equal Protection Clause, not to mention the First Amendment itself, government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views.") (emphasis added). Indeed, it is a fundamental principle of constitutional law that when the government *discriminates* in a way that impinges upon the exercise of a *fundamental right*, as in this case, it violates the equal protection guarantee of the Fourteenth Amendment. *See Plyler v. Doe*, 457 U.S. 202, 216-17 (1982) ("The Equal Protection Clause was intended as a restriction on [government] action inconsistent with elemental constitutional premises. Thus we have

treated as presumptively invidious those classifications that disadvantage a "suspect class," *or that impinge upon the exercise of a 'fundamental right*.'") (emphasis added).

Thus, even in a limited public forum—such as the one created here by Defendants for the personal, non-curricular speech of its teachers and administrators—the government cannot discriminate against a speaker based on the religious nature of her speech. Doing so not only violates the First Amendment's right to freedom of speech, but based on the principle expressed in *Mosley*, this discrimination violates the Equal Protection Clause as well.

In *Widmar v. Vincent*, 454 U.S. 263 (1981), for example, the Court held that a state university, which made its facilities generally available for the activities of *registered student groups* (similar to this case, the university's facilities were not open to the general public), may not close its facilities to a student group based on the content of the group's speech. *Id*. at 264-65, 267, n.5. The Court stated, "Through its policy of accommodating their meetings, the University has created a forum generally open for use by student groups. Having done so, the University has assumed *an obligation to justify its discriminations and exclusions under applicable constitutional norms. . . even if it was not required to create the forum in the first place*." *Id*. at 267-68 (emphasis added).

Consequently, once the government has opened a forum to certain speakers, it must respect the lawful boundaries it has itself set.[5] One such "boundary" is that the government may

[5] Certainly, if Defendants wanted to remove all personal expressive items from the School District's classrooms and offices, thereby closing the forum to all personal, non-curricular speech, they could do so. Thus, Defendants are not required to surrender control of the School District's property over to the teachers and administrators. However, once Defendants create this forum, they cannot pick and choose based on viewpoint which personal, non-curricular messages are acceptable and which are not. Allowing government officials such unbridled authority to restrict speech would obscure that "fixed star" in our constitutional constellation that prohibits all government officials, "high or petty," from "prescrib[ing] what shall be orthodox in politics, nationalism, religion, or other matters of opinion." *W.V. State Bd. of Educ. v. Barnette*,

not discriminate against speech on the basis of its religious viewpoint, *See Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 806 (1985), as Defendants have done here. This discrimination violates the Equal Protection Clause, not to mention the First Amendment itself.

III. The Official Capacity Claims and Qualified Immunity.

There is no dispute that "a judgment against a public servant 'in his official capacity' imposes liability on the entity that he represents." *Brandon v. Holt*, 469 U.S. 464, 471-72 (1985). And "when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury . . . the government as an entity is responsible under § 1983." *Monell v. N.Y.C. Dep't of Soc. Servs.*, 436 U.S. 658, 694 (1978).

Here, the speech restrictions at issue were conveyed to Plaintiff by way of a letter signed by Defendant Kane, the superintendent for the School District. Consequently, Defendant Kane is the only government official sued in his *individual* capacity at this stage of the litigation based on the facts known to date. And whether the government entity responsible for the alleged violations in this case is the School District itself, which was named in the lawsuit, or the Board of Education, which was sued by way of the "official capacity" claim against Defendant Gould, who was listed on the "counseling letter" as the President of the Board of Education, is not clear. If Defendants are willing to stipulate that the School District is the only entity responsible for the speech restrictions (and thus the entity that would be liable for the constitutional claims at issue), then there is no further need for Defendant Gould to be named in his official capacity at this stage of the litigation (*n.b.*, other facts may yet come to light to make him and/or other school officials personally liable). But the fact remains, changing the caption to exclude an official

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319 U.S. at 642.

capacity claim does not change anything substantively (again, assuming that the School District is the only responsible entity).

Regarding their qualified immunity argument, Defendants claim that Plaintiff "overlooks the fact that injunctive relief is not available against Superintendent Kane in his individual capacity," citing one unpublished case that they claim supports this proposition. (Defs.' Reply at 9 [Doc. No. 11]). However, the Second Circuit has held that "the defense of qualified immunity protects only individual defendants sued in their individual capacity, not governmental entities, *and it protects only against claims for damages, not against claims for equitable relief*." *Rodriguez v. N.Y.C.*, 72 F.3d 1051, 1065 (2d Cir. 1995) (internal citation omitted) (emphasis added).

CONCLUSION

For the foregoing reasons and those set forth more fully in Plaintiff's memorandum in opposition, Defendants' motion to dismiss should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 6, 2013, a copy of the foregoing was filed electronically. Notice of this filing will be sent to all parties for whom counsel has entered an appearance by operation of the court's electronic filing system. Parties may access this filing through the court's system.

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