IN THE
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

FREEDOM FROM RELIGION FOUNDATION, JOHN DOE, and JACK DOE,	)	
Plaintiffs,	)	
v.	)	No. 3:15-cv-00463
CONCORD COMMUNITY SCHOOLS,	)	
Defendant.	)	

Memorandum in Support of Plaintiffs' Motion to Proceed by Anonymous Name and Motion for Protective Order

I. INTRODUCTION

Plaintiff JOHN DOE is the father of a plaintiff JACK DOE, a minor student, who participates in Concord High School's music program. Both plaintiffs have been, and will be again in the future, subjected to the approximately 20-minute live nativity scene and scriptural reading that concludes the defendant's "Christmas Spectacular" concert series. Plaintiffs contend that this practice violates the Establishment Clause of the First Amendment to the U.S. Constitution and seek, among other things, an injunction requiring defendant to cease organizing, rehearsing, presenting, or allowing to be presented the live nativity scene and scriptural reading in the future.

Cases challenging governmental promotion of religion under the Establishment Clause tend to arouse strong emotions in the affected community. This case has proven no exception. The community has already exhibited hostility and prejudice against the

anonymous plaintiffs. John and Jack Doe fear that they will suffer harassment, social ostracism, and other forms of retaliation should their identities be made known. The Doe family's interests in their own and their family's safety, wellbeing, and privacy far outweigh the public's interest in knowing their identities and any potential prejudice to Concord Community Schools. Accordingly, the Court should grant the plaintiffs leave to proceed using pseudonyms.

II. ARGUMENT

A. This Court has to power to allow plaintiffs to use pseudonyms.

Generally, pleadings must disclose the identities of the litigants. *See* Fed. R. Civ. P. 10(a) (". . . the title of the complaint must name all the parties . . ."). But courts have the power to allow plaintiffs to use pseudonyms. *See, e.g.*, *Roe v. Wade*, 410 U.S. 113 (1973); *Doe v. Bolton*, 410 U.S. 179 (1973); *Poe v. Ullman*, 367 U.S. 497 (1961); *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 294 (2000); *Doe v. Elmbrook Sch. Dist.*, 687 F.3d 840 (7th Cir. 2012) (en banc), *cert. denied*, 134 U. S. 2283 (2014).

Courts often grant pseudonym motions in cases involving religion in public schools or at public school events. *See Santa Fe*, 530 U.S. 290 (allowing pseudonyms in challenge to school district's policy allowing student-led prayer before football games); *Elmbrook Sch. Dist.*, 687 F.3d at 853 (holding that public school graduation in church was unconstitutional); *Doe v. Stegall*, 653 F.2d 180, 181–82 (5th Cir. 1981) (granting anonymity in challenge to public school bible readings); *Doe v. Porter*, 370 F.3d 558, 560 (6th Cir. 2004) (holding that public schools cannot teach the Christian bible as religious truth).

In the Seventh Circuit, "[t]he presumption that parties' identities are public information, and the possible prejudice to the opposing party from concealment, can be rebutted by showing that the harm to the [party requesting anonymity] . . . exceeds the likely harm from concealment." *Doe v. Elmbrook Sch. Dist.*, 658 F.3d 710, 721 (7th Cir. 2011), *vacated but opinion adopted in relevant part by Elmbrook Sch. Dist.*, 687 F.3d at 842–43 (quoting *Doe v. City of Chicago*, 360 F.3d 667, 669 (7th Cir. 2004)). Where, as here, a minor plaintiff is likely to face harassment, intimidation, and other reprisals as the result of his personal religious (or nonreligious) beliefs and his legal challenge to governmental conduct, the Seventh Circuit and other federal courts have held that it is appropriate to permit plaintiffs to litigate pseudonymously.

B. <u>As a minor, Jack Doe is especially vulnerable and deserving of heightened protection.</u>

The potential harm to children in Establishment Clause cases is great and thus, courts have frequently allowed minor plaintiffs to proceed using pseudonyms. *See, e.g.*, *Santa Fe*, 530 U.S. 290; *Doe v. Porter*, 370 F.3d at 560–61; *Stegall*, 653 F.2d 180. In *Stegall*, the Fifth Circuit found "especially persuasive . . . that plaintiffs are children." 653 F.2d at 186. The *Stegall* Court "view[ed] the youth of these plaintiffs as a significant factor in the matrix of considerations arguing for anonymity." *Id.* The Seventh Circuit has echoed this sentiment. *See Elmbrook Sch. Dist.*, 658 F.3d at 724 (citing *Sealed Plaintiff v. Sealed Defendant # 1*, 537 F.3d 185, 190 (2d Cir.2008) (stating that an important factor in the balancing inquiry is "whether the plaintiff is particularly vulnerable to the possible harms of disclosure, particularly in light of his age" (internal citations omitted))). The Seventh Circuit wrote, "Because the subject matter of the suit [religion] frequently has a tendency to inflame

unreasonably some individuals and is intimately tied to District schools, such a risk to children is particularly compelling." *Id.*

Recognizing the vulnerabilities of minors in litigation, the Federal Rules of Civil Procedure require minors to be identified by their initials. *See* FED. R. CIV. P. 5.2. This measure of protection is insufficient here, due to the heated nature of the controversy and the expressed desire of community members to identify the plaintiffs. Because plaintiffs are drawn from a small pool of individuals, even the use of initials for Jack Doe would make him easily identifiable.

Minors are exceptionally vulnerable in Establishment Clause litigation. The *Stegall* court held that "[t]he gravity of the danger posed by the threats of retaliation against the Does for filing this lawsuit must also be assessed in light of the special vulnerability of these child-plaintiffs." 653 F.2d at 186. Jack Doe thus deserves heightened protection. John Doe is Jack Doe's father and brings this suit, in part, on behalf of his child. John's anonymity is obviously necessary to protect Jack's.

C. **The Doe family has a reasonable fear of facing harassment, threats, and physical violence based on the community's reaction already exhibited in this case.**

The Seventh Circuit has recognized that "[t]he danger of retaliation is often a compelling ground for allowing a party to litigate anonymously." *Elmbrook Sch. Dist.*, 658 F.3d at 723 (citing *City of Chicago*, 360 F.3d at 669). "To proceed anonymously for fear of retaliation and harassment a 'plaintiff must demonstrate that . . . retaliation is not merely hypothetical but based in some real-word evidence; a simple fear is insufficient." *Does v. Snyder*, No. 12-11194, 2012 WL 1344412 (E.D. Mich. April 18, 2012). The individual

plaintiffs have stated in their declaration (attached to their motion to proceed by anonymous name as Exhibit 1 ["Does Aff."]) that they fear experiencing acts of harassment, intimidation, threats, and possibly even physical harm if their identities are known. The Doe family's fears are reasonable and are based on the well-documented history of plaintiffs in similar positions to their own and based on documented reactions from citizens to the Freedom From Religion Foundation's letter to Concord Community Schools.

The Concord community has already begun to clamor for the Doe family's names. In the comment section for an article on the Goshen News website, one commenter who claims to have "resided in the Concord community for 40 years" wrote, "What I find outrageous is that this one individual can remain anonymous. . . . This one individual who is a COWARD, hiding behind the skirts of the [FFRF]." (Does Aff., pp. 3-4, 13).[1] On a Facebook group dedicated to this issue, "Save Concord's Christmas Spec's Nativity Scene," one commenter wrote, "Let the person who complained come forward! Where are they?," to which another replied, "They are hiding from the outrage they started. . . ." (Does Aff., pp. 4, 14).

Additionally, citizens have made it known that they intend to harass and intimidate the Doe family, should they discover their identity. In the comment section to an Elkhart Truth article, one commenter wrote, "If they bring the suit, let them have the conviction to give their name. Maybe we can hold signs and chant in front of their house." (Does Aff., pp. 3, 10). Another Elkhart Truth commenter wrote that "the horse's butt who tipped [FFRF] off need to be called out . . . [f]or being a trouble maker [sic]." (Does Aff., pp. 3, 9, 11-12). On the community's Facebook page, another commenter mused, "maybe a bolt of lightning will

[1] Page citations to the Does' affidavit are made the page numbers assigned by this Court's electronic filing system.

hit them." (Does Aff., pp. 5, 16). Countless other commenters have expressed that they do not want the Doe family to live in their community and that they should "stay the H--- home" during the Christmas Spectacular or should "go live somewhere else if you don't like it."

Based on this public reaction, it is clear that the plaintiffs have a well-founded fear of retaliation from their community should their identities be revealed.

D. History indicates that the Doe family's fears of harassment, intimidation, and violence are well founded.

As with other Establishment Clause plaintiffs, the Doe family faces a very real threat to their physical and mental health. History has shown that there is a unique risk inherent to bringing Establishment Clause challenges, which typically involve highly charged religious issues. The Seventh Circuit has recognized that "[l]awsuits involving religion can implicate deeply held beliefs and provoke intense emotional responses." *Elmbrook Sch. Dist.*, 658 F.3d at 723 (holding that "the Does' interest in privacy, supported in the record, outweighs the public's interest in totally transparent judicial proceedings to the extent that the Does need not divulge their real names").

In *Doe v. Porter*, plaintiffs sought to enjoin religious instruction in public schools. The Sixth Circuit noted that religious issues are uniquely controversial and found that forcing the plaintiffs to reveal their identities could "subject them to considerable harassment." 370 F.3d at 561. This is typical in Establishment Clause cases.

The well-researched law review article written by Prof. Edwards (attached in full to the motion to proceed by anonymous name as Exhibit 2) lays out this history and its importance clearly and concisely. Vashti McCollum sued in 1945 because the public school allowed students to attend religious classes held in public school classrooms. *See Illinois ex*

rel. McCollum v. Bd. of Educ., 333 U.S. 203 (1948). Ms. McCollum was fired, her house was vandalized, she received more than one thousand letters of hate, and her sons were assaulted. *See* Edwards at 456–57; Robert S. Alley, WITHOUT A PRAYER: RELIGIOUS EXPRESSION IN PUBLIC SCHOOLS 84–89 (1996).

In 1981, Joann Bell and Lucille McCord filed suit to block prayer sessions and the distribution of Gideon Bibles in their children's schools. *See Bell v. Little Axe Indep. Sch. Dist. No. 70*, 766 F.2d 1391 (10th Cir. 1985). The plaintiffs' children, who regularly attended Christian churches, were branded "devil worshipers." Edwards at 457 n.124; Alley at 106. "An upside-down cross was hung on thirteen-year-old Robert McCord's locker" and the Bells received threatening phone calls. Alley at 106. "More than once a caller said he . . . was going to break in the house, tie up the children, rape their mother in front of them, and then 'bring her to Jesus.'" *Id.* at 107–08. The threats were not empty: the Bells' home was burned down. *Id.*

In 1994, Lisa Herdahl challenged prayer practices in her children's schools. *See Herdahl v. Pontotoc Cnty. Sch. Dist.*, 887 F. Supp. 902 (N.D. Miss. 1995). As a result, her children were called "atheists and devil worshipers" by their classmates. Stephanie Saul, *A Lonely Battle in Bible Belt: A Mother Fights to Halt Prayer at Miss. School*, NEWSDAY, Mar. 13, 1995, at A8. Lisa was a Christian Scientist and her husband a Lutheran. Alley at 178. Other parents threatened to beat their own children if they were caught talking to, or playing with, the Herdahl children. Alley at 177. There were reports that a boycott would be organized against the convenience store where Lisa Herdahl worked. Saul at A08. Herdahl

gave up her job "because of threats against her children." Alley at 182. She received death threats and threats that her home would be firebombed. *Id.* at 186.

The plaintiff's son in *Chandler v. Siegelman*, 230 F.3d 1313 (11th Cir. 2000) (challenging prayer at school-related events), was "harassed at school almost daily." Jonathan Ringel, *Alabama Claims U.S. Court Order Denies Students' Right to Pray*, FULTON COUNTY DAILY REP., Dec. 4, 1998, at 1. And even though she was not a plaintiff but merely a vocal opponent of the school-prayer policy challenged in *Santa Fe*, 530 U.S. 290, Debbie Mason received threatening phone calls and was followed home by people trying to intimidate her. Kenny Byrd, *Baptist Family Opposed to Football Prayer Feels Pressure*, BAPTIST STANDARD, June 12, 2000. Her family was unable to find work in their own town. *Id.*

Tammy Kitzmiller, the lead plaintiff in a high-profile case challenging a Pennsylvania school district's promotion of intelligent design, received hate mail and death threats. *Judgment Day: Intelligent Design on Trial* (PBS *NOVA* television broadcast Nov. 13, 2007); *see generally Kitzmiller v. Dover Area Sch. Dist.*, 400 F. Supp. 2d 707, 721–22 (M.D. Pa. 2005). New Jersey high-school student Matthew LaClair also received a death threat after he tape-recorded and publically objected to his history teacher's frequent proselytizing of students. Tina Kelly, *Talk in Class Turns to God, Setting Off Public Debate on Rights*, N.Y. TIMES, Dec. 18, 2006, at B1. After speaking out, LaClair was ostracized. Matthew LaClair, *Scholarship Essay*, www.aclu.org/students/34399res20080314.html.

Proxy violence—violence against plaintiffs' pets to send the message that they are next—is also common. The McCollum's family cat was "lynched;" the McCord's prize goats were "slashed and mutilated;" every squirrel in the Maddox's yard was shot and the corpses

hung from trees; and Darla Wynne's cats were killed, hung from a tree, and gutted, her dog was beaten, and her parrot beheaded—a note, "You're next," attached to the severed head. Edwards at 457, 458, 466; Christina Lee Knauss, *A Quiet Life No More*, THE STATE, Sept. 19, 2004, at D1; Jack Kilpatrick, *Wiccan's Case Reveals Town's Intolerance*, DESERET NEWS, Aug. 14, 2004. The Harris's "two pet cats were poisoned and died as the family watched helplessly." Alley at 141.

Violence is also directed at plaintiffs themselves. Tyler Deveny, the eighteen year-old plaintiff in *Deveney v. Bd. of Educ.*, 231 F. Supp. 2d 483 (S.D. W. Va. 2002), was assaulted after successfully challenging the invocation planned for his high-school graduation ceremony. *See* Charles Shumaker, *Student Beaten for Prayer Suit*, *HE Says*, CHARLESTON GAZETTE & DAILY MAIL, June 19, 2002, at 6D. Eight teens evidently displeased with Deveny for upholding the First Amendment attacked Deveny in a public place, with one saying, "Oh, you hate God," before punching Deveny in the face. *Id.*

The Dobrich family—plaintiffs in *Dobrich v. Walls*, 380 F. Supp. 366 (D. Del. 2005)—suffered so much harassment, anti-Semitic taunts, and threats that they were forced to move, after challenging their public school district's practices allowing teachers to proselytize and distribute Bibles. *See* David Bario, *A Lesson in Tolerance*, AM. LAWYER, July 2008, at 122.

In a Seventh Circuit case challenging a city's display of Christian paintings, Judge Cudahy described events surrounding the substitution of a new, anonymous plaintiff for the named one:

> The record indicates that the original plaintiff in this case, Richard Rohrer, was, in effect, ridden out of town on a rail for daring to complain about the City's conduct.

> The present plaintiff has concealed her identity to avoid suffering the same treatment. However much some citizens of Ottawa may disagree with the position that the Plaintiffs have taken, however, much they may think the Plaintiffs annoying and overlitigious, the conduct of some of them has been deplorable.

Doe v. Small, 964 F.2d 611, 626 (7th Cir. 1992) (Cudahy, J., concurring) (citations omitted).

These reprisals are not a function of time or place. As recently as 2010–2012, a young girl, a high school student in liberal Rhode Island, was reviled in her community for challenging her high school's prayer banner. Jessica Ahlquist faced "bullying and threats at school, on her way home from school and online." *Ahlquist v. City of Cranston ex rel. Strom*, 840 F. Supp. 507, 516 (D.R.I. 2012). She was "subject to frequent taunting and threats at school, as well as a virtual online hate campaign via Facebook." *Id.* Jessica's state representative, Peter Palumbo, called her an "evil little thing" on the radio and florists refused to deliver flowers FFRF ordered for Jessica. Edwards at 458–60. Jessica eventually needed a police escort to attend public meetings and class. *Id.*

The threats to Jessica did not end with the court case. Four months after the court decided in her favor, she received a letter reading in part: "Get the fuck out of R.I. you bitch whore. You are nothing more than a sex-toy of a slut. Maybe you will [be] gang-banged before we throw you out of one of our cars. WE WILL GET YOU— LOOK OUT!" *See* Edwards at 460 for the full letter.

As this history shows, the retaliation against Establishment Clause plaintiffs—arson, assault, attacks on family, intimidation, public humiliation, proxy violence against pets, and much more—is far worse than what a typical plaintiff faces.

E. <u>There is no risk of unfairness to Defendants.</u>

In *Elmbrook*, the Seventh Circuit noted, "[t]here also is no indication that litigating anonymously will have an adverse effect on the District or on its ability to defend itself in this or future actions." 658 F.3d at 724. Similarly, in this case allowing the Doe family to proceed anonymously will not prejudice Concord Community Schools. As the case progresses, all parties will have full discovery rights and will only be minimally inconvenienced, if at all, by the restriction that documents containing the true name of John and Jack Doe be redacted, or if necessary, filed under seal. *See Barrow Cnty.*, 219 F.R.D. at 194 ("The court notes that the inconvenience to defendants should be relatively low. This is not a case that will be determined by plaintiff's credibility or recitation of facts. Rather, as long as plaintiff has standing to sue, this case will depend on the resolution of a legal question: Does the display of the Ten Commandments in the county courthouse violate the Constitution?"). This additional factor weighs in favor of granting this motion. *Doe v. United Servs. Life Ins. Co.*, 123 F.R.D. 437, 439 (S.D.N.Y. 1988).

F. <u>All other relevant factors favor anonymity.</u>

Some federal courts have identified additional relevant factors to determining whether plaintiffs should be permitted to litigate pseudonymously. These additional factors include: (1) whether plaintiffs will need to reveal information of the "utmost privacy"; and (2) whether plaintiffs seeking anonymity are suing to challenge a governmental activity. *See Doe v. Frank*, 951 F.2d 320, 323 (11th Cir. 1992), *citing Stegall*, 653 F.2d at 186. In this case, both of these factors favor preserving anonymity.

First, in the course of this suit, the Does will be forced to reveal information about their religious beliefs, or lack thereof, and their views on separation of church and state—

information that is exceedingly private and sensitive in nature. Courts have recognized that "religion is perhaps the quintessentially private matter." *Doe v. Stegall*, 653 F.2d 180, 186 (5th Cir. 1981). The Fifth Circuit has reasoned, "Although they do not confess either illegal acts or purposes, the Does have, by filing suit, made revelations about their personal beliefs and practices that are shown to have invited an opprobrium analogous to the infamy associated with criminal behavior." *Id.* The Supreme Court agrees, the "preservation and transmission of religious beliefs and worship is a responsibility and a choice committed to the private sphere." *Lee v. Weisman*, 505 U.S. 577, 589 (1992). Without pseudonyms, this intensely private information will be made public, for all in the Concord community and the rest of Indiana to judge.

Even if the Doe family would not have to "directly state their religious affiliations, or lack thereof," the Does will nonetheless have to explain their injuries—a requisite element to prove standing—which will necessarily "require [them] to reveal [their] beliefs concerning the proper interaction between government and religion." *Doe v. Barrow Cnty.*, 219 F.R.D. 189, 193 (N.D. Ga. 2003). "The court recognizes that such concerns can implicate privacy matters similar to those associated with actual religious teachings and beliefs." *Id.* at 193. Religion is an intensely private matter and in light of the threat to their safety and well-being, the Does should not be forced to air those beliefs in order to challenge the defendant's promotion of religion.

As for the second factor, in this case, the Doe family is suing Concord Community Schools, a public school district. Citizens have a greater interest in seeing that the

government complies with the Constitution than in knowing which fellow citizen is seeking to enforce that compliance.

III. CONCLUSION

For the foregoing reasons, plaintiffs respectfully request that their Motion to Proceed by Anonymous Name and Motion for Protective Order be granted.

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was filed electronically on this 7th day of October, 2015. Parties may access this document through the Court's electronic system. This document was also served on the following parties by first-class U.S. mail, postage pre-paid, on this 7th day of October, 2015.

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