IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

DOUGLAS MARSHALL, SIMON CAMPBELL, ROBERT ABRAMS, AND TIMOTHY DALY, Plaintiffs, v. PETER C. AMUSO, et al. Defendants.	: : : : : : : : :	Civil Action No. 2:21-cv-04336 Honorable Gene E.K. Pratter

DEFENDANTS' REPLY BRIEF IN SUPPORT OF THEIR MOTION TO DISMISS PLAINTIFFS' COMPLAINT PURSUANT TO FED. R. CIV. P. 12(b)(6)

Defendants, Pennsbury School District, Michael P. Clarke, Esq., Peter C. Amuso, Esq., Cherrissa Gibson, Christine Toy-Dragoni, Joshua Waldorf, Sherwood (Chip) Taylor, Howard Goldberg, T.R. Kannan, Michael Pallotta, Linda Palsky, Gary Sanderson, Debra Wachspress and Ann Langtry ("Defendants"), by and through their attorneys, Sweet, Stevens, Katz & Williams LLP, hereby submit this Reply Brief in Support of their Motion to Dismiss Plaintiffs' Complaint pursuant to Rule 12(b)(6), Federal Rules of Civil Procedure. The arguments set forth herein will be limited to those arguments raised in Plaintiffs' Brief in Opposition (ECF 55) that were not fully addressed in Defendants' Brief in Support.

I. ARGUMENT

A. Individual Defendants are entitled to qualified immunity because they did not violate any rights of Plaintiff that were clearly established at the time of the alleged violations.

Plaintiffs argue that Defendants are not entitled to qualified immunity because viewpoint discrimination generally violates a clearly established right. Plaintiffs rely upon the Third Circuit decision of *Montiero v. City of Elizabeth*, 436 F.3d 397 (3d Cir. 2006) to support their position. Defendants agree that the Third Circuit in *Montiero* opined that "it is clearly established that when

a public official excludes a elected representative or a citizen from a public meeting, she must conform her conduct to the requirements of the First Amendment." *Id.* at 404. However, *Montiero* is factually distinguishable from the case *sub judice* because the Plaintiffs in this action allege that certain policies, on their face and as applied by Defendants, amount to viewpoint discrimination in the limited public forum of a school board meeting. This case does not involve exclusion of citizens from a public meeting. To deprive a Section 1983 defendant of qualified immunity, the federal right alleged to have been violated must have been clearly established, not merely as a broad general proposition as Plaintiffs attempt to argue with respect to viewpoint discrimination, but in light of the specific context of the case. *Mullenix v. Luna*, 577 U.S. 7, 11-12 (2015). Since Plaintiffs do not cite to any precedential case law that applies to the relevant facts of this case, Defendants did not violate a firmly established right of Plaintiffs. Therefore, Defendants Michael P. Clarke, Esq., Peter C. Amuso, Esq., Cherrissa Gibson, Christine Toy-Dragoni, Joshua Waldorf, Sherwood (Chip) Taylor, Howard Goldberg, T.R. Kannan, Michael Pallotta, Linda Palsky, Gary Sanderson, Debra Wachspress and Ann Langtry ("Individual Defendants") must be afforded immunity from suit on this basis alone.

Furthermore, this Court relied upon the United States Supreme Court decisions of *Matal v. Tam*, 137 S. Ct. 1744 (2017) and *Iancu v. Brunetti*, 139 S. Ct. 2294 (2019) to support its decision that the challenged policy terms are facially invalid because they amount to viewpoint discrimination as a matter of law. These decisions by the Supreme Court, however, were in the context of public forums. Moreover, the Court relied upon the recent Sixth Circuit decision in *Ison v. Madision Loc. Sch. Dist. Bd. Of Educ.*, 3 F.4th 887 (6th Cir. 2021) to support its conclusion that the challenged policy terms of "abusive," "offensive," and "personally directed" constitute impermissible viewpoint discrimination. The Third Circuit has yet to address whether such terms may constitute impermissible viewpoint discrimination in any forum, including limited public

forums. Simply put, in addition to this case being factually distinguishable from any Third Circuit cases addressing viewpoint discrimination, there was no controlling case law in this jurisdiction at the time the policy terms were adopted and/or applied that said terms amount to viewpoint discrimination in the context of limited public forums such as school board meetings. Also, the challenged policy terms were derived from a model policy circulated by the Pennsylvania School Board Association ("PSBA") and Individual Defendants would have no reason to believe that the adoption and application of such policies with such terms could violate an individual's First Amendment rights. *See*, ECF 44-4, Unsworn Declaration of Amuso, ¶ 20. Accordingly, since Plaintiffs' First Amendment rights were not firmly established with respect to the challenged policy terms at the time of the alleged violations, and because Individual Defendants reasonably relied upon the model policies provided by the PSBA and used by school boards throughout the Commonwealth, Individual Defendants must be afforded immunity and dismissed with prejudice.

B. Individual Defendants must be dismissed because there are no allegations that they had sufficient personal involvement in any violation of any of Plaintiffs' constitutional rights.

Plaintiffs argue that sufficient personal involvement of certain Individual Defendants exists to plead a viable Section 1983 claim because there are sufficient allegations that these Defendants acquiesced to the alleged restriction of speech. To support their argument, Plaintiffs creatively attempt to rely on language in Third Circuit Model Jury Instruction 4.6.1. Plaintiffs' argument is grossly misplaced and Individual Defendants Clarke, Gibson, Taylor, Goldberg, Kannan, Pallotta, Palsky, Sanderson, Wachspress and Langtry must be dismissed because there are insufficient allegations of their personal involvement in the alleged violation of Plaintiffs' constitutional rights.

Initially, it is important to note that Plaintiffs ignore the Third Circuit's decision in *Rode v. Dellarciprete*, 845 F.2d 1195, 1207 (3d Cir. 1988), whereby the Court held that general authority to enforce an applicable law is not sufficient to make government officials the proper parties to

litigation challenging the law. *Id.* at 1208. Additionally, Third Circuit Model Jury Instruction 4.6.1 holds no precedential weight as a matter of law. Moreover, and perhaps most importantly, the discussion of "acquiescence" in Instruction 4.6.1 relates to supervisory liability, which is not the basis for liability against these Individual Defendants. Furthermore, there are no facts alleged that these Individual Defendants had any express or implied authority under either Policy 903 or 922 to enforce the provisions of same. Without more, Individual Defendants Clarke, Gibson, Taylor, Goldberg, Kannan, Pallotta, Palsky, Sanderson, Wachspress and Langtry must be dismissed.

C. Count VII of the Complaint attempting to set forth a claim for conspiracy pursuant to Section 1983 must be dismissed.

Plaintiffs argue that certain allegations regarding editing of Marshall's comments from a video, Assistant Solicitor Amuso's restriction of speech during the May 2021 Board meeting, and Defendants' argument that Clarke and Amuso are not state actors are sufficient to set forth a viable Section 1983 conspiracy claim. Plaintiffs do not cite to any specific allegations of any agreement between/among any of the Defendants to violate their First Amendment rights. Specific allegations of an agreement to carry out the alleged chain of events is essential in stating a claim for conspiracy. *Spencer v. Steinman,* 968 F.Supp. 1011, 1020 (E.D. Pa. 1997). "It is not enough that the end result of the parties' independent conduct caused plaintiff harm or even that the alleged perpetrators of the harm acted in conscious parallelism." *Id.* Since there are no allegations as to when any agreement was formed, the agreed upon conduct, and/or the scope and length of the agreement, the Complaint fails to set forth a viable conspiracy claim. Thus, Count VII of the Complaint must be dismissed.

II. CONCLUSION

For the good and sound reasons advanced herein, and for those reasons set forth in Defendants' Motion to Dismiss and Brief in Support, Defendants respectfully request that the Court grant their Motion to Dismiss.

Respectfully Submitted,

SWEET, STEVENS, KATZ & WILLIAMS LLP

Date: December 1, 2021

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CERTIFICATE OF SERVICE

I, Gary H. Dadamo, Esquire, counsel for the Defendants, hereby certify that a true and correct copy of the foregoing Reply Brief was served through the Court's ECF filing system upon counsel of record.

SWEET, STEVENS, KATZ & WILLIAMS LLP

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