24-1900

United States Court of Appeals for the Second Circuit

Parents Defending Education,
Plaintiff-Appellant,

v.

Croton-Harmon Union Free School District, *et al.*,
Defendants-Appellees.

On Appeal from the United States District Court for the Southern District of New York, No. 7:24-cv-4485 (Seibel, J.)

PLAINTIFF-APPELLANT PARENTS DEFENDING EDUCATION'S PETITION FOR INITIAL HEARING EN BANC

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RULE 35 STATEMENT

Associational standing is good. Allowing associations to sue on their members' behalf is "advantageous both to the individuals represented and to the judicial system as a whole." *UAW v. Brock*, 477 U.S. 274, 289 (1986). Associations can draw on "a pre-existing reservoir of expertise and capital" and "'specialized expertise and research,'" all of which "assist[s] both courts and plaintiffs." *Id.* And without the help of these "representative[s]," the "constitutional rights" of many—especially the unpopular and underresourced—"could not be effectively vindicated." *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 459 (1958).

But this Court's precedent is uniquely hostile to associational standing. Two of its decisions, *Pfizer* and *Aguayo*, make it virtually impossible for associations to vindicate their members' rights—especially when quick relief is needed. *Pfizer* holds that an association loses standing if it moves for a preliminary injunction without volunteering its members' real names. *Do No Harm v. Pfizer*, 96 F.4th 106, 118-19 (2d Cir. 2024). And *Aguayo* holds that associations never have standing to bring §1983 claims on behalf of their members. *Aguayo v. Richardson*, 473 F.2d 1090, 1099-100 (2d Cir. 1973).

Both decisions should be overruled en banc. *Pfizer*'s ban on anonymity splits with at least three circuits. *Am. All. for Equal Rts. v. Fearless Fund Mgmt.*, 103 F.4th 765, 773 (11th Cir. 2024); *Speech First v. Shrum*, 92 F.4th 947, 952 (10th Cir. 2024); *Advocs. for Highway & Auto Safety v. FMCSA*, 41 F.4th 586, 594 & n.2 (D.C. Cir. 2022). It also misreads Supreme Court cases that didn't involve pseudonyms, *e.g.*, *Summers v. Earth*

Island Inst., 555 U.S. 488 (2009), and contradicts high-profile cases that allowed anonymity, *e.g.*, *SFFA v. Harvard*, 600 U.S. 181 (2023). And it needlessly "constrict[s] access to the courts." *Pfizer*, 96 F.4th at 126 (Wesley, J., concurring).

Aguayo's ban on associational standing under §1983 is even less defensible. It puts this Court at odds with *every* circuit. And it contradicts many landmark cases where the Supreme Court allowed associations to sue under §1983. *Aguayo* predates the doctrine of associational standing and guessed wrong about how it would work; yet later panels have felt constrained to follow *Aguayo*. Panels have tried to make up for *Aguayo*'s error by letting associations assert "increasingly tenuous and pretextual claims of injury to … themselves," like diversions of resources. *Centro de la Comunidad Hispana v. Oyster Bay*, 868 F.3d 104, 123 (2d Cir. 2017) (Jacobs, J., dissenting). But the Supreme Court just upended that compromise in *FDA v. Alliance for Hippocratic Medicine*, 602 U.S. 367, 395-96 (2024), where it severely curtailed (if not eliminated) the diversion-of-resources theory of standing. The time to finally overrule *Aguayo* en banc has thus arrived.

Petitioner, Parents Defending Education, lost below under *Pfizer* and *Aguayo*. Because those precedents cannot be overruled by any panel, this Court should grant initial hearing en banc to decide two questions:

1. Whether *Pfizer* should be overruled because an association seeking a preliminary injunction does not lose Article III standing when it refers to its members with pseudonyms.

2. Whether *Aguayo* should be overruled because an association can assert claims under 42 U.S.C. §1983 on behalf of its members.

BACKGROUND

The Croton-Harmon school district has some of the most aggressive speech codes in the country. These vague policies against "hate speech," "harassment," "incivility," and the like impose viewpoint-based restrictions on students' speech, both on and off campus, on all sorts of topics. *See* SDNY-Doc.1 ¶¶38-83. Far from denying it, the school district responded to this lawsuit by boasting that it's "proud" that its policies forbid what it views as "harmful and hateful rhetoric." SDNY-Doc.9 at 4.

Parents Defending Education, a membership association that protects the rights of K-12 students, challenges those speech codes. It represents at least three members—identified by pseudonym as "Parent A," "Parent B," and "Parent C"—whose children attend school in the district. SDNY-Doc.1 ¶¶84-150. Those members' children have unpopular views that they wish to share, but refrain because their speech is arguably covered by the district's policies. SDNY-Doc.1 ¶¶98-106, ¶¶119-31, ¶¶141-47.

PDE filed a lawsuit under §1983 and immediately sought a preliminary injunction, arguing that the district's policies violate the First and Fourteenth Amendments. Though its brief explained why its constitutional claims have merit and why the other preliminary-injunction factors are satisfied, PDE acknowledged that its motion had to be denied and its case dismissed under *Pfizer* and *Aguayo*. SDNY-Doc.6-1. Under *Pfizer*, PDE lacks standing because it moved for a preliminary injunction while referring to its members only with pseudonyms. 96 F.4th at 118-19. And under *Aguayo*, PDE lacks standing because associations cannot sue under §1983. 473 F.2d at 1099.

PDE asked the district court to promptly rule against it under both *Pfizer* and *Aguayo* so PDE could challenge those precedents on appeal. At a status conference, the district insisted that those precedents were "[c]orrectly decided," and the district court agreed that they foreclose standing. CA2-Doc.14 at 3:2-3. The court thus denied the preliminary-injunction motion and dismissed the case under *Pfizer* and *Aguayo*, allowing PDE to "go up to the Second Circuit." CA2-Doc.14 at 16:12-17; *accord* CA2-Doc.2.

REASONS FOR GRANTING THE PETITION

Initial hearing en banc is necessary to "secure or maintain uniformity of the court's decisions" or to resolve "a question of exceptional importance." Fed. R. App. P. 35(a). *Pfizer* and *Aguayo* implicate both. Though initial hearing en banc is rare, it's "required" when an appellant is "asking the court to overturn its prior decisions." Fed. Ct. App. Manual § 33:2 (7th ed.). Because only the en banc Court can overrule *Pfizer* and *Aguayo*, it should grant this petition and do so.

Notably, *Pfizer* itself is currently pending before the en banc Court. *See* Docket, No. 23-15 (2d Cir.). If the en banc Court decides to rehear *Pfizer*, PDE asks the Court to grant this petition on both questions presented (whether to overrule *Pfizer* and *Aguayo*). If the panel in *Pfizer* grants rehearing and eliminates that decision's anonymity holding, PDE asks the Court to grant this petition only on the second question presented (whether to overrule *Aguayo*).

I. Whether *Pfizer* should be overruled warrants en banc review.

This Court should grant initial hearing en banc to consider overruling *Pfizer*. That decision holds that an association loses Article III standing if it moves for a preliminary injunction without disclosing its members' real names. 96 F.4th at 118-19. This holding is incorrect and should be overruled for all the reasons in Judge Wesley's concurrence, as well as Do No Harm's rehearing briefs, which PDE joins. In short, *Pfizer* misreads Supreme Court precedents that don't involve pseudonyms, splits with at least three circuits, and contradicts older circuit precedent. *See id.* at 122-26 (concurrence); *Pfizer*-Pet.5-15 (CA2-Doc.129); *Pfizer*-Reply.2-4 (CA2-Doc.216).

This case proves the dangers of leaving *Pfizer* intact. In *Pfizer*, the association's standing turned on whether its members were able and ready to apply to a fellowship. 96 F.4th at 113. Their use of pseudonyms, *Pfizer* reasoned, was "relevant" to Article III standing because it suggested their intent to apply was not "sincer[e]." *Id.* at 116. *Pfizer* also deemed it "incongruous" that these members could use pseudonyms when, if they had sued on their own, the "federal procedural rules" would require them to use their real names. *Id.* at 117. But here, PDE's standing turns on whether the policies chill the speech of its members' children. Their use of pseudonyms does not suggest insincerity; revealing their children's identities would publicly connect them to their controversial views, risking the very punishment they're trying to avoid. And the federal procedural rules *ban* the use of minors' real names, *see* Fed. R. Civ. P. 5.2(a), giving their parents a right to withhold their real names too (to avoid identifying the child), *see P.M. v. Evans-*

Brant Cent. Sch. Dist., 2008 WL 4379490, at *3 (W.D.N.Y. Sept. 22). Yet *Pfizer*'s inflexible "rule requiring an associational plaintiff to name at least one injured member" accounts for none of these nuances. 96 F.4th at 115.

Though *Pfizer* is pending before the en banc Court, this case presents an ideal vehicle for reconsidering it. The respondent in *Pfizer* has asked this Court to deny review because the challenged fellowship was allegedly changed and will end next year. *See Pfizer*-Opp.16-17 (CA2-Doc 208). Those mootness arguments were not accepted by the panel, are not supported by evidence, and are disputed by the petitioner. *See Pfizer*-Reply.8. But if this Court has concerns about them, it could consider overruling *Pfizer* in this case, where no conceivable mootness problems exist. The school district here is defending the challenged policies. *See* SDNY-Doc.9. It hasn't changed any of them (let alone all of them) and says it can't because the policies "track state law." CA2-Doc.16 at 15:19. PDE's claims will remain live so long as it has a member with a child in a district school, *Milwaukee Police Ass'n v. Bd. of Fire & Police Comm'rs*, 708 F.3d 921, 930 (7th Cir. 2013), and Parent A alone has a child in a district school until 2030. SDNY-Doc.6-3 ¶2.

Unless *Pfizer*'s anonymity ruling is vacated by the panel, this Court should grant initial hearing en banc to reconsider that precedent here, either in this case alone or in conjunction with *Pfizer*. But if *Pfizer* is vacated, this Court should grant initial hearing en banc solely on *Aguayo*—the next question presented.

II. Whether *Aguayo* should be overruled warrants en banc review.

Equally important as *Pfizer*, this Court should go en banc to overrule *Aguayo*—an independent barrier to PDE's claims. Under that precedent, "[i]t is the law of this Circuit that an organization does not have standing to assert the rights of its members in a case brought under 42 U.S.C. §1983." *Nnebe v. Daus*, 644 F.3d 147, 156 (2d Cir. 2011). *Aguayo* states that neither the "language" nor the "history" of §1983 suggests that "an organization may sue under the Civil Rights Act for the violation of rights of members." 473 F.2d at 1099.

Aguayo is indefensible. Though *Aguayo* contains no clear reasoning, this Court has read it to say that §1983 is unique because "the rights it secures" are "personal." *League of Women Voters of Nassau Cnty. v. Nassau Cnty. Bd. of Supervisors*, 737 F.2d 155, 160 (2d Cir. 1984). But that apologetic doesn't work. Section 1983 doesn't secure "any substantive rights at all"; it is a "cause of action" for violations of *other* constitutional and statutory rights. *Chapman v. Houston Welfare Rts. Org.*, 441 U.S. 600, 617-18 (1979). While those underlying rights are personal, the whole point of associational standing is that the association is suing as a representative to assert the rights "of its members." *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 342 (1977). Put differently, courts do not ask whether the *association* has statutory standing; they ask whether the association's *members* do. *See Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 403 (1987); *Memphis A. Philip Randolph Inst. v. Hargett*, 2 F.4th 548, 557 (6th Cir. 2021). And no one doubts that

individuals can sue under §1983. So the notion that associations cannot sue under §1983 because the rights it protects are "personal" is a non sequitur.

Hence why this Court is all alone in prohibiting associations from suing under §1983. *See* Fed. R. App. P. 35(b)(1)(B). Every other circuit allows associations to sue on behalf of their members under §1983. *See Centro de la Comunidad*, 868 F.3d at 123 (Jacobs, J., dissenting) (collecting cases).[1] *Aguayo* also conflicts with Supreme Court precedent. *See* Fed. R. App. P. 35(b)(1)(A). Since *Aguayo*, the Supreme Court has decided many landmark cases involving associations bringing constitutional claims under §1983.[2] Despite "'a raft of Supreme Court precedent'" allowing this very practice, panels of this Court have felt "bound" to follow *Aguayo* until that precedent is overruled "*en banc*." *Nnebe*, 644 F.3d at 156 & n.5; *accord Knife Rts. v. Vance*, 802 F.3d 377, 387-88 & n.9 (2d Cir. 2015) (same). Now is the time to do so.

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[1] *See also, e.g.*, *Bos. Parent Coal. for Acad. Excellence Corp. v. Sch. Comm. for Bos.*, 89 F.4th 46 (1st Cir. 2023); *Speech First v. Sands*, 69 F.4th 184 (4th Cir. 2023), *vacated for subsequent mootness*, 144 S.Ct. 675 (2024); *Speech First v. Fenves*, 979 F.3d 319 (5th Cir. 2020); *Speech First v. Schlissel*, 939 F.3d 756 (6th Cir. 2019); *ACLU of Ohio Found. v. Ashbrook*, 375 F.3d 484 (6th Cir. 2004); *PDE v. Linn Mar Cmty. Sch. Dist.*, 83 F.4th 658 (8th Cir. 2023); *ACLU of Nev. v. Heller*, 378 F.3d 979 (9th Cir. 2004); *Speech First v. Shrum*, 92 F.4th 947 (10th Cir. 2024); *Speech First v. Cartwright*, 32 F.4th 1110 (11th Cir. 2022); *NetChoice, LLC v. Att'y Gen., Fla.*, 34 F.4th 1196 (11th Cir. 2022); *Metro. Wash. Chapter, Associated Builders & Contractors, Inc. v. District of Columbia*, 62 F.4th 567 (D.C. Cir. 2023).

[2] *E.g.*, *Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. Jacksonville*, 508 U.S. 656 (1993); *Minn. Voters All. v. Mansky*, 585 U.S. 1 (2018); *NIFLA v. Becerra*, 585 U.S. 755 (2018); *Warth v. Seldin*, 422 U.S. 490 (1975); *SFFA*, 600 U.S. at 181; *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007); *Moody v. NetChoice, LLC*, 144 S.Ct. 2383 (2024).

The need for en banc review has become urgent after the Supreme Court's recent decision in *Hippocratic Medicine*. Unable to rely on associational standing under §1983, associations in this circuit have turned to direct organizational standing—claiming injuries to themselves based on diversions of resources. *E.g.*, *Nnebe*, 644 F.3d at 156. That *Aguayo* has pressured this Court to accept "tenuous and pretextual" claims of direct organizational injury is reason enough to overrule it. *Centro de la Comunidad*, 868 F.3d at 123 (Jacobs, J., dissenting). But now even that stopgap is gone. *Hippocratic Medicine* rejects this circuit's reading of cases like *Havens Realty*. *See* 602 U.S. at 394-96. It is "incorrect," the Supreme Court clarified there, to suggest that an association has standing "when [it] diverts its resources in response to a defendant's actions." *Id.* at 395. *Hippocratic Medicine* thus "creates uncertainty" over the continued validity of the diversion-of-resources theory. *Tenn. Conf. of NAACP v. Lee*, 2024 WL 3219054, at *14 (6th Cir. June 28). It at least dramatically curtails that theory, which—when combined with *Aguayo*—leaves associations unable to bring *any* claims under §1983 in this circuit. That result is untenable given the "special features, advantageous both to the individuals represented and to the judicial system as a whole," that accompany "suits by associations." *UAW*, 477 U.S. at 289.

Aguayo's errors have also bled over to other contexts. In *Pfizer*, for example, the district court held that *Aguayo*'s bar on associational standing under §1983 also bars associational standing under 42 U.S.C. §198**1**. 646 F. Supp. 3d 490, 509 (S.D.N.Y. 2022). At the same time, no one seriously thinks associations can't sue on behalf of their

members under Title VI, *e.g.*, *id.* at 510, or under the Constitution itself, *e.g.*, *SFFA v. West Point*, 2024 WL 36026, at *9 (S.D.N.Y. Jan. 3). These disparate results make little sense, but district courts will continue to be confused about the scope of *Aguayo* until that decision is overruled.

This case presents an ideal vehicle to reconsider *Aguayo*. PDE is the sole plaintiff, it sued solely on behalf of its members, and it brought claims solely under §1983. The district court dismissed this case, in the alternative, under *Aguayo*. So regardless whether this Court rehears or vacates *Pfizer*, PDE also needs it to reconsider *Aguayo*. No purpose would be served by sending this case to a panel first, wasting the parties' and Court's resources on an issue that only the en banc Court can resolve differently. *See* Fed. Ct. App. Manual §33:2 ("When should you request an initial hearing en banc? … Panels generally lack authority to overrule circuit precedent. Hence, the only way in most circuits for the court to overrule its own precedent is en banc.").

CONCLUSION

The Court should grant initial hearing en banc to consider overruling *Pfizer* and *Aguayo*.

Dated: July 17, 2024

Respectfully submitted,

/s/ J. Michael Connolly

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**Supervised by principals of the firm who are admitted to practice in Virginia*

CERTIFICATE OF COMPLIANCE

This petition complies with Rule 35(b)(2)(A) because it contains 2,676 words, excluding the parts that can be excluded. This petition also complies with Rule 32(a)(5)-(6) because it is prepared in a proportionally spaced face using Microsoft Word 2016 in 14-point Garamond font.

Dated: July 17, 2024 */s/ J. Michael Connolly*

CERTIFICATE OF SERVICE

I filed this petition on the Court's electronic filing system, which will email everyone requiring notice.

Dated: July 17, 2024 */s/ J. Michael Connolly*

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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PARENTS DEFENDING EDUCATION,

Plaintiff,

- against -

CROTON-HARMON UNION FREE SCHOOL DISTRICT, *et al*.,

Defendants.

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ORDER

No. 24-CV-4485 (CS)

Seibel, J.

For the reasons stated on the record on July 11, 2024, Plaintiff's Motion for a Preliminary Injunction is denied and this action is dismissed without prejudice for lack of subject matter jurisdiction pursuant to *Do No Harm v. Pfizer Inc.*, 96 F.4th 106 (2d Cir. 2024), and *Aguayo v. Richardson*, 473 F.2d 1090 (2d Cir. 1973).

The Clerk of Court is respectfully directed to terminate the pending motion, (ECF No. 6), and close the case.

SO ORDERED.

Dated: July 11, 2024
White Plains, New York

CATHY SEIBEL, U.S.D.J.