UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

DOES 1, 2, 4, 5 and 7; DOE 6, a minor, by DOE 6's next best friend, Doe 7, *Plaintiffs*, v. ENFIELD PUBLIC SCHOOLS, *Defendant*.	Case No. 3:10-cv-00685-CFD Date: March 3, 2011 Oral argument set for March 8, 2011

PLAINTIFFS' REPLY BRIEF IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND A PERMANENT INJUNCTION OR, IN THE ALTERNATIVE, FOR PARTIAL SUMMARY JUDGMENT

Contents

I. The Schools' admission of virtually all the plaintiffs' Rule 56(a)(1) statements of fact supports summary-judgment in favor of the plaintiffs.

The Schools admit 376 of the plaintiffs' 406 fact statements. *See* Def.'s 56(a)(2) Stmt. at 97. Moreover, most of the thirty fact statements that the Schools do list as disputed are disputed only in part, or without record citations, or with citations to record pages that do not contradict the statements. *See infra* § IV. Even if the few genuine factual disputes that do exist are resolved in the Schools' favor, the plaintiffs are still entitled to judgment, for the reasons set forth in the plaintiffs' prior briefing and below.

"To defeat a summary judgment motion, the non-moving party must do more than simply show that there is some metaphysical doubt as to the material facts, and may not rely on conclusory allegations or unsubstantiated speculation." *FDIC v. Great Am. Ins. Co.*, 607 F.3d 288, 292 (2d Cir. 2010) (citations and quotation marks omitted). Yet here, for example, the Schools attempt to dispute that the Cathedral has displayed the message "THIS IS GOD'S HOUSE WHERE **JESUS CHRIST** IS LORD" on video-screens at past graduations, without citing *any* evidence contradicting Doe 1's testimony that Doe 1 saw this message at a 2009 graduation and took photographs of the message there. *Compare* Def.'s 56(a)(2) Stmt. ¶¶ 90, 91, 359 *with* Pls.' Ex. 5 ¶ 13; Pls.' Ex. 2-5, 2-6. The Schools also attempt to dispute that sites other than the Cathedral could host the graduations (Def.'s 56(a)(2) Stmt. ¶¶ 264-65), but the evidence the Schools cite does not support the Schools' position, and it is flatly refuted by the record in several ways — among other things, school officials have described some of the non-religious sites as "suitable," and other area schools have held graduations at some of the sites (*see* Pls.' Opp'n to Def.'s Summ. J. Mot. ("Pls.' SJ Opp'n") at 17; Pls.' 56(a)(2) Stmt. ¶ 40)). The Schools even attempt to partially dispute a fact they fully admitted in their answer (*compare* Def.'s 56(a)(2) Stmt. ¶ 147 *with* SAC ¶ 93; Answer ¶ 93), which is a binding judicial admission (*NLRB*

v. Consol. Bus Transit, Inc., 577 F.3d 467, 474 (2d Cir. 2009)).

II. The plaintiffs have standing, and this case is justiciable.

While the Schools do not directly challenge the plaintiffs' standing, to the extent the Schools suggest there is any standing issue, the Schools improperly conflate standing with the merits of the case. *Compare* Def.'s Opp'n to Pls.' Summ. J. Mot. ("Def.'s SJ Opp'n") at 2-3 *with Carver v. City of New York*, 621 F.3d 221, 226 (2d Cir. 2010).

The Schools' statement that "Defendant has no intention of holding a graduation at the Cathedral *absent a court order expressly permitting it to do so*" (Def.'s SJ Opp'n at 4) only confirms that the plaintiffs' claims for injunctive relief remain justiciable under the voluntary cessation doctrine (as previously explained, *see* Doc. No. 183 at 2-6). Voluntary compliance with a court ruling whose merits remain contested in the litigation does not moot a case. *See Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 791 n.1 (1985); *Lynch v. U.S. Parole Comm'n*, 768 F.2d 491, 496 (2d Cir. 1985). Even without its litigation-tied qualifier, the statement "Defendant has *no intention* of holding" (emphasis added; the Schools do not say, "Defendant *will not* hold") would be far from sufficient to meet the "heavy burden" placed upon defendants to show that "it is absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *See Adarand Constructors, Inc. v. Slater*, 528 U.S. 216, 222 (2000) (citations and quotation marks omitted). Moreover, the Schools announce that even their doubly qualified statement of intent applies only to the current Board (Def.'s SJ Opp'n at 4 n.2), all of which will be up for reelection in November 2011 (Stokes Test. at 46:23-47:12), and the risk of a governmental defendant resuming challenged conduct upon a change in leadership further weighs against mootness. *See Tsombanidis v. West Haven Fire Dep't*, 352 F.3d 565, 574 (2d Cir. 2003). In addition, the Schools admit that they would like the Cathedral to be available

as an option for future graduations. Def.'s 56(a)(2) Stmt. ¶ 263.

III. The use of the Cathedral to host graduations violates the Establishment Clause.

A. The use of the Cathedral results in religious coercion.

The Schools persist in their mistaken notion that the bar against governmental religious coercion applies only to participation in a formal religious exercise. *See* Def.'s SJ Opp'n at 6-7. As the plaintiffs have previously explained, the Supreme Court and the circuit courts have described and implemented the anti-coercion rule much more broadly. *See* Pls.' SJ Opp'n at 10-14. Indeed, the coercive imposition of religion here is more extensive than the brief, non-sectarian, and avoidable prayers the Supreme Court has previously struck down, as here students and parents are immersed in a sectarian environment for hours and must watch their graduations occur directly beneath a 25-foot-tall cross. *Id.* at 13-14; SF ¶ 69. By contrast, in *Myers v. Loudoun County Public Schools*, an unsuccessful challenge to the Pledge of Allegiance that the Schools cite (Def.'s SJ Opp'n at 7), there was no significant imposition of religion — the court there explained that the Pledge is patriotic, not religious. 418 F.3d 395, 407-08 (4th Cir. 2005).

In any event, the discussion in the plaintiffs' opening brief (at 21-24) about the religious significance of churches and entry into them demonstrates that it is questionable to even characterize entry into a church and immersion in the environment thereof as not being a "religious exercise." And the plaintiffs' evidence (SF ¶¶ 101-23) of the religious significance inherent in every aspect of the Cathedral (some of which Doe 1 was aware of long before attending any graduation there (*see* Pls.' Ex. 5 ¶ 5; *cf.* Def.'s SJ Opp'n at 9-10)) highlights the religious power — and the impossibility of secularizing — this particular church building. The Schools err in suggesting that these points would only be relevant if a Free Exercise Clause claim had been brought (Def.'s SJ Opp'n at 10-11), as both the Establishment Clause and the Free

Exercise Clause prohibit the government from imposing a religion on people who do not subscribe to it. *See Venters v. City of Delphi*, 123 F.3d 956, 969-70 (7th Cir. 1997); *see also Torcaso v. Watkins*, 367 U.S. 488, 492-93, 495-96 (1961). In fact, well before *Lee v. Weisman*, 505 U.S. 577 (1992), was decided, the courts in *Lemke v. Black*, 376 F. Supp. 87, 89-90 (E.D. Wis. 1974), and *Reimann v. Fremont County Joint School District No. 215*, Civil No. 80-4059 (D. Idaho May 22, 1980) (Pls.' Ex. 117 at 9-10), enjoined the holding of graduations in churches as violative of the Establishment Clause based in large part on coercion analysis similar to that later used in *Lee*.

Contrary to what the Schools suggest (Def.'s SJ Opp'n at 6), the coercion analysis does not require any showing that the government's *goal* was to impose religion on citizens. Government conduct is unconstitutional if *either* its purpose *or* its effect advances religion. *E.g.*, *Zelman v. Simmons-Harris*, 536 U.S. 639, 648-49 (2002). Thus, the Second Circuit has held that the government may not coerce people to take part in a religious alcoholism treatment program even when the government does so solely for the secular reason that the program is successful. *See Warner v. Orange County Dep't of Prob.*, 115 F.3d 1068, 1075, 1077 (2d Cir. 1997), *reinstated in full after vacatur and remand*, 173 F.3d 120 (2d Cir. 1999); *see also DeStefano v. Emergency Hous. Group, Inc.*, 247 F.3d 397, 411-13 (2d Cir. 2001). Further, in *Berger v. Rensselaer Central School Corp.*, 982 F.2d 1160, 1162, 1170-71 (7th Cir. 1993), the court concluded that a public school's practice of allowing a private group to distribute Bibles in classrooms was unconstitutional under the coercion test, notwithstanding that the school's conduct was "not aimed at promoting the religious values of the group." And in *Lassonde v. Pleasanton Unified School District*, 320 F.3d 979, 981, 984-85 (9th Cir. 2003), the court ruled that a school district was constitutionally *required* to prohibit a student from giving a

proselytizing religious speech at graduation — even though the student was selected to give the speech based solely on his high academic standing — because allowing the speech would have coercively imposed religion upon a captive audience.

The teaching of these cases is that a government body cannot coercively subject people to religion just because it is indifferent to the results of its conduct. If this were not the law, public schools could require students to attend weekly assemblies open on a first-come, first-served basis to outside speakers — if the schools' purpose in doing so was to expose students to a wide variety of views — and religious speakers could deliver proselytizing sermons to the students. Elementary schools could serve students milk cartons that have "WORSHIP JESUS" printed on them in large letters, if the schools did so because the milk was the least expensive available. Public school could even be held daily in a church building, replete with religious iconography in classrooms and hallways, if the school district leased the building because it was the cheapest option. *See also* Pls.' SJ Opp'n at 9-10 (setting out additional hypotheticals).

B. The use of the Cathedral endorses religion.

The Schools question the applicability of the endorsement test to objects on private land (Def.'s SJ Opp'n at 11), relying on a statement by Justice Kennedy in *Salazar v. Buono*, 130 S. Ct. 1803, 1819 (2010). But Justice Kennedy's opinion is not precedent because it was joined by only two other Justices (one of whom joined in part), and Justice Kennedy only made the qualified statement that courts do not apply the endorsement test on private land "as a general matter." *Id.* Justice Kennedy then proceeded to apply the endorsement test, suggesting that there might be no endorsement because the cross at issue was erected by private citizens to honor fallen veterans, not to promote religion, on a remote parcel of desert land that the government

then transferred to a private party. *Id*. at 1816-17, 1820.[1]

In several opinions that are precedent, the Supreme Court and the Second Circuit have held that the government did unconstitutionally endorse a private party's religious message. *See County of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 600-01 (1989); *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 302-03, 307-08 (2000); *Kaplan v. City of Burlington*, 891 F.2d 1024, 1029-30 (2d Cir. 1989). Moreover, in *Texas Monthly, Inc. v. Bullock* — a case involving religious messages presented on private property by private parties — the Supreme Court held that a sales-tax exemption exclusively for religious periodicals communicated a message of endorsement of and preference for religion. 489 U.S. 1, 15, 17 (1989) (three-Justice plurality opinion); *id.* at 29 (Blackmun, J., concurring in the judgment, joined by O'Connor, J.). And in *Freedom From Religion Foundation v. City of Marshfield*, 203 F.3d 487, 495-96 (7th Cir. 2000), where the government was much more closely linked to the religious message at issue than in *Salazar*, the court held that a city continued to endorse a religious statue in a public park despite selling the statue and the land beneath it to a private party.

The Schools point out (Def.'s SJ Opp'n at 14-15) that the disapproval of a symbolic union of church and state expressed in some of the cases cited by the plaintiffs was based on language in *School District v. Ball*, 473 U.S. 373, 389-92 (1985), which was overruled *in part* by

[1] Justice Kennedy's separate opinions support the plaintiffs' point that holding graduations in the Cathedral violates the coercion test. In a partial concurrence and partial dissent in *County of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 659 (1989), Justice Kennedy and three other Justices took the position that the coercion test should be used to evaluate government displays of religious symbols. *Id.* at 659. Justice Kennedy emphasized that such coercion may be "subtle" or "indirect," writing that the government's "[s]ymbolic recognition . . . of religious faith" could create unconstitutional coercion, citing "the permanent erection of a large Latin cross on the roof of city hall" as an example. *Id.* at 659, 661 & n.1. Justice Kennedy did not believe such coercion was present in *Allegheny*, because "[p]assersby" were "free to ignore" the displays at issue there "or even to turn their backs." *Id*. at 664. Students and parents have no such choice here — they are immersed in a religious environment, and the ceremonies take place directly beneath a large cross.

Agostini v. Felton, 521 U.S. 203, 235 (1997). But *Agostini* did not suggest that where a symbolic union between government and religion exists, such a union is constitutional, and post-*Agostini* circuit-court decisions have continued to disapprove of such unions. *See Commack Self-Serv. Kosher Meats, Inc. v. Weiss*, 294 F.3d 415, 431 (2d Cir. 2002); *Indiana Civil Liberties Union v. O'Bannon*, 259 F.3d 766, 772 (7th Cir. 2001); *Brooks v. City of Oak Ridge*, 222 F.3d 259, 264 (6th Cir. 2000). *Agostini* only rejected *Ball*'s specific conclusion that, where public-school instructors teach special-education classes in both secular and religious private schools, the presence of the instructors in parochial-school classrooms "inevitably," "without more," communicates a symbolic union to parochial-school students. *See* 521 U.S. at 223, 227.

Here, graduations in the Cathedral communicate a close union between religion and government: Religious symbols and school banners are presented together, to public-school students and families, at a school ceremony, that is run by school officials, in a religious environment typically used for religious ceremonies. SF ¶¶ 14-123. What is more, the surrounding circumstances bolster the message of governmental endorsement of religion: Numerous secular facilities can host the graduations instead, some for a lower price (*id.* ¶¶ 264-351); the Schools' decision to return to the Cathedral was influenced by a religious group's lobbying (*id.* ¶¶ 191-224); the Board Chair has called on graduating students to "keep God in your life" and pray (*id.* ¶ 200); and the Schools continued to use the Cathedral despite complaints from religious objectors (*id.* ¶¶ 163, 170-74, 226).

C. The use of the Cathedral excessively entangles government with religion.

The plaintiffs discuss three discrete points concerning entanglement here.

First, though the Schools attempt to dispute the plaintiffs' evidence that the Board intended to have Board members or Schools officials determine what items in the Cathedral were

religious and needed to be covered or removed for the 2010 graduations (Def.'s SJ Opp'n at 16), the Schools' counsel confirmed during the preliminary-injunction hearing that "the chairman of the school board or his delegate will determine" what items are religious. Pls.' Ex. 246 at 74:13-16.

Second, contrary to what the Schools suggest (Def.'s SJ Opp'n at 18), it is undisputed that the Schools asked the Cathedral in January 2007 to remove the religious banners in its sanctuary for graduations (SAC ¶ 85; Answer ¶ 85; Pls.' Ex. 145), that Archbishop Bailey was aware of this request (Pls.' Ex. 247 at 102:9-105:6), that the Cathedral rejected the request (Pls.' Ex. 178 at 26:1-7), and that the Schools nevertheless held graduations in the Cathedral in 2007, 2008, and 2009 with the banners in full view (SAC ¶ 86; Answer ¶ 86; Stipulation ¶ 7).

Third, in arguing that divisiveness is not relevant to the entanglement inquiry, the Schools mistakenly cite a dissent by Justice Souter as a concurrence by Justice O'Connor. *See* Def.'s SJ Opp'n at 19-20 (citing *Mitchell v. Helms*, 530 U.S. 793, 872 n.2 (2000)). In any event, Justice Souter only stated that the Court "may well have moved away from considering" divisiveness in cases involving public aid to religious institutions. 530 U.S. at 872 n.2. In other kinds of cases, the Court has continued to consider divisiveness. *See McCreary County v. ACLU of Ky.*, 545 U.S. 844, 860-61 (2005); *Santa Fe*, 530 U.S. at 311, 316-17 (decided nine days before *Mitchell*); *see also Van Orden v. Perry*, 545 U.S. 677, 702-04 (2005) (Breyer, J., concurring in the judgment).

D. The funding of graduations at the Cathedral aids religion.

The Schools contend that using taxpayer dollars to rent the Cathedral is constitutional because the Schools are spending the money on something of value to the government and the public. Def.'s SJ Opp'n at 22. But the same was true in many cases where the provision of public

funds to religious institutions was struck down because, as here, what the government paid for was infused with religion. *See, e.g.*, *Comm. for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 773-74 (1973); *Sloan v. Lemon*, 413 U.S. 825, 829-30 (1973); *Lemon v. Kurtzman*, 403 U.S. 602, 613, 625 (1971); *Ams. United for Separation of Church & State v. Prison Fellowship Ministries*, 509 F.3d 406, 416-17, 424-25 (8th Cir. 2007). The Schools rely on Justice Thomas's plurality opinion in *Mitchell* in arguing that provision of public funds for religious uses is constitutional so long as the funds are allocated neutrally (Def.'s SJ Opp'n at 22), but it is Justice O'Connor's opinion in *Mitchell* — which rejected this proposition (530 U.S. at 837-41, 857) — that is controlling. *DeStefano*, 247 F.3d at 418-19.

E. The Schools' hypotheticals are inapposite.

The Schools contend that if holding graduations at the Cathedral is unconstitutional, it would also be unconstitutional for a public school's basketball team to play in a parochial school gym that displays religious imagery, for a choir to give concerts at religious venues, or for a church to be used as a polling place. Def.'s SJ Opp'n at 3. The plaintiffs have previously explained why the latter two situations are distinguishable. *See* Pls.' SJ Opp'n at 23-24. The basketball analogy is likewise inapposite, for in sports an opposing team's arena is expected to be a hostile environment, while graduation ceremonies are intended to be events that honor and uplift the graduates and their families. Moreover, a public-school basketball team would play most of its games at secular venues even when some games are at parochial schools, while graduations at the Cathedral place a seminal school event exclusively in a religious environment.

IV. Relief requested.

For the foregoing reasons, the plaintiffs respectfully ask that the Court grant them summary judgment.

If not, the plaintiffs respectfully ask that the Court grant partial summary judgment that the plaintiffs have standing, as the Schools have not disputed any facts about the plaintiffs. *See* Def.'s 56(a)(2) Stmt. ¶¶ 356-58, 360-406.

In addition, if the Court does not grant summary judgment, the plaintiffs respectfully ask that the Court issue an order under Federal Rule of Civil Procedure 56(g) specifying what facts are established in this case for purposes of trial, in particular that (1) all the facts listed in Sections II and III (page 97) of the Schools' 56(a)(2) Statement are established, since the Schools conceded that those facts are undisputed[2]; (2) facts No. 28, 66, 221, 225, 226, 227, 246, 247, 300, and 329 (all references are to the fact numbers in the Schools' 56(a)(2) Statement), which the Schools admitted in part or with qualifications, are established to the extent that the Schools admitted them; (3) facts No. 47, 88, and 237, which the Schools in part disputed and in part failed to address, are established to the extent that the Schools did not specifically dispute them; (4) facts No. 48, 90, 91, 95, and 359 are established because the Schools attempted to dispute them without citing contrary evidence; and (5) facts No. 127, 147, 173, 236, 264, 265, and 270 are established because the evidence cited by the Schools in attempting to dispute the facts fails to contradict them.

[2] The Schools claim that the facts listed in Section III are not material, but the Court need not determine in advance of trial which facts are material, because "[i]n bench trials, judges routinely hear inadmissible evidence that they are presumed to ignore when making decisions." *Harris v. Rivera*, 454 U.S. 339, 346 (1981); *accord BIC Corp. v. Far Eastern Source Corp.*, 23 F. App'x 36, 39 (2d Cir. 2001); *Ellerton v. Ellerton*, __F. Supp. 2d __, Case No. 5:09-CV-71, 2010 WL 4004948, at *1 (D. Vt. Oct. 8, 2010). (The plaintiffs are concurrently filing a motion to strike the Schools' jury-trial demand because it is clearly foreclosed by controlling precedent.)

Respectfully submitted,

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March 3, 2011

CERTIFICATE OF SERVICE

I hereby certify that on March 3, 2011, a copy of the foregoing "PLAINTIFFS' REPLY BRIEF IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND A PERMANENT INJUNCTION OR, IN THE ALTERNATIVE, FOR PARTIAL SUMMARY JUDGMENT," along with Plaintiffs' Exhibits 246 and 247, was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the Court's CM/ECF System.

Respectfully submitted,

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