16-2272-cv

United States Court of Appeals
for the Second Circuit

UNITED STATES OF AMERICA, EX REL. ANTI-DISCRIMINATION CENTER OF METRO NEW YORK, INC.,

Plaintiff-Appellee,

v.

WESTCHESTER COUNTY, NEW YORK,

Defendant-Appellant,

ON APPEAL FROM THE OPINION AND ORDER
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

AMICUS CURIAE BRIEF OF THE CENTER FOR INDIVIDUAL RIGHTS IN SUPPORT OF APPELLANT AND REVERSAL

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Corporate Disclosure Statement

The Center for Individual Rights is a nonprofit corporation. It has no parent corporation, and does not issue stock.

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 represented parties in litigating numerous cases concerning issues related to the First Amendment, including *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 show how the District Court, in its order, abused its discretion by both erroneously holding that the County Executive of Westchester County lacked First Amendment protection for his public, political statements and erroneously injecting itself, in violation of

important principles of federalism and the separation of powers, into a political dispute between Westchester County and the federal government.[1]

[1] This brief is filed pursuant to the written consent of both parties. No counsel of a party in this case authored this *amicus curiae* brief, in whole or part, and no party, party's counsel, or person – other than the *amicus curiae*, its members, or its counsel – contributed money that was intended to fund preparing or submitting the brief.

Introduction

A political dispute has opened up between the Westchester County Executive and the Obama Administration's Department of Housing and Urban Development (HUD). The District Court, in the order here appealed from, has all-but-openly taken sides in this dispute. And, in doing so, it made a crucial error of law in derogation of the free-speech rights of elected officials. It accordingly should be reversed.

The Westchester County Executive, Robert Astorino, has made a number of public 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"). In its order, the District Court, while not finding these statements false, found that they constituted a breach of the Settlement. The District Court "remedied" that supposed breach, and avowedly sought to deter further speech along the same lines by Astorino, by ordering the public release of videotapes of depositions in which Astorino and other County officials answered questions about the terms of the Settlement.

In an attempt to justify thus punishing and chilling the political speech of Astorino, an elected official, the District Court held that, as a public employee, he

lacked any First Amendment protection for his political speech. Compounding this obvious error, the District Court gratuitously lent its prestige to one side of this political controversy, thus putting itself at odds both with federalism and with the separation of powers set forth in the Constitution. Either error constitutes an abuse of discretion, and mandates reversal.

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 Robert 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* Joint Appendix at 0177 ("JA 0177"), Monitor's Report at 33. 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* JA 0178, Monitor's Report at 34. 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* JA 0179, Monitor's Report at 35. 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* JA 0182, Monitor's Report at 38; Astorino's Remarks at North Castle Town Hall, Jun. 18, 2013, at 35-37, WC105129, *quoted in* JA 0183, Monitor's Report at 39.

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 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/SB10001424127887324685104578386693 5

14796654 (stating that HUD "is interfering with local zoning in Westchester to force more racial diversity on suburban neighborhoods" than would result from the numerical terms of 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.huffington post.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, 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 federal Monitor appointed in this case 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." JA 0203-205, Monitor's Report, Appendix A, at 1-3. The transcripts, but not the videotapes, of these depositions

have been released to the public. District Court's Order dated June 27, 2016 ("Order") at 14, 25.

In its order, the District Court found the public campaign the County has launched to educate the public about the benefits of affordable housing and diverse neighborhoods to be inadequate to comply with ¶ 33(c). Order at 16-24. And, even though it did not find Astorino's public statements about HUD's agenda to be false, the District Court stated that they showed the County's "bad faith" in its efforts to comply with ¶ 33(c), and also "undermine[d] the goals of the Settlement." Order at 20-22, 26-27. To remedy the supposed breach of ¶ 33(c) in part constituted by Astorino's public statements, the District Court ordered the release of the videotapes of Astorino's and other officials' depositions. Order at 33. In doing so, the District Court brushed aside the County's concern that the videotapes would be used in misleading political attack ads against Astorino, and stated that one purpose of this remedy for his speech was, indeed, to deter his future speech along the same lines. Order at 28-30, 26-27. The propriety of other requested relief – *viz.*, that the District Court declare Astorino's public statements to be false and require the County to post that declaration on its website and distribute it to municipalities in the County – the District Court declined to decide "at this time." Order at 13-14 n.6.

Argument

The County, in its principal brief, convincingly shows that its efforts to comply with ¶ 33(c) have not been inadequate; that Astorino's public statements are not at variance with the County's public education campaign pursuant to that paragraph; and that the District Court exceeded its authority by going beyond the terms of the Settlement to enforce its "purposes." *See* County's Brief at 35-36 (citing, *e.g.*, *Barcia v. Sitkin*, 367 F.3d 87, 106 (2d Cir. 2004) ("[A] district court may not impose obligations on a party that are not unambiguously mandated by the decree itself."). This brief elaborates on two other arguments: 1) that the District Court abused its discretion by basing its ruling on the erroneous view that Astorino, as a public employee, lacked the right under the First Amendment to make his public statements, or else that the County waived his right to make them by entering ¶ 33(c); and 2) that the District Court's gratuitous injection of itself into a political dispute between the County and HUD puts it at odds with important constitutional principles of federalism and the separation of powers.

I. THE COURT ABUSED ITS DISCRETION BY PUNISHING, AND ATTEMPTING TO DETER, ASTORINO'S POLITICAL SPEECH.

The District Court premised its holding that the County breached ¶ 33(c) not only on the County's supposedly inadequate compliance efforts, but also on Astorino's public statements. Indeed, the remedy – the release of videotapes that

the County fears will be used to make misleading political attack ads against Astorino – has far more to do with Astorino's public statements than with any supposed sins of omission in the County's compliance with ¶ 33(c). The District Court made this very clear when it said that it hoped this remedy would deter future speech by Astorino along the same lines. Order at 26-27. The District Court did not order, or reject, even more draconian (and blatantly unconstitutional) "remedies," such as itself declaring the falsity of Astorino's public statements and compelling his political speech by requiring him to post that declaration on the County website and distribute it to municipalities in the County.[2] Rather, the District Court declined to decide the appropriateness of these remedies "at this time," thus leaving open the possibility that they will be imposed in the future. Order at 13-14 n.6 (describing other requested relief and declining to decide its appropriateness "at this time").

To try to justify this punishment and chilling of Astorino's speech, the District Court held, remarkably, that Astorino, an official elected by the voters of the County and speaking on matters of concern to them, enjoyed *no First*

[2] *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).

Amendment protection at all in his public statements, and that even if he did, his predecessor in office had waived such protection. Order at 20-21 n.9.

On the contrary, Astorino's speech here occurred in speeches, op-eds, interviews, press releases, and town-hall meetings, was directed at the public, was obviously on an issue of public concern, and was certainly political; indeed, it appears it was political in a classically partisan way. His implicit argument to the electorate appears to have been 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 have been 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 was 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). *A fortiori*, the political speech of an elected officeholder is entitled to the highest protection – in part because of the crucial role of candidates' speech in our system of government, and also because federal courts should not function as watchdogs of political truth. *United States v. Alvarez*, 132 S. Ct. 2537, 2547 (2012) (holding that an elected 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; "[o]ur constitutional tradition stands against the idea that we need Oceania's Ministry of Truth.") (citing George Orwell, Nineteen Eighty-Four (1949)).

The District Court's sole basis for holding that Astorino's public statements lack any First Amendment protection is that he is a public employee. The District Court stated that "[t]he County has not made a persuasive showing that [Astorino's public statements] are protected under the First Amendment," because:

> [I]n the context of employer discipline, when "[']public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.[']"

Order at 20-21 n.9 (quoting *Lynch v. Ackley*, 811 F.3d 569, 577 (2d Cir. 2016)) (omitting citation and quotation marks). In the above passage from *Lynch*, this Court was itself quoting *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006).

The facts of *Garcetti* and *Lynch*, however, in no way suggest that the lack of First Amendment protection from public-employee speech applies to speech on matters of public concern by elected officials, including high elected officials such as Astorino. *See id.* at 413 (stating respondent was a deputy county attorney general); *Lynch*, 811 F.3d at 573 (stating plaintiff was a police officer). Indeed, the key role played by speech by elected officials in our democracy, that of allowing the electorate to judge their fitness for office and the degree of congruence between the officials' policy aims and their own, makes *Garcetti* eminently distinguishable. *See, e.g.*, *Bond v. Floyd*, 385 U.S. 116, 135-36 (1966) (holding Georgia House of Representatives violated newly-elected representative's free speech rights by refusing to seat him because of his public statements on matters of public concern; "[t]he manifest function of the First Amendment in a representative government requires that legislators be given the widest latitude to express their views on issues of policy."); *Rangra v. Brown*, 566 F.3d 515, 518 (5th Cir. 2009) ("[The] First Amendment's protection of elected officials' speech is full, robust, and analogous to that afforded citizens in general . . . . [W]hen a state seeks to restrict the speech of an elected official on the basis of content, a federal court must apply strict

scrutiny and declare the limitation invalid unless the state carries its burden to prove both that the regulation furthers a compelling state interest and that it is narrowly tailored to serve that interest."), *dismissed for mootness upon rehearing* en banc in *Rangra v. Brown*, 584 F.3d 206 (5th Cir. 2009)).

Garcetti is also distinguishable on another ground. *Garcetti* only leaves the speech of unelected public employees unprotected from "employer discipline." The District Court is not Astorino's employer. The County is his employer, and there is no indication that it objects to the public statements of its chief officeholder. For this glaring reason, the District Court's appeal to *Garcetti* is wholly inapposite.

And, of course, neither Astorino nor the office of County Executive waived his right not to have his political speech burdened here. Needless to say, the District Court cited no authority for its claim that a governmental entity, merely by entering a settlement or consent decree, waives the First Amendment rights of its officeholders. Nor were Astorino's rights to make his public statements waived in ¶ 33(c). 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. The District Court did not assert, or point to any evidence, that Astorino's predecessor even had any of Astorino's future public statements in mind when he agreed to ¶ 33(c). *See id.* (holding no waiver where it was not clear that statements fell under contract terms). Nor did the District Court even state that Astorino's public statements were false. Rather, the District Court merely claimed that Astorino's statements about HUD's real agenda showed "bad faith" and "undermined" the Settlement – specifically, presumably (though the District Court does not say so), his duty under ¶ 33(c) to advertise the benefits of mixed-income and integrated housing. But, as indicated above, and as the County amply shows in its brief, this is just wrong. Astorino's statements are not inconsistent with educating the public on the benefits of affordable housing and diverse neighborhoods; 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 ¶ 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 the Settlement in general, or ¶ 33(c) in particular, does not make Astorino or the County, when it comes to what they may say, the vassals of the District Court.

The District Court seemed to acknowledge this, stating that it "is neither censoring Astorino's speech nor dictating what he must say." Order at 21 n.9. But one wonders why not, if he has no First Amendment rights to begin with, or else has waived them whenever his speech has something to do with the Settlement. In its holding, the District Court arrogates to itself just such power, even if it has not (yet) exercised it.

II. THE DISTRICT COURT'S INJECTION OF ITSELF INTO A POLITICAL DISPUTE BETWEEN THE COUNTY AND HUD PUTS IT AT ODDS WITH BOTH FEDERALISM AND THE SEPARATION OF POWERS.

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 intervene 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").

In addition, the doctrine that courts are neither arbiters nor enforcers 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. For this reason, even apart from the First Amendment, federal courts should shrink from engaging in or otherwise influencing speech in a political debate (such as the one here about HUD's real agenda) in favor of one side or the other, unless clearly forced to do so in the exercise of their judicial role. That the District Court here made itself a political ally of the executive branch of the federal government, by punishing and seeking

to deter the political speech of an elected official in opposition to that government's policies, without its order being strictly necessary to decide any case or controversy, is further ground for reversal.

Conclusion

For these reasons, the District Court's order should be reversed.

Dated: July 22, 2016

Respectfully submitted,

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Certificate of Compliance

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify that this brief is proportionately spaced (Times New Roman 14-point), and contains 4,142 words exclusive of tables, this certificate, the corporate disclosure statement, and the cover.

/s/ Michael E. Rosman
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