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

-against-

VDARE FOUNDATION, INC.,
Respondent.
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Index No. 453196/2022

MEMORAMDUM OF LAW

This discovery dilemma stems from mutual distrust. Respondent doesn't trust the motives of the Petitioner's investigation—thinking it a political and ideological witch hunt. Petitioner doesn't trust Respondent's financial housekeeping, and perhaps its attorneys—thinking Respondent is engaged in rampant self-dealing and will not (or cannot) make a clean document production. Caught in the middle are Movants, pseudonymous authors who simply look to protect their constitutional right to shield their identity (the "Pseudonymous Authors").[1] The solution is for the Court to require the parties do what they are all agreed is necessary and proper: a production that protects the Pseudonymous Authors' identities. That solution is also constitutionally required.

[1] Movants file this motion anonymously because "the injury litigated against would occur as a result of the disclosure of the plaintiff's identity." *Doe v. Szul Jewelry, Inc.*, 2008 NY Slip Op 31382(U) (Sup. Ct.). That is, this motion is filed to protect Movants' identities. Because shielding their identities is the *sine qua non* of this motion, Movants are permitted to proceed anonymously. Importantly, an attorney affirmation can provide the grounds to proceed anonymously. *Doe v. Yeshiva Univ.*, 2021 NY Slip Op 04101, ¶ 1, 195 A.D.3d 565, 566, 146 N.Y.S.3d 482, 483 (App. Div. 1st Dept.) In this particular instance, the parties have already acknowledged Movants privacy interests at stake.

Both Petitioner and Respondent have acknowledged the necessity of shielding Intervenors' identities, have agreed on a manner to do so, and yet the standoff remains over *who* does the redactions. Petitioner, dissatisfied with the first production and the Respondent's apparent failure to produce a redaction log—a basic discovery task—doesn't want Respondent's attorneys to make the redacted production that Petitioner agrees is reasonable. Instead, Petitioner wants to have the power to select a third-party to make the redactions for Respondent

The authors are agnostic as to the mechanism by which their First Amendment rights would be secured. They trust either VDARE, the Court itself, or an appropriate, responsible third party tasked by this Court and subject to its jurisdiction to maintain their anonymity. What matters is that their rights would be protected, as the Constitution requires.

Thus, Movants request a protective order that enters the agreed protocol. Alternatively, the Court could amend the original order in this case to include the protocol. This should be entered regardless of whether the Court permits Respondent to make the production directly, or orders an alternative means of production.

Procedural History

In this Court's original January 25, 2023 Decision and Order on Motion, it addressed VDare's argument about the need to protect the identities of pseudonymous authors:

> Although Respondent argues that redactions are required to protect the identities of contractors—including writers who contribute to the

> website—these are precisely the records the Petitioner seeks to examine in its investigation of Respondent's alleged organizational misconduct. To the extent anonymity is used to mask violations of the law, "it is unprotected by the First Amendment." Arista Recs., LLC v. Doe 3, 604 F.3d 110, 118 (2d Cir. 2010). For example, the only board member among four who is not a Brimelow family member is a known contributor. The Attorney General may probe this contributor's compensation as part of its investigation of conflicts of interest and board independence. And the Attorney General may seek the identities of other contributors to determine whether further conflicts of interest may exist.

[Doc 62, at 8]. In other words, the identities of *all* pseudonymous authors could not be shielded because *some* of them are insiders.

Of course, the Court and Petitioner acknowledged that a few authors being insiders is not a basis to unmask the Pseudonymous Authors as well as many, many others who have contributed to Respondent's website pseudonymously. "Moreover, Petitioner has indicated a willingness to enter into a stipulation / order of confidentiality to further address any of Respondent's concerns." [Id at 9]. Thus, the Court's Order thoughtfully allowed Respondent to make a production containing "any additional redaction identified by VDARE in a written log that complies with the requirements of CPLR 3122(b)". [Id]

The Court reconfirmed on December 11, 2023, that Respondent could make redactions and "simultaneously produce corresponding redaction logs with each production," [Doc 129, at 1].

The First Department also recognized the importance of the redactions allowed by the Order, "Contrary to respondent's claim, anonymity of its vendors and contributors would not be sacrificed, as both the OAG and the court have agreed to

a so-ordered confidentiality agreement." *Matter of People of the State of N.Y. v. VDARE Found., Inc.*, 2024 NY Slip Op 00819, ¶ 3, 2024 N.Y. App. Div. LEXIS 872, *2 (App. Div. 1st Dept.). Petitioner has filed a pending motion for contempt based on Respondent's failure to comply with the Court's orders.

Factual Background

The Court is aware of the facts that have occasioned this suit, and the discovery dispute. This memorandum will primarily focus on additional relevant facts pertinent to this motion and the interests of the Pseudonymous Authors.

Movants are two pseudonymous authors who have been paid for writings published on Respondent's website in the period covered by the subpoena. Fearing retribution for their controversial political speech, the authors wish to remain pseudonymous so that they can continue to fully engage in political debate. Movants also desire to maintain associational anonymity, as they fear retribution for associating with Respondent. Specifically, Movants believe their primary jobs are at risk if they were to be demasked. One Movant also fears that family member's jobs would also be at risk. Both Movants risk subjecting themselves to harassment if their identities are disclosed. This is why they write under pseudonyms in the first instance.

In October 2023, Counsel for the Pseudonymous Authors reached out to Petitioner, seeking to protect their interests. Petitioner engaged Movants' counsel in several substantive, professional and candid exchanges, which culminated in an

agreement in principle that would preserve the authors' anonymity while allowing a production to go forward.

Movant proceeded to engage in several productive meet-and-confers, after one of which, Petitioner requested a formal proposal from Movants. Movants sent a substantive letter to Petitioner on November 27, 2023, explaining our position that pseudonymous authors identities are constitutionally protected and that their identities are not needed by Petitioner to conduct its investigation. (See Affirmation in Support of Motion, at Ex A).

Petitioner agreed that the pseudonymous authors' identities are not needed for Petitioner's investigation. (See Id., at Ex. B). In a good faith effort to resolve the concerns of the pseudonymous authors, Petitioner made a proposal which pseudonymous authors agree will satisfy their concerns at this juncture. The relevant portions of Petitioner's proposal are:

> 2. Information that reveals the identities of pseudonymous authors may be redacted, e.g., name, address, social security number or other identifying number or code, telephone number, email address.) All other information regarding transactions between VDARE and the pseudonymous author (such as, without limitation, payment records, contracts, terms of the transactions and corresponding communications) will be provided without redaction. The actual identity of the author can be redacted if information identifying the pseudonym is provided in a redaction log.
>
> 3. All redactions will be reflected in a redaction log that identifies the basis for the redaction and where applicable, the identity by pseudonym of the author who is counterparty to the transaction.
>
> 4. The terms of this protocol will apply to *all* VDARE responsive documents, including those previously produced in redacted form.
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> * * *
>
> 6. The Attorney General reserves all rights to seek disclosure of identifying information for the pseudonymous authors where it deems it necessary to the

> Attorney General's investigation. If we demand that disclosure from VDARE, the Attorney General will provide notice to you in writing by email.

(Id., at 2-3).

One would have thought this standoff could have ended there. Petitioner offered a reasonable discovery protocol that would protect the identities of the pseudonymous authors. Movants agreed these terms would work. But the standoff continued.

Petitioner conditioned its offer on Respondent agreeing to have a third party make the redactions. "We propose the following redaction protocol, but it is contingent on all redaction determinations and corresponding logging of information being done by a third party acceptable to the OAG and the Court, with the cost of the third party to be borne by VDARE." (*Id*. at 2). Petitioner made clear that its distrust of Respondent was the cause of this request. "We are not willing to agree with your proposal to allow VDARE to make the redactions in light of the failure, from the outset of this investigation and continuing to the present, by VDARE and its current counsel to comply with the court's orders or our prior agreements." (*Id*.) While Movants take no position on Petitioner's request for third party review, the source of Petitioner's frustrations is not under Movants' control, and does not relate to Movants' rights.

Movants held a call with counsel for the parties in an effort to bridge this gap. Respondent would not agree to having a third-party supervise its redactions, but Petitioner would not agree to withdraw its contempt motion unless Respondent did agree.

In the interim, Movants have encouraged Respondent to simply make the production under the protocol proposed by Petitioner. But the lack of trust continues to be a barrier. Respondent will not do so because it believes Petitioner will not "accept" the production. By this, Movants understand Respondent to mean that because Petitioner does not trust Respondent to make the production, Respondent will not make the production.

At this point, the Parties have agreed on a protocol to protect the identities of pseudonymous authors. They simply disagree on who will make the redactions. But as this Court has twice recognized and the Appellate Department acknowledged, the unmasking of pseudonymous authors should be off the table. This motion is filed to formalize the means of protection referenced in the previous Order.

Standard of Review

"The court may at any time … on motion … of any person … about whom discovery is sought, make a protective order denying, limiting, conditioning or regulating the use of any disclosure device. Such order shall be designed to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts." N.Y. CPLR 3103(a).

Movants are persons about whom discovery is sought. As such, they possess standing to file this motion to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to themselves. *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).

Movants may do so anonymously. *Doe v. Yeshiva Univ.*, 2021 NY Slip Op 04101, ¶ 1, 195 A.D.3d 565, 566, 146 N.Y.S.3d 482, 483 (App. Div. 1st Dept.); *Doe v. Szul Jewelry, Inc.*, 2008 NY Slip Op 31382(U) (Sup. Ct.).

The First Amendment requires the narrow tailoring of relief to the State here. "[E]ven where, as here, the Attorney General's purpose in serving the subpoena is found to be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." *Matter of Evergreen Ass'n, Inc. v. Schneiderman*, 2017 NY Slip Op 05086, ¶ 5, 153 A.D.3d 87, 101, 54 N.Y.S.3d 135, 145 (App. Div. 2nd Dept.) When First Amendment rights are at stake, "in order to pass constitutional muster, the governmental action must be narrowly tailored to serve the compelling state interest." *Id.* Here, narrow tailoring requires the issuance of a protective order that includes an express protocol for shielding Movants' identities—one to which the Parties have already agreed is adequate. In addition to the federal Constitution, the Pseudonymous Authors' rights to free speech and the free press are reinforced by the NEW YORK STATE CONST., ART. I, §8.

Per NY CPLR § 2221(e), a Court is empowered to revisit and modify prior nonfinal orders as justice may demand when a Motion to Renew is filed, especially when new facts are presented. "A motion for leave to renew is intended to direct the

court's attention to new or additional facts which, although in existence at the time the original motion was made, were unknown to the movant and were, therefore, not brought to the court's attention." *Garner v. Latimer*, 306 A.D.2d 209, 209, 761 N.Y.S.2d 657, 658 (App. Div. 1st Dept. 2003). "[C]ourts have discretion to relax this requirement and to grant such a motion in the interest of justice" *Mejia v Nanni*, 307 A.D.2d 870, 871, 763 NYS2d 611 (2003). Here, Movants are not party to this case and were not able to argue their case at the original hearing. Additionally, new facts are present that show that Petitioner agrees to a protocol where Movants' identities can be protected and need not be produced. As such, this Motion to Renew, is proper under NY CPLR § 2221(e).

This combined Motion for a Protective Order an Motion to Renew does not seek to relitigate the original motion. Rather, it seeks only to refine the portion of the Order that authorized Respondent to make redactions to include an express protocol for doing so as it related to pseudonymous authors.

Argument

I. Unmasking of Pseudonymous Authors Cannot Be Ordered Where Reasonable Alternatives Exist

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)).

Whether intermediate or strict scrutiny applies here is admittedly a bit of an open question. *Ams. for Prosperity*, 141 S. Ct. at 2392 (Alito, J., concurring) ("I am not prepared at this time to hold that a single standard applies to all disclosure requirements. And I do not read our cases to have broadly resolved the question in favor of exacting scrutiny.") At a minimum, exacting scrutiny is needed where disclosure *might* deter First Amendment protected activity. *Ams. for Prosperity*, 141 S. Ct. at 2388. "The risk of a chilling effect … is enough, because First Amendment freedoms need breathing space to survive." *Id.* at 2389 (internal quotation omitted).

Movants submit that strict security applies here. *Ams. for Prosperity*, 141 S. Ct. at 2390 (Thomas, J., concurring) However, even under exacting scrutiny, Movants' anonymity should be protected. The government bears the burden of establishing that unmasking the authors would be constitutional. "[T]he government must show that the challenged law (1) advances important governmental interests unrelated to the suppression of free speech and (2) does not burden substantially more speech than necessary to further those interests." *Cornelio*, 32 F.4th at 171 (quotations omitted).

The burden on the government is great. It cannot rely on conjecture or speculation. *Id*. And the burden imposed must be "narrowly tailored" to meet a compelling government interest. *Id*.

In the associational context, "disclosure requirements can chill association even if there is no disclosure to the general public." *Ams. for Prosperity*, 141 S. Ct. at 2388. Here, Movants have two separate First Amendment rights chilled (as well as their rights secured by the New York State Constitution. First, their right to associate with Respondent anonymously is chilled. *Id*. No one here contests that VDare is a controversial organization. In fact, the reason is purchased the castle was because it faced difficulties using other facilities for its events.

Second, Movant's right to speak anonymously is chilled. Movants jobs are at risk, their family member's jobs are also as risk, and they risk subjecting themselves to harassment if their identities are disclosed. This is why they write under pseudonyms in the first instance.

New York courts have applied these principles to protect the very rights of political expression and association as are at state here. *Matter of N.Y. State Senate Republican Campaign Comm. v. Sugarman*, 2018 NY Slip Op 07218, ¶ 3, 165 A.D.3d 1536, 1540-41, 88 N.Y.S.3d 580, 585 (App. Div. 3rd Dept.) ("Nevertheless, in order to withstand constitutional scrutiny, respondent must also establish that the subpoenas are narrowly tailored to effectuate said governmental interest, i.e., that the subpoenas seek only production of those documents and materials directly related to respondent's inquiry"). In *Sugarman*, the Appellate Department partially reversed a trial court order and quashed over a dozen document requests from an investigatory subpoena because they were not narrowly tailored.

Likewise, in *Matter of Evergreen Ass'n, Inc.,* the Second Department "limit[ed] in scope the demands set forth in the subpoena to require the disclosure of only those documents that are substantially related to the Attorney General's legitimate need to gather evidence . . . and which do not unnecessarily intrude on Evergreen's First Amendment right to freedom of association." *Matter of Evergreen Ass'n, Inc.* 153 A.D.3d at 101.

Here, the government has acknowledged that its interests can be served by a production that shields the identity of pseudonymous authors. Therefore, they must be shielded. The constitutional analysis is as simple as that. The government cannot establish that there is a narrowly tailored need to require the unmasking of pseudonymous authors (at least those who are not insiders) when it has agreed there is a path forward without unmasking them.

It is also important the Court does not punish pseudonymous authors for any wrongdoing by Respondent. Should the Court finds it necessary to sanction Respondent, those sanctions should not unmask the pseudonymous authors, for the same reason Petitioner cannot demand the unmasking. There are other ways the Court can sanction Respondent that do not involve unmasking. And if it is possible not to unmask the pseudonymous authors, then it is necessary not to do so.

Conclusion

Because Petitioner has admitted the unmasking of pseudonymous authors is unnecessary, their identities must be shielded. Accordingly, to adequately protect the interests of Movants, a protective order should be entered and/or the Original

Order modified to expressly include the redaction protocol proposed by Petitioner regardless of whether the Court determines the redactions should be made by Respondent, a third-party special master, or by the Court *in camera*. *Board of Managers of Regal Walk Condo. I v Community Mgmt. Servs*., 226 A.D.2d 414, 640 N.Y.S.2d 784, (N.Y. App. Div. 2d Dep't 1996) (same).

The protective order should provide, substantially as follows:

1. Information that reveals the identities of pseudonymous authors must be redacted, e.g., name, address, social security number or other identifying number or code, telephone number, email address.) All other information regarding transactions between VDARE and the pseudonymous author (such as, without limitation, payment records, contracts, terms of the transactions and corresponding communications) shall be provided without redaction.
2. All redactions will be reflected in a redaction log that identifies the basis for the redaction and where applicable, the identity by pseudonym of the author who is counterparty to the transaction.
3. The above redaction rules shall not apply to pseudonymous authors who are "related parties" to VDARE, as that term is defined in the N-PCL § 102(23). Related Parties are not entitled to redaction under this Order.
4. The terms of this protocol will apply to all VDARE responsive documents, including those previously produced in redacted form.
5. The Attorney General may seek disclosure of identifying information for the pseudonymous authors where it deems it necessary to the Attorney General's investigation. If the Attorney General demands that disclosure, the Attorney General will provide notice to Movant's Counsel in writing by email, who may oppose the same.

Dated: New York, New York
February 20, 2024

Respectfully Submitted,

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