UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA *ex rel.* ANTI-DISCRIMINATION CENTER OF METRO NEW YORK, INC., Plaintiff,	:	No. 06 Civ. 2860 (DLC)
v.	:	ECF Case
WESTCHESTER COUNTY, NEW YORK, Defendant.	:	

AMICUS CURIAE BRIEF OF THE CENTER FOR INDIVIDUAL RIGHTS, IN SUPPORT OF DEFENDANT, IN RESPONSE TO MONITOR'S REPORT REGARDING DEFENDANT'S COMPLIANCE WITH PARAGRAPH 33(c) OF THE SETTLEMENT

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Interest of *Amicus Curiae*

The Center for Individual Rights (CIR) is a public interest law firm with a longstanding interest in issues of free speech, federalism, and the separation of powers. It has participated in the litigation of numerous cases concerning issues related to the First Amendment, including *Morse v. Frederick,* 551 U.S. 393 (2007), *Rosenberger v. Rectors and Visitors of the University of Virginia,* 515 U.S. 819 (1995), *Sypniewski v. Warren Hills Regional Bd. of Educ.,* 307 F.3d 243 (3d Cir. 2002), *Vera v. O'Keefe,* 791 F. Supp. 2d 959 (S.D. Cal. 2011), and *Doe v. Burke,* 91 A.3d 1031 (D.C. 2014). It litigated *United States v. Morrison,* 529 U.S. 598 (2000), and has filed *amicus curiae* briefs in cases concerning federalism and the separation of powers, including *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.,* 561 U.S. 477 (2010) and *Bond v. United States,* 134 S. Ct. 2077 (2014).

CIR submits this *amicus curiae* brief to help this Court understand the unconstitutionality of the relief the Monitor seeks with respect to free speech, federalism, and the separation of powers.

Introduction

A political dispute has opened up between the Westchester County Executive and the Obama Administration's Department of Housing and Urban Development (HUD). In his Report, the federal Monitor in this case (selected by HUD) seeks this Court's help in this dispute. It should be refused.

The Westchester County Executive, Republican Rob Astorino, has made a number of statements about what he characterizes as HUD's unacknowledged agenda: to use the Order of Settlement and Dismissal in this case ("the Settlement") and other mechanisms to bring about changes in local zoning, and obtain federal control over local land-use decisions, in Westchester County ("the County"). The Monitor asks this Court to find that the statements Astorino has made in the political arena about HUD's agenda are false, asks this Court to order Astorino to communicate that finding to others, and seeks the removal of statements inconsistent with that finding from the County's website.

Both compelled political speech and prior restraints on political speech are forbidden by the First Amendment. And what the Monitor asks is unconstitutional in another way: for this Court gratuitously to lend its prestige to either side of this political controversy would put it at odds both with federalism and with the separation of powers set forth in the Constitution.

Statement of Facts

By its terms, the Settlement calls for 750 new affordable housing units to be created in County communities. Settlement ¶ 7. It also calls for the County to submit to HUD what HUD calls "analyses of impediments" to fair housing ("AIs") in these communities, which must 1) include plans, complete with commitments to implement these plans, for how any such impediments can be overcome, and 2) be deemed acceptable by HUD. Settlement ¶ 32.

Separately, HUD's own regulations have required localities to submit AIs in order for HUD to grant certain funds to those localities. Repeatedly, HUD has rejected the County's AIs submitted under these regulations on the ground that, because of "inadequate analysis," they failed to show that "exclusionary zoning" was not an impediment to fair housing in County municipalities. *Cty. of Westchester v. U.S. Dep't of Hous. & Urban Dev.*, 802 F.3d 413, 431 (2d Cir. 2015).

The Settlement also requires the County to publicize the benefits of mixed-income and integrated neighborhoods. Specifically, it calls for the County to

> create and fund campaigns to broaden support for fair housing and to promote the fair and equitable distribution of affordable housing in all communities, including public outreach specifically addressing the benefits of mixed-income housing and racially and ethnically integrated communities.

Settlement at ¶ 33(c).

In public statements, County Executive Rob Astorino has denounced what he claims is HUD's attempt to use the Settlement, and other mechanisms, to force the County to go beyond its terms. For example, in an op-ed he claimed that HUD was "trying to use the settlement as a hammer to dismantle local zoning . . . ." Robert P. Astorino, *HUD's Warped War on Westchester,* New York Daily News, Nov. 30, 2011, *quoted in* Monitor's Report at 33, attached thereto as Exhibit 44. In another op-ed he stated that HUD "wants to control local zoning and remake communities." Robert P. Astorino, *Washington's "Fair Housing" Assault on Local Zoning,* Wall Street Journal, Sept. 6, 2013, *quoted in* Monitor's Report at 34, attached thereto as Ex. 42. In a State of the County address, Astorino said, "From HUD's point of view, the settlement was never about building affordable housing . . . . [T]he goal is control over our local communities." Astorino's 2014 State of the County Address at 26-27, *quoted in* Monitor's Report at 35, attached thereto as Ex. 45. In the same speech he stated, "[HUD's] strategy was simple. Withhold the money and wait for the county to capitulate on zoning." *Id.* Astorino also

claimed that HUD, as evidenced by letters from the Monitor referencing recommendations in a 2004 study, wanted the number of affordable housing units that must be built in County communities to be increased to 10,768. *Astorino Contends Zoning Is Not Discrimination,* The Journal News, May 12, 2013, *quoted in* Monitor's Report at 38, attached thereto as Ex. 33; Astorino's Remarks at North Castle Town Hall, Jun. 18, 2013, at 35-37, WC105129, *quoted in* Monitor's Report at 39, transcript attached thereto as Ex. 48.

Astorino also made a number of statements to the public that were conditional, based on the assumption that HUD would achieve what he claimed was its objectives. He stated, for example, that to build 10,768 units would cost $1 billion and require a crippling increase in taxes, and that, in the absence of zoning laws, residents of a neighborhood of single-family houses on lots of at least a quarter of an acre could find themselves living next door to high-rise apartment buildings. Monitor's Report, Appendix A (collecting statements), at 3, 6-7.

Astorino is not the only one to take this view of HUD's real agenda. *See, e.g.,* Stanley Kurtz, *Massive Government Overreach: Obama's AFFH Rule is Out,* National Review Online, Jul. 8, 2015, available at http://www.nationalreview.com/node/420896/print (stating that HUD regulations give "the federal government a lever to re-engineer nearly every American neighborhood – imposing a preferred racial and ethnic composition [and] densifying housing"); *HUD's Racial Subdivisions,* Wall Street Journal, Apr. 3, 2013, available at http://www.wsj.com /articles/SB10001424127887324685104578386693514796654 (stating that HUD "is interfering with local zoning in Westchester to force more racial diversity on suburban neighborhoods" than would result from the Settlement); Patrick Brennan, *Mr. Astorino Goes to Westchester,* National Review Online, Jan. 11, 2012, available at http://www.nationalreview.com/node/287630/print (describing some of HUD's attempts to achieve results beyond the Settlement); Joanne

Wallenstein, *The Battle Over Affordable Housing Heats Up in Westchester,* Huffington Post, May 5, 2013, available at http://www.huffingtonpost.com/joanne-wallenstein/the-battle-over-affordabl_b_3203312.html ("If the Federal Department of Housing and Urban Development has it their way, villages like Scarsdale and Bronxville could find their local zoning ordinances under attack.").

Astorino's public statements have touched off a burgeoning national debate about HUD's agenda for communities across the country. For example, in June 2015, Congress debated an amendment meant to block HUD from implementing a rule that, in the eyes of the amendment's proponents, HUD would use to control local zoning. Introducing the amendment, Rep. Paul Gosar (R-Ariz.) stated, "HUD's misguided rule would grant the Department authority to dictate local zoning requirements in any community across the country that applies for a community development block grant." 161 Cong. Rec. H3884 (daily ed. Jun. 4, 2015). Opposing the amendment, Rep. David Price (D-NC) responded, "The charge that this rule injects HUD into local planning and zoning conditions is simply inaccurate." *Id.* at H3885. *See also, e.g.,* Robert Astorino and Rep. Paul Gosar, *Stop HUD's Takeover of Local Zoning,* Breitbart, Dec. 7, 2015, available at http://www.breitbart. com/big-government/2015/12/07/stop-huds-takeover-of-local-zoning/ (stating HUD "seeks to radically subvert local zoning laws in the United States"); Marc Theissen, *Obama Wants to Reengineer Your Neighborhood,* Washington Post, June 15, 2015, available at https://www. washingtonpost.com/opinions/obama-wants-to-reengineer-your-neighborhood/2015/06/ 15/f7c0c558-1366-11e5-9518-f9e0a8959f32_story.html (accusing HUD of an effort to "micromanage the housing and zoning policies of thousands of local communities").

In depositions the Monitor took, Astorino and other County officials testified that the terms of the settlement required a minimum of 750 units of affordable housing; that this Court

had not changed that number; that the Monitor had never petitioned this Court to change that number; that the County had received no explicit command from HUD that zoning in County communities be dismantled; and that the Monitor's letter referencing the recommendation that 10,768 affordable housing units be built, though it contained the word "proposed," seemed to Astorino to set a "new standard." Monitor's Report, Appendix A, at 1-3.

As for ¶ 33(c), the County, as part of its One Community Campaign, has created a website that includes a letter from Astorino highlighting the benefits of fair housing and diversity; a page touting the benefits of mixed-income and integrated housing; a gallery of affordable housing in the County; and "links to various web-based resources for . . . . understanding the importance of fair and open housing and diversity." The County planned to expand this campaign to include advertising on County buses and bus shelters, starting in January 2016, and has done so. Monitor's Report at 11-13.

Argument

The Monitor recommends, *inter alia,* that the Court issue findings that Astorino's public statements about HUD's agenda are false; that the Court order the County to distribute these findings to the leadership of County communities (if the County does not do so voluntarily); and that "the Court and the County" post the Court's findings "prominently on the County website and remov[e] press releases inconsistent with the . . . . findings." Monitor's Report at 56.

What the Monitor is asking this Court to do has no basis in the record he adduces. Furthermore, because federal courts should not act as political truth squads or censors of officeholders' political utterances, the actions the Monitor wants this Court to take would violate the First Amendment, federalism, and the separation of powers set forth in the Constitution.

1. The Monitor Fails To Show That Astorino's Political Statements Are False

The Monitor wishes the Court to see a contradiction between Astorino's public political statements and his and others' sworn deposition testimony. Monitor's Report at 43. But no such contradiction exists. The reason is simple: Astorino's political statements are about what he regards as HUD's agenda to use the Settlement, and other mechanisms, to achieve results the terms of the Settlement do not call for. But the Monitor never asked about this agenda, or Astorino's beliefs about it, in the testimony cited in his report. Instead, he asked about other, much narrower subjects, such as what the terms of the Settlement were, and whether the Monitor had ever petitioned the Court to alter them. These questions seem designed to create a spurious inconsistency; they do not establish a real one.

Indeed, the Monitor has not adduced any public statement by Astorino that the terms of the Settlement are other than they are, or that HUD, or the Monitor, is either misreading the Settlement or seeking to have the Court alter it. Rather, Astorino claims that HUD is trying, through the Settlement and otherwise, to bring about massive zoning changes in the County. Of course, this Court is not being asked to find that Astorino's public, political statements are true. Yet it is worth mentioning that they reflect a plausible view. The Settlement requires, after all, that the County submit an AI to HUD that must be deemed acceptable by HUD. HUD has made clear that the County's previous AIs were unacceptable because, owing to "inadequate analysis," they failed to demonstrate that "exclusionary zoning" was not an impediment to fair housing. Given the difficulty of proving a negative, it is at least unclear whether HUD ever would be content with an AI that failed to find "exclusionary zoning" an impediment. Indeed, as recounted by the Second Circuit, when the Monitor prepared reports recommending County action to abolish what the Monitor regarded as widespread "exclusionary zoning," the federal

government sent a letter to the County informing it that its adoption of these reports would be an "acceptable" AI because it would "'satisfy the County's obligation to identify zoning ordinances that act as impediments to fair housing, as required by the [consent decree], 42 U.S.C. §§ 5304(b)(2) and 12705(b)(15), 24 C.F.R. § 91.225(a)(1), and by HUD's Fair Housing Planning Guide.'" *Cty. of Westchester,* 802 F.3d at 426 (quoting the government's letter). If HUD does not have the agenda Astorino claims, it manages to create the distinct impression that it does.

2. <u>The Relief The Monitor Seeks Would Violate Astorino's First Amendment Right To Free Speech</u>

Here, the Monitor seeks not to enjoin Astorino's actions, but to censor his public utterances and muzzle him in a political debate. Specifically, the Monitor seeks a finding from this Court that Astorino's public political statements are false, and an order from this Court (if necessary) that Astorino communicate this finding to municipalities in the County. He also either recommends that Astorino, in light of this finding, remove contrary statements in press releases from the County's website or asks that this Court order him to do so (it is not clear which).

In part, then, the Monitor's request is that this Court compel Astorino's political speech. Astorino's speech here occurs in speeches, op-eds, interviews, press releases, and town-hall meetings, is directed at the public, is obviously on an issue of public concern, and is certainly political; indeed, it appears political in a classically partisan way. His implicit argument to the electorate appears to be that while he is County Executive, the County will resist, and stands some chance of stopping, HUD's agenda, whereas if an executive favorable to HUD were elected, all opposition to that agenda would evaporate. His speech might also be aimed at forestalling an even more starkly partisan outcome: the likely increase in the number of voters in the County favorable to HUD's policies that would result from the construction of 10,768, as

opposed to 750, HUD-facilitated affordable housing units. Because Astorino's speech is political, it is entitled to the highest First Amendment protection. As the Supreme Court has explained:

> Speech on matters of public concern is at the heart of the First Amendment's protection. The First Amendment reflects a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open. That is because speech concerning public affairs is more than self-expression; it is the essence of self-government. Accordingly, speech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection.

Snyder v. Phelps, 562 U.S. 443, 451-52 (2011) (internal citations and quotation marks omitted).

And *compelled* speech, let alone compelled political speech, violates the First Amendment. *E.g., Riley v. National Federation of Blind of N.C., Inc.,* 487 U.S. 781, 797 (1988) (holding that the First Amendment protects "the decision of both what to say and what *not* to say") (emphasis in original). In a line of cases, the Supreme Court has struck down laws or governmental policies that compelled individuals merely to subsidize speech with which they disagreed. *See, e.g., United States v. United Foods, Inc.,* 533 U.S. 405 (2001) (striking down, under the First Amendment, regulations that compelled the subsidization of certain commercial speech); *Knox v. Serv. Employees Int'l Union, Local 1000,* 132 S. Ct. 2277 (2012) (striking down the compelled subsidization of union-related speech); *Harris v. Quinn,* 134 S. Ct. 2618 (2014) (striking down an Ohio law compelling non-union home-care assistants to subsidize speech related to collective bargaining). *A fortiori,* Astorino's political speech may not be compelled here. Were this Court to grant the Monitor's request, Astorino would not merely have to subsidize speech he disagrees with; as a public official, he would undergo the humiliation of having to post this Court's finding that his repeated public statements are false on the County website, and "distribute" this finding to the municipalities in his County. It is easy to see why

HUD would seek such a result; it could be used to discredit Astorino's public statements in the larger national debate they have sparked. But such a motive is certainly not a compelling governmental interest justifying forcing Astorino to speak against his own political views, and the Monitor has suggested no other. And, indeed, any standard that could rightly be applied here under the First Amendment would have to be of the most stringent, for Astorino's utterances are in the realm of core political speech, accorded the very highest constitutional protection.

Of course, neither Astorino nor the office of County Executive waived his right to free, compulsion-free speech here. A finding of a waiver of First Amendment rights to make a given statement must be based on clear and compelling evidence – so much more so for waivers of political speech. *E.g., Curtis Pub. Co. v. Butts,* 388 U.S. 130, 145 (1967) ("Where the ultimate effect of sustaining a claim of waiver might be an imposition on [the right to speak on matters of public concern], we are unwilling to find waiver in circumstances which fall short of being clear and compelling."). In other words, a waiver of free-speech rights "must be narrowly construed to effectuate the policies of the First Amendment." *Nat'l Polymer Products, Inc. v. Borg-Warner Corp.,* 641 F.2d 418, 424 (6th Cir. 1981). There is no clear and compelling evidence of waiver here. True, the Monitor claims that Astorino's statements about HUD's real agenda "undercut" his duty under paragraph 33(c) to advertise the benefits of mixed-income and integrated housing. Monitor's Report at 1, n.1. But as shown above, this is just wrong. Astorino's statements are not inconsistent with the contents of the County's public-education campaign; they are simply about another subject. But even were there some attenuated sense in which Astorino's public statements about HUD's real agenda indirectly devalued the benefits of mixed-income and integrated housing, to find his statements waived by Paragraph 33(c) could only be on a correspondingly expansive, not a narrow, reading of that paragraph. In short, that Astorino's

predecessor in office agreed to Paragraph 33(c) does not bind Astorino, and his constituents, to the total political vassalage the Monitor demands. The Monitor objects to Astorino's "tone." Monitor's Report at 1. That he seeks here, in effect, to have this Court do something about it only reveals his own, remarkable impatience with free speech, "tone" and all, and our system of self-government. His request that Astorino be forced to bear tidings of his own supposed political "dishonesty" should be indignantly denied.

Even less so may this Court enter a prior restraint against Astorino's political speech by ordering examples of it removed from the County's website. *See Alexander v. United States,* 509 U.S. 544, 550 (1993) ("Temporary restraining orders and permanent injunctions – *i.e.,* court orders that actually forbid speech activities – are classic examples of prior restraints."); *Fort Wayne Books, Inc. v. Indiana,* 489 U.S. 46, 63-64 (1989) (holding a pre-trial seizure of allegedly obscene publications a prior restraint because the materials were presumptively protected by the First Amendment); *Camfield v. City of Oklahoma City,* 248 F.3d 1214, 1227-28 (10th Cir. 2001) (holding removal of a video from public access a prior restraint). Here, the stringent standards for censoring political speech combine with the almost categorical ban on prior restraints under the First Amendment. *See Southeast Promotions, Ltd. v. Conrad,* 420 U.S. 546, 558-59 (1975) (holding prior restraints on speech presumptively unconstitutional). Needless to say, the Monitor can point to no governmental interest that could possibly justify such a step.

Additionally, the First Amendment is one reason for the long tradition in this country that the courts are not the watchdogs of political truth. As the Supreme Court has held, "[o]ur constitutional tradition stands against the idea that we need Oceania's Ministry of Truth." *United States v. Alvarez,* 132 S. Ct. 2537, 2547 (2012) (citing George Orwell, Nineteen Eighty-Four (1949)). Indeed, the Supreme Court held that a political officeholder's verifiably false

claim that he had won the Medal of Honor was protected speech under the First Amendment, and could not be punished pursuant to the Stolen Valor Act. *Id.* at 2542-43. *A fortiori,* Astorino's political speech, which paints a plausible picture of HUD's agenda regarding the future of affordable housing in the County, may not be censored, nor opposite speech by him compelled. *See also Lebron v. Washington Metro. Area Transit Auth.,* 749 F.2d 893, 898 (D.C. Cir. 1984) ("[C]ourts ought not to restrain speech [here, a photo montage] where the message sought to be communicated is political and is sufficiently ambiguous to allow a discerning viewer (or reader) to recognize it as something other than a reproduction of an actual event") (internal quotation marks omitted).

3. <u>The Finding The Monitor Seeks Would Be At Odds With Both Federalism And The Constitutional Separation Of Powers</u>

Under the doctrine of *Younger* abstention, grounded in federalism, federal courts are not to interfere in state court proceedings. *Younger v. Harris,* 401 U.S. 37, 43-44 (1971). So much the less should they interfere in state political controversies, or in those between an arm of the state and the federal government, when no clause in an agreement they are enforcing clearly calls upon them to do so. *Cf. Shannon v. Jacobowitz,* 394 F.3d 90, 94 (2d Cir. 2005) ("Principles of federalism limit the power of federal courts to intervene in state elections"). The finding the Monitor is asking this Court to make – namely, that Astorino's public statements are false – would have no purpose other than as a predicate for unconstitutionally compelling and censoring Astorino's political speech. As such, it would constitute gratuitous meddling by a federal court in a local political controversy.

Furthermore, the doctrine that courts are not arbiters of political truth arises not merely from the First Amendment, but from the separation of powers. The Constitution gives the federal courts the power to decide "Cases" and "Controversies," and no other power, U.S.

Const., art. III, § 2, and the political question doctrine, developed by the Supreme Court, generally restrains federal courts from taking up questions that are properly the province of the political branches. *See, e.g.,* Robert J. Pushaw, Jr., *Justiciability and Separation of Powers: A Neo-Federalist Approach,* 81 Cornell L. Rev. 393, 455 (1996) ("Article III's language extending 'judicial Power' to 'Cases' and 'Controversies' has been construed [by the modern Supreme Court] as limiting federal courts to the adjudication of live disputes between parties with private interests at stake. . . . [For the Court,] [j]udicial restraint [also] preserves separation of powers by avoiding interference with the democratic political branches, which alone must determine nearly all public law matters.") (footnotes omitted). Accordingly, political speech aimed at the electorate is the province of the people and of the "political" branches, that is, the legislative and executive branches of federal, state, and local governments. Federal courts should shrink from engaging in it – from weighing in on one side or the other of a political controversy – unless forced to pass upon a particular factual issue in the exercise of their judicial role (in which case the court would not be engaging in political speech, but in judicial fact-finding). Thus, if a court made itself a political ally of the executive branch of the federal government, and exercised the power of persuasion in its favor in an electoral or political contest or controversy, without its words or findings being strictly necessary to decide a case or controversy, it would overstep its constitutional role as the judicial (and not the executive, or other political) branch. That is exactly what the Monitor is asking this Court to do, when he asks it to reach a finding of fact that would have no other purpose in this case but to be the basis of an unconstitutional prior restraint on Astorino's political speech, or an unconstitutional compulsion of his political speech.

Conclusion

For these reasons, the relief the Monitor seeks should be denied.

Dated: May 5, 2016

Respectfully submitted,

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