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on the Coronavirus Pandemic
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Chairman Wenstrup, Ranking Member Ruiz, and Members of this Subcommittee, I am grateful for the opportunity to testify. Over a two-year period, I had the honor of representing brave, ordinary citizens against the unprecedented assault on our civil rights that began in Spring of 2020.¹ I'd like to begin by telling you some of our clients' stories and then end with thoughts on what reforms Congress could consider to address some of the problems that I saw while doing this work.

Chris McDonald is a severely disabled individual, who had been packaging parts at a facility in Illinois under a state program for disabled individuals.² When COVID-19 hit, Governor Pritzker's underlings shut down this program,³ so able-bodied persons began doing the work that

¹ See *Arizona v. Mayorkas*, 143 S. Ct. 1312, 1314 (2023) (statement of Gorsuch, J.) (“Since March 2020, we may have experienced the greatest intrusions on civil liberties in the peacetime history of this country.”).

² See Declaration of Karen Haney, ¶¶ 3–4, 7, *Haney v. Pritzker*, No.1:20-cv-03653, Dkt. 8 (N.D. Ill. June 23, 2020); see also Complaint, ¶¶ 36–39, *Haney*, No.1:20-cv-03653, Dkt. 1 (N.D. Ill. June 23, 2020).

³ See Complaint, ¶ 28, *Haney*, Dkt. 1; see also Ill. Dep't of Hum. Servs., UPDATED – COVID 19 Community Day Services (CDS) & Residential Rates and Reimbursement, *Haney*,

Chris had done for 20 years.⁴ When I learned about Chris’ plight through a friend, I reached out to several disability-rights organizations, thinking—naively, as it turned out—that protecting against this kind of discrimination is what these organizations are there for. But they didn’t want to take on a powerful Governor. So we brought a lawsuit under the Americans with Disabilities Act (“ADA”). Faced with having to defend against a federal lawsuit, state officials who had repeatedly denied Chris’ requests to return to his job—insultingly telling him that they just couldn’t trust disabled people to wear masks⁵—gave in and let him return, while also reopening the entire program earlier than scheduled.⁶

St. Ambrose is a small Catholic secondary school in Wisconsin, which spent tens of thousands of dollars to comply with Dane County’s school reopening plan in Summer 2020. Yet, as the school year approached, the County became worried that the parents of public-school

Dkt. 9-10, *available at* <https://www.dhs.state.il.us/page.aspx?item=123490> (all websites last visited June 19, 2023).

⁴ Complaint, ¶¶ 41, 55, *Haney*, Dkt. 1.

⁵ See Letter from John F. Schomberg, Gen. Couns. for Ill. Dep’t of Hum. Servs., to Misha Tseytlin & Sean T.H. Dutton (June 19, 2020), at 2, *Haney*, Dkt. 1-1.

⁶ See Def.’s Supp. Filing Regarding Pl.’s Mot. For TRO & Prelim. Inj., ¶¶ 4–7, *Haney*, Dkt. 25 (July 1, 2020); Order, *Haney*, Dkt. 27 (July 2, 2020).

students were choosing in-person private schooling, costing the County per-pupil state funding. So Dane County abruptly ordered all of these private schools closed for students third grade and older, just three days before the first day of class.⁷ We brought suit and won—allowing the kids to have a full year of in-person instruction, when so many didn't.

I also represented religious minorities targeted by COVID restrictions. In incendiary press conferences, Governor Cuomo singled-out the Orthodox Jewish community as being at fault for the spread of COVID in Brooklyn, explaining that he was imposing new restrictions on religious gatherings to stop “an ultra-orthodox cluster.”⁸ While the Governor's bullying conduct is now well known, at the time he was wildly popular, and many were too scared to fight him. We sued him on behalf of Orthodox Jewish synagogues and won at the U.S. Supreme Court.⁹

⁷ Pub. Health Madison & Dane Cnty., Emergency Order #9, at 5 (Aug. 21, 2020), available at https://publichealthmdc.com/documents/2020-08-21_Order_9.pdf.

⁸ See Carl Campanile, *Cuomo Calls COVID-19 Resurgence An 'Ultra-Orthodox' Jewish Problem*, N.Y. Post (Oct. 9, 2020), <https://nypost.com/2020/10/09/gov-cuomo-ny-covid-19-spike-an-ultra-orthodox-jewish-problem/>.

⁹ *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63,65 (2020) (representing companion Petitioner Agudath Israel of America in *Agudath Israel of America v. Cuomo*, No. 20A90 (U.S.), both decided in same opinion, see 141 S. Ct. at 65).

The Mix Up is a small restaurant in Amery, Wisconsin, serving delicious broasted chicken. When Governor Evers attempted to impose additional, crushing capacity limits on Wisconsin's small businesses, which would have put the Mix Up out of business, the Mix Up joined a lawsuit by the Tavern League of Wisconsin.¹⁰ But under pressure from the Governor, the Tavern League declined to pursue the case beyond the trial court.¹¹ The Mix Up's owner bravely told us that she wanted to take the case all the way to the Wisconsin Supreme Court and we won.¹²

While I was proud to represent successfully all of these brave clients and more, the sad truth is that my clients are the exception, not the rule. Many tens of millions of Americans lost the small businesses that were their life's work, couldn't worship in person for months, had their kids' educations stolen from them, and so much else. This happened, in part, because many of these ordinary folks lacked the legal assistance to fight

¹⁰ *Tavern League of Wis., Inc. v. Palm*, 2021 WI 33, ¶ 8, 396 Wis. 2d 434, 957 N.W.2d 261.

¹¹ *Tavern League*, 2021 WI 33, ¶¶ 9–12; see *Tavern League of Wis., Inc. v. Palm.*, No. 2020CV128, Dkt. Entries 10-26-2020 to 11-20-2020 (Sawyer Cnty. Cir. Ct.), available at <https://wcca.wicourts.gov/caseDetail.html?caseNo=2020CV000128&countyNo=57#records>.

¹² *Tavern League*, 2021 WI 33, ¶ 34.

back, in a climate of widespread fear. To avoid this from reoccurring, I propose two areas of potential reform that Congress could take up.

Attorneys' Fees. While I am grateful that my firm stood behind me in bringing these cases, many other big firms, as well powerful organizations like those that should have brought the ADA lawsuit on Chris' behalf, and well-funded groups like the Tavern League, refused to stand firm against the broadest attack on civil liberties in our lifetime.

During my efforts to encourage other attorneys to take on these types of cases, I came to believe that more robust incentives are needed to allow and encourage individual lawyers, including ones not at big law firms, to bring lawsuits on behalf of ordinary Americans. While Section 1988 provides for attorneys' fees for a "prevailing party" in actions brought against State and local officials for violation of certain federal rights,¹³ that is, unfortunately, inadequate. For example, a party is not "prevailing" if the State simply changes its practices when faced with the lawsuit, including after preliminary proceedings in the case make it clear

¹³ 42 U.S.C. § 1988(b).

that the State is going to lose.¹⁴ And attorneys' fees are available only in far too narrow circumstances when the illegal actions are taken by federal officials,¹⁵ such as in the Contractor Vaccine Mandate case,¹⁶ which I also successfully litigated and am happy to further discuss.

Scope of Relief. The ability of individuals or small businesses like my clients to obtain complete relief against illegal orders is critical to protecting the rule of law, so that not every small business owner, parent, or disabled individual needs to bring their own successful lawsuit against the same unconstitutional edict. Accordingly, I respectfully submit that this Subcommittee explore legislation that allows ordinary citizens harmed by such an order to obtain nationwide or statewide relief against the order, while also avoiding the problem of conflicting injunctions from different courts of the type that Justice Gorsuch has highlighted.¹⁷

¹⁴ *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Hum. Res.*, 532 U.S. 598, 602–09 (2001); *see id.* at 619–20 (Scalia, J., concurring); *Farrar v. Hobby*, 506 U.S. 103, 109–110 (1992).

¹⁵ *See, e.g.*, 28 U.S.C. § 2412(d)(1)(A).

¹⁶ *Georgia v. President of the United States*, 46 F.4th 1283 (11th Cir. 2022).

¹⁷ *Arizona*, 143 S. Ct. at 1313 (statement of Gorsuch, J.) (“[T]he federal government found itself in an unenviable spot—bound by two inconsistent nationwide commands, one requiring it to enforce the Title 42 orders and another practically forbidding it from doing so.”).