IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF VIRGINIA
Roanoke Division

| | | |
|---|---|---|
| DOE 1, by Doe 1's next friend and parent, DOE 2, who also sues on Doe 2's own behalf,<br><br>Plaintiffs,<br><br>v.<br><br>SCHOOL BOARD OF GILES COUNTY,<br><br>Defendant. | ) | Case No. 7:11-cv-00435 |

**REPLY MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR LEAVE TO PROCEED USING PSEUDONYMS AND FOR PROTECTIVE ORDER**

The private nature of deeply held religious beliefs and the strong community reactions provoked by Establishment Clause cases – including, historically, harassment and violence -- combined with the vulnerable age of the student plaintiff, provide good cause to grant the plaintiffs' request to proceed using pseudonyms in this case. Establishment Clause cases involving minors have regularly proceeded with pseudonymous plaintiffs. For example, in the recent case of *Doe 3 ex rel Doe 2 v. Elmbrook*; School *Dist.,* No. 10-2922, 2011 WL 4014359, *11 (7th Cir. Sept. 9, 2011), the court upheld a grant of anonymity to plaintiff students and their parents in a challenge to holding graduation ceremonies at a church. The court explained, "[b]ecause the subject matter of the suit frequently has a tendency to inflame unreasonably some individuals and is intimately tied to District schools, such a risk to children is particularly compelling." *See also Santa Fe Independent School Dist. v. Doe,* 530 U.S. 290 (2000); *Doe v. Harlan County School Dist.,* 96 F.Supp. 2d 667, 670-71 (E.D. Ky. 2000) (By challenging the

school district's practice of hanging the Ten Commandments in classrooms, the plaintiffs are challenging governmental activity. The anonymity of the plaintiffs will not adversely affect the defendants. The plaintiffs seek only an injunction, not individual damages. Because of the public's interest in this issue, the plaintiffs may be subjected to humiliation and harassment if their identities are disclosed."); *Doe v. Stegall*, 653 F.2d 180, 185 (5th Cir. 1981) ("Because this case also involves a religious matter, a child litigant, and a community which is highly interested in this issue's resolution, a balancing of interests justifies the plaintiffs' continued anonymity."); *Freedom From Religion Foundation v. Hanover School Dist.* 626 F.3d 1 (1st Cir. 2010); *Doe v. Tangipahoa Parish School Bd.,* 494 F.3d 494 (5th Cir. 2007); *Doe v. Porter,* 370 F.3d 558 (6th Cir. 2004); *Doe v. School Bd. of Ouachita Parish*, 274 F.3d 289 (5th Cir. 2001); *Doe v. School Bd. For Santa Rosa County, Fla.*, 711 F.Supp.2d 1325 (N.D. Fla. 2010); *Does v. Enfield Public Schools*, 716 F.Supp.2d 172 (D. Conn. 2010); *Doe v. Madison School Dist. No. 321,* 177 F.3d 789 (9th Cir. 1999); *Doe v. Duncanville I.S.D.,* 70 F.3d 402 (5th Cir. 1995); *Doe v. Wilson County School System*, 564 F.Suupp.2d 766 (M.D. Tenn., 2008); *Doe v. Human,* 725 F.Supp. 1499 (W.D. Ark. 1989). Indeed, the defendant has not pointed to a single case in which anonymity was denied in an Establishment Clause case involving schoolchildren.

While the sensitive Establishment Clause context and the minority of Doe 1 are sufficient reason to grant the request to use pseudonyms, there is also, contrary to defendant's assertions, ample admissible evidence of community hostility toward both the Does and their lawyers. Further, allowing the Does to proceed pseudonymously will not prejudice the defendant.

1. **The Evidence Submitted by Plaintiffs is Admissible and Demonstrates an Atmosphere of Hostility Toward Those Who Brought This Lawsuit.**

The letters and comments submitted by plaintiffs in support of their motion for leave to use pseudonyms are not hearsay because they are not offered "to prove the truth of the matter

asserted." Fed. R. Evid. 801(c). Plaintiffs do not seek to prove that plaintiffs' "position is nothing more than an atheist position" (Ex. 5); that plaintiffs or their lawyers should "take a ride" to "you know where" (Ex. 6); that plaintiffs or their lawyers will "have a special place in Hell"; that "non-Christians ought to move out of Giles County before things get ugly over there" (Ex. 8); that plaintiffs or their lawyers are "allowing Satin [sic] to rule" them (Ex. 11); or any of the other hateful sentiments expressed in those communications. Rather, plaintiff only seeks to prove that those things were said.

Defendant is correct that the letters submitted as evidence were directed at the American Civil Liberties Union and the Freedom From Religion Foundation, rather than the Does themselves. This is only natural, given that the ACLU and FFRF have been publicly identified with this case, while the Does' identity is unknown to the public. There is no reason to assume that the Does would not receive similar mail if people knew where to send it. Indeed, the public comments, as opposed to the letters, submitted in evidence disparage the Does at least as much as they disparage the ACLU and FFRF. *See* Ex. 9 ("Maybe we should ship these 'families' overseas to play in the sand with al-Quaida for a little while...maybe then, they would seek God's word!"); Ex. 10 ("we won't let an anonymous coward tell us how to run our business"). Such comments have continued unabated since plaintiffs filed their original motion. *See* Ex. 14, comments posted on Blue Ridge Caucus blog at roanoke.com, Comment 3 ("Maybe 'DOE 1' and 'DOE 2' need to move to Iran where their beliefs would be mainstream."); Ex. 15, Letter to the Editor of The Roanoke Times, Sept. 24, 2011 (calling Doe 2 "a cowardly parent hiding behind a child supposedly offended by the public display of the Ten Commandments"); Ex. 16, Letter to the Editor of the Bluefield Daily Telegraph, Oct. 6, 2011 ("These people that don't want anything in our buildings about our Lord Jesus Christ, find you another country to live in.")

These comments represent more than, as defendant would have it, a mere expression of disagreement with plaintiffs' point of view, or mere "annoyance and criticism that accompany virtually any litigation." (Def't's Opp. At 5.) Rather, they express personal animosity and contempt for those who oppose the posting of the Ten Commandments in a public school.

**2. The Use of Doe 1's Initials and Doe 2's Full Name is Insufficient to Protect the Identity of the Minor Plaintiff.**

There is little doubt that revealing Doe 1's identity would lead to harassment of Doe 1 at school. As Doe 1 has explained, "In general, students at my school are often intolerant of different religious beliefs. For example, I have often heard Christian students tell non-Christian students that they are going to hell." Ex. 1 ¶ 7 (Doe 1 Decl.). In a school of 292 students, disclosing Doe 1's initials would significantly narrow the pool of students who could be the plaintiff. Disclosing Doe 2's full name would narrow it down to one.

**3. Allowing Doe 1 and Doe 2 to Use Pseudonyms Would not Prejudice the Defendant.**

As defendant implicitly concedes, the plaintiffs' identities are irrelevant to the *merits* of this case. The sole question is whether the defendant's policies and actions were constitutional, and no acts of the plaintiffs are at issue. Instead, the defendant claims that the School Board needs to know plaintiffs' identities in order to establish their standing. But this can be easily accomplished if the Board's attorneys know the plaintiffs' identities, as contemplated in plaintiffs' draft protective order. The Board need only provide their attorneys with a list of Narrows High School students and their parents, and the attorneys can easily verify that Doe 1 is a student and Doe 2 is Doe 1's parent. To the extent that this does not satisfy the defendant, its attorneys may depose the plaintiffs and use the deposition testimony in court.

## CONCLUSION

For the foregoing reasons, plaintiffs respectfully request that the Court grant its Motion for Leave to Proceed Using Pseudonyms and for Protective order.

Respectfully submitted,

DOE 1
DOE 2

By:

/s/ Rebecca K. Glenberg

Rebecca K. Glenberg (VSB #44099)
Thomas O. Fitzpatrick (VSB #80364)
American Civil Liberties Union of Virginia Foundation, Inc.
530 E. Main Street, Suite 310
Richmond, Virginia 23219
(804) 644-8080
Fax: (804) 649-2733
rglenberg@acluva.org
tfitzpatrick@acluva.org

Frank M. Feibelman (VSB #13877)
Cooperating Attorney for the ACLU of Virginia
5206 Markel Rd., Suite 102
Richmond, Virginia 23230
(804) 355-1300
FAX: (804) 355-4684
frank@feibelman.com

Patrick C. Elliott
WI Bar #1074300 (*pro hac vice*)
Freedom From Religion Foundation
304 W. Washington Ave
Madison, Wisconsin 53703
(608) 256-8900
Fax: (608) 204-0422
patrick@ffrf.org

**CERTIFICATE OF SERVICE**

I hereby certify that on this 18th day of October, 2011 I electronically filed this document through the ECF system, which will send a notice of electronic filing to the following:

Mary E. McAlister VSB
Richard L. Mast, Jr. VSB
Liberty Counsel
P.O. Box 11108
Lynchburg, VA 24506
court@lc.org

/s/ Rebecca K. Glenberg

Rebecca K. Glenberg (VSB #44099)
American Civil Liberties Union of Virginia Foundation, Inc.
530 E. Main Street, Suite 310
Richmond, Virginia 23219
(804) 644-8080
Fax: (804) 649-2733
rglenberg@acluva.org