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CLERK OF WISCONSIN
SUPREME COURT

No. 2020AP1032

IN THE SUPREME COURT OF WISCONSIN

John Doe 1, Jane Doe 1, Jane Doe 3, and Jane Doe 4,

Plaintiffs-Appellants-Petitioners,

John Doe 5 and Jane Doe 5,

Plaintiffs-Appellants,

John Doe 6, Jane Doe 6, John Doe 8, and Jane Doe 8,

Plaintiffs,

v.

Madison Metropolitan School District,

Defendant-Respondent,

Gender Equity Association of James Madison Memorial High School,

Gender Sexuality Alliance of Madison West High School, and

Gender Sexuality Alliance of Robert M. LaFollette High School,

Intervenors-Defendants-Respondents.

NON-PARTY BRIEF OF THE LIBERTY JUSTICE CENTER

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STATEMENT OF INTEREST

The Liberty Justice Center ("LJC") is a national public-interest law firm based in Chicago. One of the pillars of LJC's practice is pushing back against cancel culture in defenses of privacy and free speech. *See, e.g., Liberty Justice Center v. James*, No. 1:21-cv-06024-JGK (S.D.N.Y.) and *Liberty Justice Center v. Grewal*, No. 3:21-cv-13616-MAS-DEA (D.N.J.) (defending the right to charitable privacy after *Americans for Prosperity Foundation v. Bonta,* 141 S. Ct. 2373 (2021)).

LJC also frequently represents plaintiffs who move for anonymity out of fear of cancel culture. *See, e.g., Ratliff v. West Ada Educ. Ass'n*, No. CV01-20-17078 (4th Judicial District of Idaho) (representing anonymous parents and students challenging illegal union strike); *Menders v. Loudon County School Board*, 1:21-cv-00669-AJT-TCB (E.D. Va.) (representing anonymous parents and students challenging unconstitutional school policy).

STATEMENT OF THE ISSUE

This brief only addresses the first question presented: Under what circumstances may parent-plaintiffs proceed anonymously against a school board?

ARGUMENT

The reality of cancel culture in modern American society necessitates that courts extend an understanding ear to parents and other plaintiffs who feel compelled to move to proceed anonymously to protect themselves and their families. In our increasingly politicized society, with the weaponization of employment and the Internet, protecting your constitutional rights should not be conditioned on putting a target on your back.

I. Cases on critical race theory and COVID-19 illustrate the importance of an understanding attitude for anonymous litigants.

Two highly politicized issues that are frequently litigated—the teaching of critical race theory in schools, and restrictions on liberty imposed in the name of combatting COVID-19—illustrate the importance of anonymity to the preservation of rights.

On the first issue, Amicus LJC represents a group of parents who are challenging elements of their school board's "Action Plan to Combat Systemic Racism" in *Menders v. Loudoun County School Board*, 1:21-cv-00669-AJT-TCB (E.D. Va. 2021). Looking at a variety of recent newspaper articles regarding fights over critical race theory in classrooms, the *Menders* court concluded, "it is abundantly evident that the issues in this case are a matter of highly

charged political debate. The extreme emotions on both sides of this debate make likely the risk of ridicule and mental or physical harm to the parents in this suit – but more concerning – to their minor children." *Id*., Dkt. 22, at 3. The court granted the plaintiffs' request to proceed anonymously.

Courts have reached similar conclusions in a number of cases concerning anonymous plaintiff challenges to COVID-19 restrictions, one of which was brought by Amicus LJC, *Ravago v. Lightfoot*, 1:22-cv-00745 (N.D. Ill. 2022), ECF 6 (motion to proceed anonymously). One court noticed the "substantial public controversy currently surrounding public and private mandates requiring individuals to be vaccinated for the COVID-19 coronavirus or to provide proof of vaccination status." *Does v. Mills*, No. 1:21-cv-00242-JDL, 2021 U.S. Dist. LEXIS 167020, at *4-5 (D. Me. Sep. 2, 2021). Another recognized "the charged atmosphere concerning vaccinations and vaccine mandates," and the possibility of retaliation in the workplace by the sued employer. *Doe v. NorthShore Univ. Healthsystem*, No. 21-cv-05683 , at *27, 2021 U.S. Dist. LEXIS 228371 (N.D. Ill. Nov. 30, 2021). *Accord Doe v. N.Y. Univ*., 537 F. Supp. 3d 483, 496-97 (S.D.N.Y. 2021) ("[T]he Court sees no reason to expose her to potential online retaliation . . . . And, given her stated career goals . . ., plaintiff represents that revealing her identity in a lawsuit pertaining to her violations of COVID-19 protocols could impede her progress.").

Other judges have shown particular concern for the plaintiff-parents of minor students challenging COVID-related mandates. For example, one found that the plaintiffs established "a reasonable and severe fear of retaliation . . . due to the heated debate in their District over COVID-19 related masks." *Doe v. Perkiomen Valley Sch. Dist.*, No. 22-cv-287, 2022 U.S. Dist. LEXIS 12903, at *3-4 (E.D. Pa. Jan. 25, 2022). The plaintiffs were allowed to proceed anonymously based on their "fear [of] possible violence against their children in the form of intimidation, bullying and reprisal," which they supported by citing "two news articles which detail[ed] intense school board meetings" and "death threats" made to "school board officials … for their positions on mandatory masking." *Id.*

These cases and others reflect a growing judicial consensus that plaintiffs should be allowed to proceed anonymously when they raise issues pertaining to the most contentious issues of our day, especially when children are involved, and particularly for facial challenges. *See, e.g., Doe v. San Diego Unified Sch. Dist.*, No. 21-CV-1809-CAB-LL, 2021 U.S. Dist. LEXIS 223106, at *15 (S.D. Cal. Nov. 18, 2021) (granting temporary permission to proceed anonymously in vaccine challenge pending further proceedings); *Doe v. Scalia*, 530 F. Supp. 3d 506, 509 (M.D. Pa. 2021) (Defendant did not oppose motion in vaccine challenge); *Omori v. Brandeis Univ.*, 533 F. Supp. 3d 49, 56 (D. Mass. 2021) (same).

II. Cases on donor disclosure for charities and political campaigns similarly reflect a growing judicial recognition of the dangers of cancel culture.

For over sixty years, the Supreme Court has recognized two foundational principles. First, public affiliation with a politically controversial cause or organization can lead to "economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility." *NAACP v. Ala. ex rel. Patterson*, 357 U.S. 449, 462-63 (1958). Second, because of that potential for retaliation following disclosure, "[d]isclosure requirements burden speech." *McCutcheon v. FEC*, 572 U.S. 185, 223 (2014). Justice Alito put the two thoughts in a single syllogistic sentence: "disclosure becomes a means of facilitating harassment that impermissibly chills the exercise of First Amendment rights." *Doe v. Reed,* 561 U.S. 186, 208 (2010) (Alito, J., concurring).

What the Supreme Court said of race-related civil rights organizations in 1958 was also true of political organizations in the 1970s, when public supporters of the Socialist Party endured "threatening phone calls and hate mail, burning of the group's literature, destruction of members' property, police harassment, firing of shots at the group's office, and termination of members' employment." *Lassa v. Rongstad*, 2006 WI 105, ¶ 70 (summarizing *Brown v. Socialist Workers '74 Campaign Comm.,* 459 U.S. 87, 98-99 (1982)).

And, sadly, this legacy of cancel culture remains in our own day. We live in "a climate marked by the so-called cancel or call-out culture that has resulted in people losing employment, being ejected or driven out of restaurants while eating their meals; and where the Internet removes any geographic barriers to cyber harassment of others." *Ams. for Prosperity v. Grewal*, No. 3:19-cv-14228-BRM, 2019 U.S. Dist. LEXIS 170793, *61 (D.N.J. Oct. 2, 2019). Another judge recently found that "evidence of threats, harassment, and retaliation against other persons affiliated with nonprofit free enterprise groups and media accounts of public persons encouraging reprisals for speech by those with opposing views is alarming." *Rio Grande Found. v. City of Santa Fe*, 437 F. Supp. 3d 1051, 1073 (D.N.M. 2020). *See also Nat'l Rifle Ass'n v. City of L.A.*, 2:19-cv-03212-SVW-GJS, at *19 (C.D. Cal. Dec. 19, 2019) (company justified in its fear that it could lose city contracts if forced to disclose NRA sponsorship).

And the Internet has opened new doorways to harassment on a heretofore unimaginable scale, where an activist can target a litigant in minute detail. "Such risks are heightened in the 21st century and seem to grow with each passing year, as 'anyone with access to a computer [can] compile a wealth of information about' anyone else, including such sensitive details as a person's home address or the school attended by his children." *Ams. for Prosperity Found. v. Bonta*, 141 S. Ct. 2373, 2388 (2021) (quoting *Reed*, 561 U. S. at 208 (Alito, J., concurring)).

The Supreme Court has consistently recognized the second principle as well, that disclosure burdens speech by discouraging participation in controversial causes. As the Court said in its seminal campaign finance case, "It is undoubtedly true that public disclosure of contributions to candidates and political parties will deter some individuals who otherwise might contribute. . . . These are not insignificant burdens on individual rights." *Buckley v. Valeo,* 424 U.S. 1, 64, 68 (1976). Numerous courts have recognized the same reality in other contexts. *See, e.g., U.S. Servicemen's Fund v. Eastland*, 488 F.2d 1252, 1265-67 (D.C. Cir. 1973) (donor disclosure makes fundraising more difficult), *vacated on other grounds*, 421 U.S. 491 (1975); *In re Bay Area Citizens Against Lawsuit Abuse*, 982 S.W.2d 371, 379 (Tex. 1998) (same); *Nat'l Fed'n of Republican Assemblies v. United States*, 218 F. Supp. 2d 1300, 1312 n.13 (S.D. Ala. 2002) (same); *Vote Choice, Inc. v. Di Stefano*, 814 F. Supp. 195, 200 (D.R.I. 1993) (same); *In re Heartland Inst.*, No. 11 C 2240, 2011 U.S. Dist. LEXIS 51304, at *13-14 (N.D. Ill. May 13, 2011) (same); *Citizens Union v. AG of N.Y.*, No. 16-cv-9592, 2019 U.S. Dist. LEXIS 169438, *30 (S.D.N.Y. Sep. 30, 2019) (same).

The same "fear of economic or official retaliation [or] concern about social ostracism," *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 341 (1995), is just as present for litigants as for donors because the underlying problem is the same: public association with a highly controversial organization or issue.

And the same chilling occurs: people choose to grin-and-bear under unconstitutional laws because doing so is less bad than stepping forward publicly to challenge them. Constitutional rights are rendered meaningless by the bullying and intimidation tactics of an unconstitutional law's supporters. Courts should recognize this reality, recognize the burden created for public challengers to popular laws, and grant appropriate relief.

III. Cancel culture is pervasive and here to stay.

A national poll found that 42 percent of Democrats would support firing a business executive if it became known that he or she had privately donated to Donald Trump's campaign for president in 2020. Twenty-six percent of Republicans said they would support firing a Biden donor. Small wonder, then, that fully one-third of respondents overall were worried about losing their job if their political opinions became public. Emily Ekins, *Poll: 62% of Americans Say They Have Political Views They're Afraid to Share*, CATO Institute (July 22, 2020).[1] A similar poll a year later made similar findings: about a quarter of Americans were completely comfortable firing someone because of a political

[1] *Available at* https://www.cato.org/publications/survey-reports/poll-62-americans-say-they-have-political-views-theyre-afraid-share#implications.

donation. Eric Kauffman, *The Politics of the Culture Wars in Contemporary America*, Manhattan Institute (Feb. 4, 2022).[2]

The Constitution is and should be a "shield" that protects people "from retaliation—and their ideas from suppression—at the hand of an intolerant society." *McIntyre*, 514 U.S. at 357.

CONCLUSION

At the end of the day, the difference between a law review article and a case is a client. That is, a correct understanding of constitutional rights is only useful if people are willing and able to protect their rights in court. Privacy is often a prerequisite for such a case. Many constitutionally offensive laws and policies, from abortion restrictions on the left (*Roe v. Wade* & *Doe v. Bolton*[3]), to COVID-19 restrictions on the right (*Dr. A v. Hochul* & *Does v. Mills*[4]), only received judicial review because counsel for plaintiffs were able to promise confidentiality to their clients to bring a controversial case on a high-profile issue.

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[2] *Available at* https://media4.manhattan-institute.org/sites/default/files/913-MI-Kaufmann-Report-v7-1.pdf at 20.

[3] *Roe v. Wade*, 410 U.S. 113, 124 (1973); *Doe v. Bolton*, 410 U.S. 179, 187 (1973).

[4] *Dr. A. v. Hochul*, 142 S. Ct. 552 (2021); *Doe v. Mills*, 142 S. Ct. 17 (2021).

All of us as Americans have benefited from a generous judicial attitude that does not condition the protection of constitutional rights on the sacrifice of privacy and the consequent costs to reputation, career, and tranquility. That is more important than ever today in the cancel culture that pervades our nation.

In order to ensure robust public participation in politics, Justice Alito recently urged that "speakers must be able to obtain an as-applied exemption [from campaign-related disclosure requirements] without clearing a high evidentiary hurdle." *Reed*, 561 U.S. at 204 (Alito, J., concurring). He wrote that "courts should be generous in granting as-applied relief" because "unduly strict requirements of proof could impose a heavy burden on speech." *Id*.

His words provide a good standard for evaluating a different variation on the same underlying problem. Courts should be similarly generous in granting as-applied relief from the usual expectation of proceeding in one's own name and not set a high evidentiary hurdle to prove possible harassment or retaliation.

Respectfully submitted,

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MARCH 25, 2022

CERTICATE AS TO FORM AND LENGTH

I hereby certify that this brief conforms to the rules contained in s. 809.19 (8) (b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 2,062 words in the body, as counted by Microsoft Word.

CERTIFICATE OF SERVICE

I certify that on March 25, 2022, I caused three copies of the foregoing non-party brief to be served upon counsel of record by placing the same in the care of a commercial courier service.

CERTIFICATES SIGNED:

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