SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

-x

Index No. 453196/2022

PEOPLE OF THE STATE OF NEW YORK, by LETITIA JAMES, Attorney General of the State of New York,

Petitioner,

REPLY

Mot. Seq. No. 6

-against-

VDARE FOUNDATION, INC.,

Respondent.

-x

Movants Pseudonymous Authors are grateful for the Court's handling of their motion, and the useful, practical request the Court made that the parties submit proposed redaction protocols. Likewise, Movants apricate the AGO's willingness to waive legal arguments and submit a proposed protocol.

In this spirit, Movants reply to address two issues they have with the AGO's proposal, and to address Movants' planned limited role going forward.

1. The AGO's proposed order departs from the AGO's December proposal by requesting that *each* Pseudonymous Author "provided, individually or through counsel, a sworn statement (or certification under penalty of perjury) representing that they are not a 'Related Party' as that term is defined in N-PCL § 102(23)." This is unnecessary.

VDare knows who qualifies for redaction and who doesn't. It is unnecessary to burden each pseudonymous author to retain counsel and come to this court or go

to the AGO and certify their pseudonymity—an action that itself risks demasking. Counsel for Movants certified Movants' status in connection with this Motion, but that was solely to establish standing to seek the protective order. No other author should be required to do so. AGO certainly didn't suggest it was necessary in December.

A speaker's decision "to remain anonymous ... is an aspect of the freedom of speech protected by the First Amendment. Under our Constitution, anonymous speech is an honorable tradition of advocacy and of dissent." *Cornelio v Connecticut*, 32 F.4th 160, 169-170 (2d Cir 2022) (quoting *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 342 & 357 (1995)). Protecting anonymity is necessary "to protect unpopular individuals from retaliation—and their ideas from suppression." *Id*. Even "private" disclosure to the government is violative of the First Amendment. *Id* at 170 (citing *Ams. for Prosperity Found. v. Bonta,* 141 S. Ct. 2373, 2388 (2021)).

"[T]he government must show that the challenged law . . . (2) does not burden substantially more speech than necessary to further those interests." *Cornelio*, 32 F.4th at 171 (quotations omitted).

The government must explain why the burden it will impose is necessary. *Id*. And the burden imposed must be "narrowly tailored" to meet a compelling government interest. *Id*.

Here, narrow tailoring requires the redaction protocol not include any demands for certification from pseudonymous authors. It isn't necessary. AGO acknowledged this when it said Counsel for VDare could make the certification:

> To the extent that VDARE has other identically situated pseudonymous or anonymous authors—that is, other writers who have published works under a pseudonym at VDARE.com or received payments from VDARE for such written work—and *VDARE, through its counsel, is likewise willing to certify that they are not related parties as that term is defined by N-PCL § 102(23), the OAG agrees that the same redaction protocol, attached as Exhibit G, may apply*.

[Doc 226 at 16](emphasis added). Because even AGO admits certification from pseudonymous / anonymous authors isn't necessary, the strictures of narrow tailoring require that it not occur.

2. AGO request that the redaction protocol contain elements that are best addressed in the contempt matter and not in response to this Motion for a Protective Order. Specifically, the request that VDare counsel (versus VDare or one of its officers) certify that redactions are proper, and the demand that a third-party referee be involved in VDare's production, have nothing to do with Movants' request for a protective order. Rather, those requests relate to the relationship between the parties and the motion for contempt.

Whether the Court elects to allow VDare an opportunity to make a production under the redaction protocol or instead requires a special master or some other form of court supervision, is beyond the scope of this motion, and should be addressed through another lens. All that is necessary in response to this Motion is that a protective order issue stating that pseudonymous authors identities be redacted.

3. Although AGO did not contest the entry of a protective order or redaction protocol at Movants request, it made a nod towards questioning the propriety of the

request and Movants standing to request it. AGO also referred to Movants and "intervenors." Movants wish to clarify that their motion was properly sought under N.Y. CPLR 3103(a). *See. e.g. Matter of Harris v Seneca Promotions, Inc.*, 149 A.D.3d 1508, 53 N.Y.S.3d 758, (N.Y. App. Div. 4th Dep't 2017)(non-party "about whom discovery is sought" has standing to seek protective order) *Doe IV v Roman Catholic Diocese (In re Law Offices of Paul A. Lange)*, 245 A.D.2d 118, 665 N.Y.S.2d 651, (N.Y. App. Div. 1st Dep't 1997) (granting protective order to a nonparty movant). This is significant because this is a limited "intervention." Movants are ***not*** intervening in this action as parties and have no desire to be parties, or to address the merits of the action. Movants' involvement is limited to seeking a protective order, and any necessary follow-up hereto.

Conclusion

Because Petitioner has admitted the unmasking of pseudonymous authors is unnecessary, pseudonymous authors' identities must be shielded. A protective order should issue requiring the entry of a redaction protocol as delineated in the conclusion of Movant's motion. The protocol should not require any certification from any author. The order/protocol itself should be limited to the mechanics the redactions, and should not address AGO's request for the appointment of a referee. The appropriateness of that request (and its advisability), is beyond the scope of this motion. That issue should be separately addressed by the Parties as either an aspect of a contempt motion or otherwise.

Dated: March 14, 2024

Respectfully Submitted,

/s/ David J. Hoffman, Esq.
David J. Hoffman, Esq.
One Whitehall Street
Suite 1825
New York, NY 10004
212-248-7200
djhoffman@djhoffmanlaw.com

and

Charles Miller+
(*pro hac vice*)
INSTITUTE FOR FREE SPEECH
1150 Connecticut Ave., NW
Suite 801
Washington, DC 20036
202-301-3300
cmiller@ifs.org

Counsel for Movants

+Admitted in Ohio. Supervised practice per D.C. Ct. of Appeals R. 49(c)(8)