UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF NEW JERSEY

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Care-One Management, LLC, *et al.*

v. Civ.Act No. 2:12-cv-06371

-SDW-MCA

United Healthcare Workers East,
SEIU, 1199, *et al.*

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BRIEF OF *AMICUS CURIAE* SUBMITTED ON BEHALF OF THE NEW JERSEY CIVIL LIBERTIES UNION IN SUPPORT OF MOTION TO QUASH SUBPOENAS DIRECTED TO TWO NAMED NYU LAW STUDENTS, AND FOR A PROTECTIVE ORDER

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Interest of Proposed *Amicus Curiae* [1]

This matter raises important questions concerning the United States Constitution, specifically regarding the rights of speakers to be free from forced disclosure of private documents regarding their associational and speech activities.

The American Civil Liberties Union of New Jersey ("ACLU-NJ") is a private, non-profit, non-partisan membership organization dedicated to the principles of individual liberty embodied in the Constitution, including most notably the rights to freedom of speech and association. Founded in 1960, the ACLU-NJ has approximately 13,000 members in New Jersey. The ACLU-NJ is the state affiliate of the American Civil Liberties Union, which was founded in 1920 for identical purposes, and is composed of more than 500,000 members nationwide.

The ACLU-NJ has long supported individuals' First Amendment rights, has opposed actions that chill expression, and has handled dozens of cases in the past decade involving freedom of speech and association. Most notably, *see, e.g., Too Much Media, LLC v. Hale*, 206 N.J. 209 (2011) (setting standard for assessing

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[1] Federal District Courts have inherent power to determine whether to permit the filing of briefs *amicus curiae.* Neither the Federal Rules of Civil Procedure nor the Local Rules specifically refer to *amicus* participation. Proposed *amicus curiae* has sought to conform this motion to the requirements of Rule 29 F.R. App. Proc. Counsel represent that no person other than *amicus curiae* and the counsel listed herein authored this brief in whole or part, or contributed money to fund its preparation and filing,

when reporter shield applies to blogger); *Committee For A Better Twin Rivers v. Twin Rivers Homeowners' Ass'n*, 192 N.J. 344 (N.J. 2007) (establishing right to free speech in condominium complexes); *Tarus v. Borough of Pine Hill*, 189 N.J. 497 (N.J. 2007) (establishing free speech right to tape public meetings); *Forum for Academic and Institutional Rights v. Rumsfeld*, 390 F.3d 219 (3d Cir. 2004) (supporting the right of associations to litigate on behalf of their unnamed members), reversed, __U.S.__, 126 S.Ct. 1297 (2005); *Donato v. Moldow*, No. BER-L-6214-01 (N.J. Super. Ct. Law Div.) (defending anonymous website posters and owner against public officials' libel suit), *affirmed*, 374 N.J. Super. 475 (App. Div. 2005).

The participation of *amici curiae* is particularly appropriate "in cases of general public interest by making suggestions to the court, by providing supplementary assistance to existing counsel, and by insuring a complete and plenary presentation of difficult issues so that the court may reach a proper decision." *NAACP v. Town of Harrison*, 940 F.2d 792, 808 (3d Cir. 1991). The motion to quash herein presents important First Amendment issues concerning the rights of persons (in this case, law students) to communicate and associate freely. In the hope that participation of *amicus curiae* may be of assistance to this Court in resolving First Amendment issues of significant public importance, the

undersigned counsel respectfully submits this brief *amicus curiae* in support of the motion to quash.

Introductory Statement

Pursuant to Rules 45(d)(3)(iii) and (iv) FRCP,[2] and Rule 26(c) FRCP, non-party movants, two law students at New York University School of Law,[3] seek an order quashing an overbroad subpoena issued by counsel for the plaintiff herein. The subpoena imposes an undue burden within the meaning of Rule 45(d) because it requires production of confidential communications protected by the First Amendment.

The subpoenas at issue, currently returnable on April 25, 2014, seek copies of all email and other communications between the two named law students and: (1) the Dean of NYU Law School; (2) two student groups at NYU;[4] (3) all NYU students acting on behalf of or associating with the two student groups; and (4) persons employed by, or associated with, two defendant labor unions concerning

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[2] Rule 45 was amended in December, 2013 to place provisions dealing with objections and motions to quash in Rule 45(d).

[3] The named-targets of the subpoena are Leo K. Gertner and Luke Herrine, first-year law students at NYU Law School facing final examinations beginning on May 9, 2014.

[4] The two student groups are NYU Student Labor Action Movement (an undergraduate organization); and NYU Law Students for Economic Justice (a law school student group).

an ongoing dispute between the plaintiff, herein, Mr. Daniel Straus, and two defendant labor unions arising out of Mr. Straus' business activities as the CEO of several major health providers. The amended RICO complaint herein alleges that the defendant unions are engaged in a systemic pattern of extortionate behavior designed to force Mr. Straus to consent to union organization of his health facilities. The alleged extortionate acts are divided into three categories: (1) allegations of isolated workplace sabotage; (2) allegations of facially-lawful campaign contributions to elected public officials, including the Governor of Connecticut, allegedly designed to induce them to take improper action against Mr. Straus; and (3) allegations of numerous, allegedly untrue, statements made to elected officials, law enforcement officials, clergy, members of the NYU community, and the general public concerning Mr. Straus' business and health care practices, allegedly designed to undercut Mr. Straus' standing with government officials having the power to injure his business interests.

As it specifically relates to the instant subpoenas, the complaint alleges that the union defendants communicated with two NYU student organizations to raise questions concerning Mr. Straus' standing as a member of NYU Law School's Board of Trustees, and in connection with protests, the distribution of leaflets, and petitions seeking Mr. Straus' removal as a law school trustee based on his alleged

business practices.[5] None of the complaint's factual allegations regarding communications to and from any NYU law students describe illegal activity (or any activity that could conceivably fall under a RICO claim).[6] Quite the contrary, the paragraphs of the complaint pertaining to NYU student organizations, and to NYU law students, describe classic, wholly-lawful constitutionally-protected speech activities.

No doubt exists that all members of the NYU community, including the two law students subpoenaed herein, are entitled under the First Amendment to communicate freely with each other, with the Dean, with elected officials, and with Mr. Straus' critics in the labor union movement, free from the threat that their

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[5] Mr. Straus' allegations concerning communications to and from students at NYU School of Law are set forth at paragraphs 79-83 of the amended complaint. Briefly summarized, they allege that the union defendants have communicated with a number of NYU law students to "embarrass" Mr. Straus; to "disparage him in front of the community;" to "shame" him; to "publicly denigrate" him; and to seek to "oust" him from the NYU Law School Board of Trustees.

[6] Even if Plaintiffs were to claim that the students' speech was inaccurate, in recent years the Supreme Court has repeatedly rebuffed efforts to impose civil or criminal liability on the basis of nothing more than a communication's alleged inaccuracy or offensiveness. *See United States v. Alvarez*, 132 S. Ct. 2537 (2012) (reversing conviction for falsely claiming to have been awarded the Congressional Medal of Honor); *Snyder v. Phelps*, 131 S. Ct. 1207 (2011) (reversing jury award for intentionally inflicting emotional distress on family engaged in burying fallen soldier). At a minimum, the truth or falsity of any such communications must be measured against the demanding "actual malice" standard of *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), and, as in *NAACP v. Claiborne Hardware*, 458 U.S. 886 (982), the allegations concerning "pure speech" must be carefully severed from any allegations of unlawful conduct.

lawful communicative activities will be the target of a government-enforced subpoena designed to compel them to subject their private communications to Mr. Straus' scrutiny. Forced disclosure of internal documents of the student organizations, as well as forced disclosure of the organizations' and students' communications with each other and with Mr. Straus' critics, would significantly infringe upon the organizations' (and on the subpoena recipients') First Amendment rights to free speech and freedom of association. At a minimum, the prospect of forced disclosure of private communications would unquestionably deter other students who might wish to engage in constitutionally-protected activities similar to the activities described in the complaint, but who do not wish to subject themselves to Mr. Straus' scrutiny.

Since the subpoenas at issue clearly impinge on First Amendment rights, plaintiffs bear a heavy burden in seeking to enforce them. They must demonstrate that their need for the information at issue is so great that it outweighs the First Amendment interests of the targets of the subpoena. Such a heavy constitutional burden cannot be satisfied in this case. In the absence of even an allegation of any improper student activity, Plaintiffs cannot demonstrate an overriding need to force the student-targets of the subpoenas at issue to reveal: (1) private communications by students and student organizations; (2) the students' communications with the Dean; (3) communications between and among NYU law students; or (4)

communications to or from the union defendants. Even if plaintiffs were to attempt articulate an interest in reviewing particular communications from the union defendants to NYU students, that information must be sought from the defendants themselves without unnecessarily impinging on the First Amendment rights of NYU law students.

In short, all members of the NYU community, including the two law students subpoenaed herein, are entitled under the First Amendment to communicate freely among themselves, with Mr. Straus' supporters, with his critics in the labor union movement, and with elected or other officials, free from the threat that their wholly lawful communicative activities will be the target of an intrusive court-enforced subpoena designed to force them to open their lawful political communications to the scrutiny of the subject of their protests (here, Mr. Straus).

Since the only even arguably relevant information sought by the subpoenas to the NYU Law students can be obtained from the defendants themselves, the subpoenas cannot withstand First Amendment scrutiny and must be quashed.

Argument

1. Rule 45 Subpoenas, Even When Issued By Counsel in Private Litigation, Are the Equivalent of "State Action" for the Purposes of First Amendment Review Because They

Are a Form of Delegated Government Power
Enforceable by Contempt of Court

Movants, two NYU Law students, argue that the subpoenas in question violate their First Amendment rights by compelling them, under threat of contempt of court, to reveal private communications with the Dean, their fellow students, and outside critics concerning Mr. Daniel Straus, a member of the Board of Trustees of NYU Law School whose business activities are the subject of a public debate that first erupted prior to the two students' matriculation at NYU.

Although the First Amendment applies only to "state action," its protections apply fully to Rule 45 subpoenas issued by counsel in a private litigation seeking to compel disclosure of material protected by the First Amendment. *In re Motor Fuel Transportation Sales Practices Litig.,* 707 F.Supp.2d 1145, 1150 (D. Kans. 2010). The text of Rule 45 makes it clear that governmental subpoena power is being delegated to private counsel. While Rule 45 subpoenas must ordinarily be issued by the clerk of the court, Rule 45(a)(3)(A) provides: "An attorney also may issue and sign a subpoena if the attorney is authorized to practice in the issuing court." Even more clearly, Rule 45(g) (as amended) provides that a person who "fails without adequate excuse to obey a subpoena" may be held in contempt by the issuing court.

Thus, the two law students in question are not merely confronted with an information demand by a private party. They confront an official command issued by an officer of the court directing them to reveal their private political communications, the violation of which is punishable by contempt of court. Such a government-backed command to disclose private communications is unquestionably an exercise of governmental power subject to full First Amendment review. *See Edmonson v. Leesville Concrete Company, Inc.* 500 U.S. 614 (1991) (private litigant may not use peremptory challenges to exclude jurors based on race because litigant is exercising delegated government power).

2. The Records of Private Student Communications Sought By the Subpoenas in Question Are Protected Against Government-Mandated Disclosure by the First Amendment

The subpoenas at issue herein seek disclosure of private communications by NYU Law students to and from a variety of correspondents, ranging from the Dean, student organizations, other students, and Mr. Straus' critics in the labor union world, concerning allegations that Mr. Straus, a trustee of the law school, has engaged in improper business practices rendering it inappropriate for him to continue as a trustee. It is hard to imagine a more protected set of set of private communications.

There is no doubt that NYU students enjoy a constitutionally-protected right to discuss and engage in expressive activities related to the pending dispute

between Mr. Straus, Care One, and the defendant labor unions. Indeed, NYU students have a particular interest in learning about, and discussing Mr. Straus's business activities because he is an NYU Law School trustee, whose business behavior, argue the students, reflects on the law school itself. Such a right to learn about, and comment on, matters of social and political interest "occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection." *Connick v. Myers*, 461 U.S. 138, 145 (1983).

In *Doe v. Reed,* 561 U.S. 186, 130 S. Ct. 2811 (2010), Chief Justice Roberts, writing for the Court, noted that forced disclosure of private First Amendment activity is subject to "exacting review," requiring the person seeking the forced disclosure to demonstrate a substantial relationship between the information at issue and a government interest important enough to outweigh the First Amendment values at stake.[7] Once the target of a forced disclosure demonstrates that it would impose a "chilling effect" on First Amendment activity, the government (or, as here, the private litigant clothed with delegated government power) must demonstrate a compelling need for the information; a need that is sufficiently strong to overbalance the powerful First Amendment interest in

[7] While *Doe v. Reed* addressed disclosure of information specifically in the electoral context, the standard has also been held to apply to discovery matters. *See., e.g., In re Motor Fuel Transportation Sales Practices Litig.*, 707 F.Supp.2d at 1152.

confidentiality. *Doe v. Reed*, 130 S. Ct. at 2818; *In re Motor Fuel Transportation Sales Practices Litig.,* 707 F.Supp.2d at 1152.

In the present case, the First Amendment balance could not be clearer. The prospect of forced disclosure of the identities and communications of students engaged in protest activities aimed at Mr. Straus would unquestionably deter many from engaging in protected activities. Given such a "chilling effect," plaintiffs must meet an extremely heavy burden in order to overcome the students' First Amendment rights. Forced disclosure would strike at the students' First Amendment right to carry on associational and expressive activities anonymously, free from the threat of government-mandated disclosure. *See, e.g., NAACP v. Alabama*, 357 U.S. 449 (1958) (invalidating demand for names and addresses of Alabama NAACP); *Bates v. Little Rock*, 361 U.S. 516 (1960) (invalidating demand for membership list in connection with occupational licensing statute); *Shelton v. Tucker*, 364 U.S. 479 (1960) (invalidating requirement that teachers list organizations to which they belong, or have contributed); *Louisiana ex rel Gremillion v. NAACP*, 366 U.S. 293 (1961) (invalidating demand for membership list of non-profit corporation); *Gibson v. Florida Legislative Investigating Comm.,* 372 U.S. 539 (1963) (invalidating demand for membership records of Miami NAACP); *Brown v. Socialist Workers '74 Campaign Committee*, 459 U.S. 87 (1982) (exempting contributions to Socialist Party from public disclosure).

If students fear that private communications concerning powerful figures in the educational community may be the subject of compulsory disclosure to the target of their criticism, criticism will simply dry up. While the squelching of such criticism would, no doubt, please the targets, such a process of government-assisted suppression of criticism, especially criticism in an academic environment committed to free thought, is wholly antithetical to the First Amendment. *See, e.g., Shelton v. Tucker, supra.* There is, therefore, no doubt that the students' right to communicate with the law school Dean, and with Mr. Straus' critics in the larger community, is fully protected under the First Amendment, including the right to be free from government-mandated disclosure rules. *McIntyre v. Ohio Elections Comm'n,* 514 U.S. 334 (1995) (upholding right to distribute anonymous campaign literature); *Lamont v. Postmaster General,* 381 U.S. 301 (1965) (right to receive propaganda from abroad without registering with government); *Doe v. Reed, supra* (upholding facial validity of disclosure of petition signatures; but recognizing First Amendment right to anonymity in specific cases if risk of retaliation exists).

When the students' overwhelming interest in anonymous speech is balanced against Mr. Straus' interest in forcing disclosure of the speech, there is absolutely nothing on Mr. Straus' side of the scale. Whatever the validity of the amended complaint, neither the speech of NYU Law students sought by the subpoenas in

question, nor the expressive activities in which the students have engaged, constituted anything remotely approaching unlawful behavior that could be relevant to plaintiffs' RICO complaint.[8] The only communications even arguably relevant to the RICO claim against defendants are *the defendants' communication to the students.* Even as to those communications, it is difficult to understand how speech, if any, from defendants to NYU law students could be relevant to a RICO complaint sounding in allegedly extortionate threats to Mr. Straus' property interests. NYU students simply lack the power to harm Mr. Straus' businesses. But even if Mr. Straus continues to insist on a need to review such communications, the short and obvious answer to such an implausible assertion of need is to *ask the defendants for the relevant information.* There is, therefore, absolutely no need to impinge on the constitutional rights of NYU law students, and to subject them to *in terrorem* subpoenas about their private communications in order to discover information already in the hands of the defendants.

Conclusion

For the above-stated reasons, *amicus curiae* respectfully urges that the subpoenas in question be quashed, and that a protective order issue under Rule 26

[8] Even if there was some reason proffered by plaintiffs that disclosures related to student speech might tangentially assist in establishing the RICO claim against defendants, it would still be insufficient to overcome the burden the forced disclosure would place on the students' First Amendment rights.

restraining Mr. Straus from seeking to discover or interfere with lawful speech within the NYU community concerning his business practices.

Respectfully submitted,

x *Edward L. Barocas*
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