IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

ALLEN R. DYER,	*	
Plaintiff	*	
v.	*	**CIVIL NO. JKB-15-3699**
MARYLAND STATE BOARD OF EDUCATION, *et al.*,	*	
	*	
Defendants	*	
	*	

* * * * * * * * * * * *

MEMORANDUM AND ORDER

Allen R. Dyer ("Plaintiff") brought an action against the Maryland State Board of Education and nine of its current and former members (the "State Defendants"), as well as Judith S. Bresler, Esq., and the law firm of Carney, Kelehan, Bresler, Bennett & Scherr, LLP (the "Carney Kelehan Defendants") (collectively, "Defendants"), seeking declaratory relief and damages in connection with his 2013 removal from his elected position on the Howard County Board of Education. On May 19, 2016, the Court granted Defendants' motions to dismiss and dismissed Plaintiff's case with prejudice (ECF No. 17); on June 16, 2016, the Court permitted Plaintiff's counsel to withdraw his appearance in this matter (ECF No. 25).

Now pending before the Court is Plaintiff's *pro se* "Motion to Alter or Amend Judgment and Motion for Certification of Question of Maryland Law to the Maryland Court of Appeals" (ECF No. 27), filed pursuant to Rule 59(e) of the Federal Rules of Civil Procedure ("Rule 59(e) Motion").[1] The Court has reviewed Plaintiff's Rule 59(e) Motion and has determined that

[1] Also pending are Plaintiff's "Entry of Appearance *Pro Se*" (ECF No. 28), which he submitted as a motion via the Court's CM/ECF electronic docketing system, and a duplicate of his Rule 59(e) Motion (ECF No. 29). The Court will GRANT ECF No. 28 and TERMINATE ECF No. 29 as FILED IN ERROR.

additional briefing is unnecessary at this time; a hearing is likewise unnecessary, *see* Local Rule 105.6 (D. Md. 2014). The motion will be DENIED.

Rule 59(e) of the Federal Rules of Civil Procedure provides that a "motion to alter or amend a judgment must be filed no later than 28 days after the entry of the judgment." The Court's Order of dismissal was entered on the docket on May 20, 2016; Plaintiff filed his *pro se* motion on June 17, 2016. Accordingly, Plaintiff's motion is timely. However, as the United States Court of Appeals for the Fourth Circuit has recognized, relief under Rule 59(e) is available on only three limited grounds: "(1) to accommodate an intervening change in controlling law; (2) to account for new evidence . . . or (3) to correct a clear error of law or prevent manifest injustice." *Henson v. Santander Consumer USA, Inc.*, Civ. No. RDB-12-3519, 2015 WL 433475, at *2 (D. Md. Feb. 2, 2015) (citing *Gagliano v. Reliance Standard Life Ins. Co.*, 547 F.3d 230, 241 n.8 (4th Cir. 2008)), *aff'd*, 817 F.3d 131 (4th Cir. 2016). The Fourth Circuit has also cautioned that parties should not employ Rule 59(e) motions to "raise arguments which could have been raised prior to the issuance of the judgment." *Pac. Ins. Co. v. Am. Nat'l Fire Ins. Co.*, 148 F.3d 396, 403 (4th Cir. 1998). Reconsideration of a final order is an extraordinary remedy that must be applied sparingly, *id.*, and "mere disagreement" with a court's analysis "does not support a Rule 59(e) motion," *Hutchinson v. Staton*, 994 F.2d 1076, 1082 (4th Cir. 1993); *see also Projects Mgmt. Co. v. DynCorp Int'l, LLC*, 17 F. Supp. 3d 539, 541 (E.D. Va. 2014) ("[A] motion for reconsideration under Rule 59(e) is inappropriate if it asks the court to 'reevaluate the basis upon which it made a prior ruling' or 'merely seeks to reargue a previous claim.'" (citation omitted)), *aff'd*, 584 F. App'x 121 (4th Cir. 2014) (per curiam). These limitations are essential: without them, "there would be no conclusion to motions practice, each motion becoming nothing more than the latest installment in a potentially endless serial that

would exhaust the resources of the parties and the court—not to mention its patience." *Potter v. Potter*, 199 F.R.D. 550, 553 (D. Md. 2001).

In his Rule 59(e) Motion, Plaintiff seeks reconsideration on three separate grounds. First, he challenges the Court's application of the doctrines outlined in *Garcetti v. Ceballos*, 547 U.S. 410 (2006), and *Pickering v. Board of Education*, 391 U.S. 563 (1968), to his First Amendment claim. Plaintiff contends that the Court should have instead invoked strict scrutiny. However, he also concedes that the "Court may be correct that the Fourth Circuit has not addressed the issue of whether the speech of elected officials is subject to strict scrutiny." (ECF No. 27 at 4.) In fact, the Court acknowledged in its prior Memorandum that there is "some disagreement over the application of *Garcetti* to speech by elected officials" and that the "Fourth Circuit has not yet had occasion to address this matter." (ECF No. 16 at 28 n.34.) The Court added that, "to the extent that an elected official's political speech pursuant to his official duties might be entitled to some First Amendment protection, the Court seriously doubts that such protection would extend to the conduct giving rise to Plaintiff's removal from office." (*Id.*) Plaintiff may fervently disagree with the Court's application of *Garcetti–Pickering* to the facts of his case, but absent controlling authority in this Circuit (and given that courts elsewhere have divided on the question), it certainly cannot be said that the Court's prior analysis amounted to a "clear error of law" or wrought a "manifest injustice," *Henson*, 2015 WL 433475, at *2. What is more, the Court's prior decision did not turn on its *Garcetti–Pickering* analysis: Plaintiff's First Amendment claim additionally failed because (1) the State Defendants were entitled to absolute, quasi-judicial immunity or, alternatively, qualified immunity; (2) the Carney Kelehan Defendants were not amenable to suit under 42 U.S.C. § 1983; and (3) Plaintiff's claim was far too vague and conclusory to satisfy the notice-pleading and plausibility requirements of Rule 8(a) and

Twombly/*Iqbal*. Plaintiff does not so much as acknowledge the Court's discussion of these fatal defects. He has not shown (or even made a colorable argument) that the Court improperly dismissed his First Amendment claim, and so the Court declines to grant his Rule 59(e) Motion with respect to that claim.

Plaintiff next moves the Court to certify the following question to the Court of Appeals of Maryland:

> *Does MARYLAND CONSTITUTION ARTICLE XV, §2 [sic] invalidate or supersede an administrative adjudication and removal of an elected local board of education member pursuant to MARYLAND EDUCATION ARTICLE § 3-701(g)?*

(ECF No. 27 at 4.) As the Court observed in its prior Memorandum, Plaintiff has repeatedly contended (in state tribunals as well as in federal court) that a certain 2012 amendment to Article XV, Section 2, of the Constitution of Maryland ("Article XV") superseded the statutory procedure pursuant to which he was removed from office. Plaintiff's contention is meritless: nothing in the plain text of Article XV purports to invalidate statutory removal mechanisms such as Md. Code Ann., Educ. § 3-701(g), and Plaintiff has adduced no legislative history (or any other evidence) showing that Article XV was designed to sweep more broadly than its text suggests. For that reason alone, had Plaintiff moved the Court to certify his question before the Court entered its Order of dismissal, the Court very likely would have denied his request. *Cf. Lehman Bros. v. Schein*, 416 U.S. 386, 391 (1974) (observing that the decision whether to certify a question "rests in the sound discretion of the federal court"). Moreover, certification of the question *now*, after the Court has construed the relevant constitutional text and dismissed Plaintiff's case with prejudice, would be inappropriate absent some particularly persuasive justification. *See Thompson v. Paul*, 547 F.3d 1055, 1065 (9th Cir. 2008) ("There is a presumption against certifying a question to a state supreme court after the federal district court has issued a

decision."), *cited with approval by Hall v. Greystar Mgmt. Servs., L.P.*, 637 F. App'x 93 (4th Cir. 2016). Plaintiff proffers no such justification, nor any explanation for his failure to request certification in advance of the Court's prior ruling. The Court declines to unsettle that ruling with an untimely and unnecessary question to the Court of Appeals of Maryland.[2]

Finally, Plaintiff contends that the Court should have considered the affidavit of one Cynthia Vaillancourt, a nonparty, in ruling on Defendants' motions to dismiss. The Court declined to consider that affidavit, as it fell outside the proper scope of Rule 12(b)(6) review. (*See* ECF No. 16 at 8.) Having examined the affidavit, however, the Court notes that Ms. Vaillancourt, who serves on the Howard County Board of Education, appears to share Plaintiff's antipathy toward certain of the board's actions and policies. To the extent that Ms. Vaillancourt seeks judicial intervention with respect to her dispute with the county board, she is free to file her own lawsuit—but under long-settled justiciability principles, Plaintiff may not litigate Ms. Vaillancourt's claims on her behalf. *See Equal Rights Ctr. v. Abercrombie & Fitch Co.*, 767 F. Supp. 2d 510, 523 (D. Md. 2010) ("The Supreme Court . . . has 'limited [the third-party standing] exception by requiring that a party seeking [such] standing make two additional showings': (1) that the litigant has a 'close' relationship with the third party; and (2) that the third party faces some obstacle to asserting her own right." (quoting *Kowalski v. Tesmer*, 543 U.S. 125, 130 (2004))). Because the Court properly excluded the Vaillancourt affidavit during its prior analysis, and because—in any event—the affidavit would have had no impact on the Court's analysis, the Court declines to grant Plaintiff's Rule 59(e) Motion with respect to the affidavit.

[2] Furthermore, the Court of Special Appeals of Maryland affirmed the circuit court's dismissal of Plaintiff's declaratory-judgment action precisely because Plaintiff failed to avail himself of the remedy prescribed under Md. Code Ann., Educ. § 3-701(g)(4). *See Dyer v. Md. State Bd. of Educ.*, No. 232, 2015 WL 5885393, at *3 (Md. Ct. Spec. App. Aug. 5, 2015), *cert. denied*, 126 A.3d 4 (Md. 2015) (unpublished table decision). The Court strongly suspects that, if the Court of Special Appeals harbored any uncertainty as to the constitutionality of the removal statute, it would not have then relied on that statute as its basis for depriving Plaintiff of declaratory relief.

ORDER

For the foregoing reasons, it is ORDERED:

1. Plaintiff's Entry of Appearance *Pro Se*, which he filed as a motion (ECF No. 28), is GRANTED;
2. Plaintiff's Rule 59(e) Motion (ECF No. 27) is DENIED;
3. Plaintiff's duplicate Rule 59(e) Motion (ECF No. 29) is TERMINATED as FILED IN ERROR; and
4. This case shall REMAIN CLOSED.

DATED this 27th day of June, 2016.

BY THE COURT:

/s/

James K. Bredar
United States District Judge