UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

DEBORAH ALEXANDER, et al.,	:	
	:	No.: 1:24-cv-2444-DG-JRC
Plaintiffs,	:	
	:	
v.	:	
	:	
TAJH SUTTON, et al.,	:	
	:	
Defendants.	:	

PLAINTIFFS' MEMORANDUM IN REPLY TO DOE DEFENDANTS' OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION

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INTRODUCTION

Defendants' concession that CEC 14's speech policies should be enjoined is irreconcilable with their claim that the challenged portions of Regulation D-210 are somehow *not* viewpoint discriminatory. As a matter of First Amendment doctrine and common sense, there is no functional difference between the CEC Community Guidelines' prohibition of "disrespect," Dkt. 13-9 at 2, and Regulation D-210's prohibition of "derogatory or offensive comments," Dkt. 13-12, § II.D.[1] Indeed, Defendants admit that Regulation D-210 was in part enacted to oppose allegedly "racist views." Dkt. 32 at 5. How is the regulation of "views" *not* viewpoint-based? At the very least, Regulation D-210's challenged aspects fail strict scrutiny as content-based speech restrictions. Defendants' analogy to the government employee speech doctrine is inapposite. Plaintiffs are not government employees, they are elected to public office precisely *because* of their views. And even employees retain the freedom to speak in their private capacity, something Regulation D-210 forbids.

Defendants also fail to undo their various admissions that Regulation D-210 is, indeed, vague and overbroad nature, imposing "abstract" notions of "safe[ty]." Exh. A at 26. And Defendants do not deny that Regulation D-210's purpose is to change the way that people speak. They cannot now deny that it does, in fact, have this impact, chilling Plaintiffs and causing them to self-censor.

Plaintiffs do not doubt that Defendants earnestly believe that the speech *they* deem offensive is harmful. But the Constitution forbids the imposition of official orthodoxy—even for benevolent reasons, just as it forbids vague and overbroad restrictions on speech. Plaintiffs' motion should be granted in its entirety.

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[1] As Defendants acknowledge, Dkt. 32 at 7-8, Plaintiffs only challenge Regulation D-210's regulation of particular forms of speech. *See* Dkt. 13 at 2 (noting bases of D-210 applications to be enjoined).

ARGUMENT

I. DEFENDANTS CONCEDE THAT THIS COURT SHOULD ENJOIN CEC 14'S UNCONSTITUTIONAL SPEECH POLICIES

Defendants "do not oppose items 1-3 in Plaintiffs' proposed preliminary injunction concerning how CEC 14 meetings are conducted and access to the CEC 14's X [] account." Dkt. 32 at 2 n.2. Helpfully, they even submit additional evidence confirming their unconstitutional discrimination against Plaintiffs. *See e.g.*, Dkt. 32-4. The matter is conceded.

II. THIS IS NOT AN EMPLOYMENT RETALIATION CASE

Defendants assert that D-210 properly regulates Plaintiffs' speech for "actual or potential disruption," Dkt. 32 at 12, per the *Pickering* test for First Amendment employment retaliation cases as in *Jeffries v. Harleston*, 52 F.3d 9 (2d Cir. 1995).

This is simply wrong. Plaintiffs are elected officials, not employees. "When 'the State is not acting in a traditional employer role,' 'the *Pickering* test is inapplicable.'" *Warren v. DeSantis*, 90 F.4th 1115, 1133 (11th Cir. 2024) (quoting *Harris v. Quinn*, 573 U.S. 616, 652 (2014)); *see also Velez v. Levy*, 401 F.3d 75, 95, 97 (2d Cir. 2005) (refusing to apply *Pickering* to elected officials); *Boquist v. Courtney*, 32 F.4th 764, 780 (9th Cir. 2022); *Phelan v. Laramie Cnty. Cmty. Coll. Bd. of Trs.*, 235 F.3d 1243, 1247 (10th Cir. 2000); *Jenevein v. Willing*, 493 F.3d 551, 558 (5th Cir. 2007); *see also Werkheiser v. Pocono Twp.,* 780 F.3d 172, 178 (3d Cir. 2015) ("[m]any of the reasons for restrictions on employee speech appear to apply with much less force in the context of elected officials"). Elected officials represent their constituents by speaking disruptively; it is *their* job, in a functioning democracy, to determine the government's interests and to speak accordingly.

In any event, there is nothing "disruptive" about presenting viewpoints that some people find objectionable. And Defendants supply no evidence of disruption. They merely note that "several" parents and students complained about Plaintiff

Maron's speech and the newspaper article itself inspired over 300 online comments. Dkt. 32 at 14. "Actual disruption" for Defendants apparently means counter-speech. Elected CEC members do not have fewer First Amendment rights than students, who cannot be punished for the disruptive potential of their off-campus speech. *Mahanoy Area Sch. Dist. v. B.L.*, 141 S. Ct. 2038 (2021). Regulation D-210 is subject to ordinary First Amendment analysis—which it fails.

III. REGULATION D-210 IMPROPERLY RESTRICT PLAINTIFFS' PROTECTED SPEECH ON THE BASIS OF VIEWPOINT AND CONTENT

To the extent that they even approximate categories of unprotected speech, Regulation D-210's restrictions miss the mark. For example, the Supreme Court classifies true threats as "statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." *Virginia v. Black*, 538 U.S. 343, 359 (2003). The government can only punish threats if the speaker acted at least "recklessly," "consciously accept[ing] a substantial risk of inflicting serious harm," lest the risk of prosecution "chill too much protected, non-threatening expression." *Counterman v. Colorado*, 143 S. Ct. 2106, 2117-18 (2023). In contrast, under D-210, Defendants can discipline, suspend, or remove CEC members for speech that merely "causes others to have concern for their personal safety," Dkt. 13-12, § II.C—regardless of the speaker's mental state. This is strict liability, not recklessness.

D-210 also bans "abusive" or "unnecessarily aggressive" speech. *Id.*, § II.C. But "the First Amendment's mantle covers speech that is vituperative, abusive and inexact." *Counterman*, 600 U.S. 66, 143 S. Ct. at 2121 (citation and internal quotation marks omitted). Many of what most people would consider the worst forms of abuse and aggression are protected. *See, e.g.*, *Snyder v. Phelps*, 562 U.S. 443, 469 (2011) (homophobic slurs directed at the dead during funerals); *Black*, 538

U.S. at 347-48, 360 (cross burning); *Rankin v. McPherson*, 483 U.S. 378, 381, 392 (1987) (vocally wishing for politician's assassination).

Likewise, "disrespect towards children," Dkt. 13-12, § II.D, is protected content. *See Mahanoy*, 141 S. Ct. at 2043. As is "derogatory or offensive" speech, Dkt. 13-12, § II.D. *See Texas v. Johnson*, 491 U.S. 397, 414 (1989); *Wandering Dago, Inc. v. Destito*, 879 F.3d 20, 33 (2d Cir. 2018). As is speech that "expose[s] private or personally identifiable information," Dkt. 13-12, § II.E. *See Fla. Star v. B. J. F.*, 491 U.S. 524, 526, 541 (1989); *United States v. Cook*, 472 F. Supp. 3d 326, 335 (N.D. Miss. 2020).

The First Amendment protects Plaintiffs' speech, which Regulation D-210 goes too far in restricting. "Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed." *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015). "Viewpoint discrimination is . . . an egregious form of content discrimination." *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829 (1995).

The Supreme Court has squarely rejected Defendants' suggestion that a regulation is not viewpoint neutral when the government applies it "to speech of all political and ideological views." Dkt. 32 at 19. The idea that debate on a matter of public concern "is not skewed so long as multiple voices are silenced is simply wrong." *Rosenberger*, 515 U.S. at 831-32. The "exclusion of several views on [an issue] is just as offensive to the First Amendment as exclusion of only one." *Id.* at 831. A regulation that is "mandat[es] only one sort of comment is not viewpoint neutral. To prohibit all sides from criticizing their opponents makes a law more viewpoint based, not less so." *Matal v. Tam*, 582 U.S. 218, 249 (2017) (Kennedy, J., concurring). As a result, the First Amendment guarantees "more than the right to

identify with a particular side. It protects the right to create and present arguments for particular positions in particular ways, as the speaker chooses." *Id.*

Defendants suggest, but do not develop an argument, that D-210 only regulates speech as to manner. Dkt. 32 at 17. The suggestion is inapposite. This is not a case where the government asks demonstrators to express themselves in a manner that doesn't push kids into the middle of the street. *Santer v. Bd. of Educ. of E. Meadow Union Free Sch. Dist.*, 23 N.Y.3d 251, 269 (2014). D-210's restrictions are "justified [by]] the content of the regulated speech," *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (internal quotation marks and citations omitted), drawing their "distinctions based on the message a speaker conveys." *Reed*, 576 U.S. at 163.

As noted earlier, D-210's challenged provisions turn exclusively not merely upon the content of speech, e.g., speech about people, but viewpoints, e.g., speech that is "abusive" rather than laudatory, "disrespect[ful]," not respectful. This is unsurprising. Defendants *admit* that D-210 was created specifically to enable the DOE to remove CEC members who "promoted racist views." Dkt. 32 at 12-13; *cf. R.A.V. v. St. Paul*, 505 U.S. 377, 391-92 (1992) (striking down hate-speech statute as impermissible viewpoint discrimination). And Defendants' own evidence shows that they intend to broadly enforce D-210 in a viewpoint discriminatory way. *See* Dkt 31-10 (pushing for discipline against CEC members who insult students on their private X account and who address their political enemies by name); Dkt. 32-11 (pushing for discipline against CEC members who do not "conduct themselves in a positive manner" or who allowed public commentators to freely speak "abusive, derogatory and offensive language").

"[A]ny restriction based on the content of the speech must satisfy strict scrutiny . . . and restrictions based on viewpoint are prohibited." *Pleasant Grove City v. Summum*, 555 U.S. 460, 469 (2009) (citations omitted). The prohibition of viewpoint

discrimination should end the inquiry. But D-210 also fails the strict scrutiny reserved for other content-based discrimination.

The government lacks an interest in shielding people from being offended. The First Amendment does not tolerate a heckler's veto. "Speech cannot be . . . punished or banned, simply because it might offend a [crowd]." *Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123, 134-35 (1992) (citation omitted). Nor does D-210 provide "the least restrictive means" available "to promote a compelling Government interest." *Evergreen Ass'n v. City of N.Y.*, 740 F.3d 233, 246 (2d Cir. 2014) (citation and internal quotation omitted). Mere narrow tailoring is insufficient. Defendants claim that D-210 is narrowly tailored, despite its incredibly broad reach, covering Plaintiffs' speech at traditional public forums, designated public forms and private settings unconnected with the CEC. But even Defendants never suggest that it is the least restrictive means.

In truth, many less restrictive ways exist to, for instance, ensure decorum at CEC meetings and keep students from discrimination and harassment. For example, Defendants could—in some cases have—set time limits for speakers at meetings, require speakers discuss school-related topics, or ban unprotected forms of speech such as true threats or discriminatory harassment. *See* Exh. A (Hr'g Transcript) 14:10-15:9. What they cannot do is ban all offensive speech, unnecessary aggressive speech, identifying speech, and so forth, on the chance that some of it might be unprotected threats or harassment. That is neither narrowly tailored nor the least restrictive means.

Defendants' reliance on a handful of cases that addressed speech in a limited public forum is unavailing. D-210's reach is far broader. In *Arnold v. Ulatowski*, No. 5:10-cv-1043 (MAD/ATB), 2012 WL 1142897 (N.D.N.Y. Apr. 4, 2012), the plaintiff spoke out of turn after the meeting closed, and his remarks were largely irrelevant

to the purposes of the forum. Defendants misread *Dyer v. Atlanta Indep. Sch. Sys.*, 426 F. Supp. 3d 1350, 1360 (N.D. Ga. 2019), *aff'd*, 852 F. App'x 397 (11th Cir. 2021). There, the Eleventh Circuit upheld the expulsion of an offensive speaker not because he was offensive, but because of his *behavior*. 852 F. App'x at 402. Finally, the outlier opinion of *Moms for Liberty v. Brevard Pub. Schs.*, 582 F. Supp. 3d 1214 (M.D. Fla. 2022), denying a preliminary injunction against viewpoint-discriminatory rules for speech at a schoolboard meeting, is simply wrong, and inconsistent with Supreme Court precedent and precedent of other courts, such as *Ison v. Madison Local Sch. Dist. Bd. of Educ.*, 3 F.4th 887 (6th Cir. 2021).[2]

IV. REGULATION D-210 IS HOPELESSLY VAGUE AND OVERBROAD

A regulation is impermissibly vague "if it fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits" or "authorizes or even encourages arbitrary and discriminatory enforcement." *Hill v. Colorado*, 530 U.S.703, 732 (2000) (citation omitted). It is overbroad when "a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *Adams v. Zelotes*, 606 F.3d 34, 37-38 (2d Cir. 2010) (citations and quotation marks omitted).

None of D-210's broad, subjective categories are defined terms. *See* Dkt. 13-12 at 1-2 (definition section). Defendants have to cite a separate regulation about pupil behavior to try to explain their terms. *See* Dkt. 32 at 20-21. When asked by this Court, DOE's own counsel could not define words like "abusive" and "disparaging" without more research, lacked "specifics," and could only "talk[] in the abstract" about what qualified as safe. Exh. A at 23:8-15, 25:3-12, 26:16-23. DOE's counsel

[2] It is also not the last word in that case. The cited affirmance was not on the merits, but for no abuse of discretion. The Eleventh Circuit heard argument in the subsequent merits decision appeal, No. 23-10656, on January 23, 2024.

also admitted that whether "any communication that's had at one of these [CEC] meetings" can be banned without unconstitutional viewpoint discrimination "is really very subjective. It's quite subjective." Exh. A at 30:15-25. But according to Defendants, this subjectiveness means that this Court should allow them to enforce their policies subjectively, rather than require them to legislate "objective, workable standards" as precedent requires. *See Minn. Voters All. v. Mansky*, 138 S. Ct. 1876, 1891 (2018).

Defendants enforce a regulation that not even their own counsel can define. Plaintiffs lack reasonable notice about what D-210 proscribes and, through its broad terminology, D-210 already chills substantial amounts of protected expression. *See* Dkt. 13-3, ¶ 38; Dkt. 13-4, ¶ 37; Dkt. 13-5, ¶¶ 21-23.

V. PLAINTIFFS ARE IRREPARABLY HARMED

Defendants appear to deny the fact that pre-enforcement actions are a well-established feature of First Amendment law. It does not matter that Defendants have not yet pursued Harlan, or that Defendants eventually abandoned a D-210 claim against Alexander, or that they have not *yet* expelled Maron on a charge that they sustained. What matters is that these plaintiffs are all quite reasonably chilled from speaking as they wish, because Defendants vigorously investigate and enforce a regulation that is designed and intended to influence their speech. *Brokamp v. James*, 66 F.4th 374, 388 (2d Cir. 2023). Defendants can hardly deny that D-210 does not have its desired effect of changing how people talk.

VI. THE INJUNCTION IS IN THE PUBLIC INTEREST

Defendants do not challenge the notion that enforcing the Constitution is in the public interest per se. Their quarrel with the public interest of an injunction against Regulation D-210 is thus really a quarrel with the wisdom and value of the First Amendment itself.

There is nothing wrong with debating the wisdom and value of the First Amendment, a debate that the First Amendment protects. But this isn't the time and place for it. Since Plaintiffs are likely to succeed on the merits of their First Amendment claim, it follows that they are irreparably harmed, and that an injunction against that harm will serve the public interest—even if Defendants believe the First Amendment goes too far in restricting their power.

In any event, Defendants' parade of horribles is illusory. This injunction would allow Defendants to implement their remaining policies and target actual conduct or unprotected speech, such as true threats or incitement to violence. Defendant DOE, for example, could discipline CEC members who engage in "conduct that subjects any person or entity to discrimination or harassment," Dkt. 13-12, § II.B, or who "use their position to personally or financially benefit themselves," *id.*, § II.H. Defendants could also regulate speech at CEC meetings, social media accounts, and elsewhere through reasonable time, manner, and place restrictions. Exh. A at 14:8-15:5.

This limited injunction is in the public interest and would not bring "chaos," Exh. A at 30:21-31:3, unless by "chaos" Defendants mean free speech. DOE insists that a limited injunction "goes too far" because it permits speakers "to engage in verbal abuse, aggressive, intimidating, derogatory, offensive, disrespectful and threatening speech without fear of investigation, reprimand or discipline by DOE." Dkt. 20 at 4; *see also* Dkt. 32-11. Indeed, because the Constitution protects the right of the people to speak aggressive speech, derogatory speech, offensive speech, disrespectful speech, and most of the other forms of speech that DOE names. Defendants do not try to conceal that their goal is denying speech rights to those they disfavor. The First Amendment does not permit government officials to misuse their power this way.

CONCLUSION

This Court should grant Plaintiffs' motion for preliminary injunction.

Dated: May 15, 2024

Respectfully submitted,

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