

No. 23-1

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**IN THE  
Supreme Court of the United States**

ERIC CLOPPER,

*Petitioner,*

v.

PRESIDENT & FELLOWS OF HARVARD COLLEGE;  
THE HARVARD CRIMSON, INC.

*Respondents,*

JOHN DOES 1-10,

*Defendants.*

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**On Petition for a Writ of Certiorari to the  
United States Court of Appeals  
for the First Circuit**

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**BRIEF OF DOCTORS OPPOSING CIRCUMCISION  
("D.O.C"), THE GENITAL AUTONOMY LEGAL  
DEFENSE AND EDUCATION FUND ("GALDEF") AND  
JEWS AGAINST CIRCUMCISION ("J.A.C.")  
IN SUPPORT OF PETITIONER**

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July 28, 2023

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**QUESTION PRESENTED**

1. Whether courts may dismiss complaints without leave to amend before expiration of the 21 days parties have to amend their pleadings once as a matter of course?

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## **IDENTITY AND INTEREST OF THE *AMICI CURIAE*<sup>1</sup>**

Pursuant to Supreme Court Rule 37, Doctors Opposing Circumcision (DOC), Genital Autonomy Legal Defense and Education Fund (GALDEF) and Jews Against Circumcision (JAC) respectfully submit this brief amicus curiae in support of Petitioner Eric Clopper (Clopper).

DOC, founded in 1995 by Emeritus Professor of Medicine George C. Denniston, MD, MPH, is an international non-profit educational organization composed of hundreds of medical professionals of many specialties. DOC has 19 Board Members: eleven physicians (including two professors of medicine), four nurses, and two bioethicists. DOC members oppose non-therapeutic, medically unnecessary modifications of the genitalia of minors who did not consent to being permanently mutilated. The efforts of DOC often center around the most common form of genital reduction surgery in the United States: infant male genital mutilation, commonly referred to as “circumcision.”

GALDEF is a collaborative team of children’s rights advocates and attorneys formed for the

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<sup>1</sup> No counsel for a party authored this brief in whole or in part, and no person other than Amici and John R. Sylla made a monetary contribution to fund the preparation or submission of this brief. Peter W. Adler is Amici’s Counsel of Record for the sole purpose of timely submitting this brief. Mr. Adler authored no part of and made no contribution to this brief. Mr. Sylla will promptly substitute in as Amici’s counsel, if and when this Court accepts his pending application to become a member of the Supreme Court Bar. The parties in this case were given notice on July 20, 2023, of the intent to file this brief.

purposes of creating social change and expanding legal awareness about non-therapeutic genital cutting and every child's basic right to bodily integrity.

JAC is a diverse group of men and women who identify as Jews or supporters and oppose involuntary circumcision. Some are secular Jews, identifying as Jewish ethnically and culturally, and some are religious Jews for whom Judaism is central to their beliefs and values. JAC members emphatically do *not* reject their Jewishness or Judaism, but reject and oppose involuntary circumcision.

Amici depend on constitutional and other guarantees of freedom of speech to act in furtherance of their missions. If opponents of Amici's beliefs wrongly punish Amici for expressing Amici's views, courts must afford Amici a fair hearing, a meaningful day in court and due process under the Federal Rules of Civil Procedure (FRCP) and the Constitution.

Based on the proceedings in the courts below, Amici fear that they and others may be wrongly punished for speech about circumcision without legal recourse or due process; and debate and free expression about this important issue may be chilled.

## **INTRODUCTION AND SUMMARY OF ARGUMENT**

The Petition presented by Clopper seeks review of rulings by courts below that denied Clopper his unambiguous right as a matter of course once to amend his complaint within 21 days of the filing of a motion to dismiss.



First, the denial of Clopper's of course right to amend deprived Clopper of his rights to due process under the FRCP and the Constitution. The courts' rulings against Clopper omitted to address Clopper's arguments, which could lead to concerns about the appearance of fairness, impartiality and diligence.

Second, Clopper's expressed position on circumcision aligns with overwhelming scientific and medical consensus. Put simply, Clopper should not be summarily "canceled" or denied due process and his day in court.

Third, Clopper's expressed position on circumcision, far from being anti-Semitic or otherwise abhorrent or obscene, is highly supported by ethical frameworks including bioethics and protection of children.

Fourth, colleges and universities will not always police themselves without court intervention and due process. The country needs them to uphold their commitments to free speech and academic freedom. The denial of due process may embolden wrongful punishment of expression, leading to chilling of debate and diminution of the open-mindedness and critical inquiry necessary for our institutions to train our country's future leaders and enable responsible citizenship.

These arguments all militate to Petitioner having an opportunity to amend his pleading once as a matter of course so that his speech is not wrongly punished with no chance for due process and a day in court.

## ARGUMENT

### **I. Petitioner was Denied Constitutionally-Mandated Due Process, Potentially Creating Appearance Suggesting Improper Adjudication**

Amici argue here with brevity that due process under FRCP and the Constitution require, at a minimum, following the FRCP.

The trial court did not allow Petitioner, as mandated by FRCP Rule 15(a)(1)(B), opportunity to amend his pleading once as a matter of course within 21 days after service of a motion (by defendant to dismiss) under FRCP Rule 12(b). Thus, the trial court ruled contrary to FRCP.

This first argument appears dispositive. The Court can simply remand with instructions to follow the FRCP, and allow Petitioner opportunity to amend his pleading.

If the Court denies the petition and leaves in place the lower courts' determinations and rulings, the appearance of fairness, impartiality and diligence may unfortunately be questioned.

But if the Court takes up this case, even with a quick remand, it will reinforce the confidence in the sanctity and importance of due process instilled by the unanimous ruling in *Nelson v. Adams USA, Inc.*, 529 U.S. 460, 466 (2000), where this Court held that due process as reflected in Rule 15 required an opportunity to be heard and to contest. Here, due process as reflected in Rule 15 requires Petitioner have an opportunity to amend and so to be heard, and

not be wrongly punished with no chance for due process and a day in court.

## **II. Petitioner’s Expressed Position on Male Circumcision Aligns with Overwhelming Scientific and Medical Consensus, and Should Not be Wrongly Punished Without Access to Due Process**

Defendants have sought to suggest that Petitioner’s views and expressions concerning circumcision should not be taken seriously, and termed his performance a “rant.” We disagree.

There is no *medical* consensus in support of neonatal circumcision *anywhere in the world*. The *last* country’s medical establishment to retract recommendation of circumcision was the United States. In 2017, the American Academy of Pediatrics allowed its policy statement justifying access to newborn male circumcision to expire without renewing it.<sup>2</sup>

More affirmatively, Canadian, Dutch, Australian, British, German, Danish, and other national medical bodies have issued guidance advising *against* neonatal circumcision until the persons most deeply affected are old enough to make an informed decision for themselves.<sup>3</sup>

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<sup>2</sup> American Academy of Pediatrics’ “Taskforce on Circumcision,” *Circumcision Policy Statement*, 130 PEDIATRICS 585 (2012) [<https://perma.cc/L96Q-NA7Z>].

<sup>3</sup> DOCTORS OPPOSING CIRCUMCISION, *Medical Organization Statements [on Circumcision]*, <https://www.doctorsopposingcircumcision.org/for->

It is an undisputed fact that amputating an infant's foreskin results in traumatic pain to the infant with a myriad of frequent physical and psychic complications,<sup>4</sup> which range from blood loss and infection to occasional and wholly-preventable death.<sup>5</sup>

It is also a medical fact that the foreskin is a normal, healthy, erogenous, and highly functional part of the human body.<sup>6</sup>

Petitioner's performance, far from being a "rant," was effective in raising awareness of medical opinion and the magnitude of the harms of infant male genital mutilation. He should not be wrongly punished with no chance for due process and a day in court.

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[professionals/medical-organization-statements/  
\[https://perma.cc/JQ3U-FXJ5\]](https://perma.cc/JQ3U-FXJ5) (last updated July 2022).

<sup>4</sup> See Gregory J. Boyle et al., *Male circumcision: pain, trauma and psychosexual sequelae*, 7 J. HEALTH PSYCHOL. 329 (2002).

<sup>5</sup> Glen Lau et al., *Identification of circumcision complications using a regional claims database*. Presentation at 66th annual meeting of the Societies for Pediatric Urology (May 18, 2018), available at <https://spuonline.org/abstracts/2018/P21.cgi> [<https://perma.cc/4M2H-6LX9>] (the study concluded "The incidence of post-circumcision complications at 2 years is much higher than expected at 11.5%."); see also Brian D. Earp et al., *Factors Associated with Early Deaths Following Neonatal Male Circumcision in the United States, 2001 to 2010*, 57 CLINICAL PEDIATRICS 1532 (2018).

<sup>6</sup> See Valeria Purpura et al., *The development of a decellularized extracellular matrix-based biomaterial scaffold derived from human foreskin for the purpose of foreskin reconstruction in circumcised males*, 9 J. TISSUE ENGINEERING (2018); see also John R. Taylor et al., *The prepuce: specialized mucosa of the penis and its loss to circumcision*. 77 BRIT J. UROLOGY 291 (1996).

**III. Petitioner's Expressed Position on Male Circumcision is Highly Ethically Supported, Not Anti-Semitic or Otherwise Abhorrent, Obscene, or Worthy of Wrongful Punishment Without Access to Due Process.**

Defendants have also sought to portray Petitioner as anti-Semitic. Petitioner has alleged that he is proudly Jewish, but that he believes protecting children is a higher cause than following harmful ancient ritual.

In addition to being aligned with scientific and medical consensus, Petitioner's expressed positions are consonant with and arguably even compelled by contemporary ethical analysis.

Many Amici members and supporters are Jewish and not anti-Semitic. Amici abhor and denounce anti-Semitism.

But there has been debate, including within the Jewish community, on whether the practice of circumcision should continue, or if it should be discontinued like other biblical practices such as real or symbolic sacrifice, slavery, slaughter of fatted calves, and punishment of adultery and same-sex sexual relationships by death.

There have also been attempts to suppress debate about circumcision, as well as to shame Jews who argue against the practice. Indeed, there are Jewish

mothers in Israel who will express their reluctance to circumcise only in private or anonymously.<sup>7</sup>

Amicus JAC does not believe circumcision is essential to the practice or survival of Judaism, the continued existence of Jews as a distinct people, or being Jewish. JAC regards opposition to circumcision as a human rights issue, not an attack on Jews or Judaism, or anti-Semitic. JAC believes this human rights message must be heard and debated, not canceled.

“Principles of Biomedical Ethics” by Beauchamp and Childress is a classic U.S. textbook for students studying medicine or nursing. It lists four basic principles of bioethics and the co-relative obligations which must all be satisfied for a medical procedure to be ethical: Beneficence (necessary and with net therapeutic benefit), Nonmaleficence (avoiding unnecessary harm and pain), Autonomy (waiting for patient’s choice or honoring likely choice), and Justice (fair treatment.) We suggest circumcision satisfies none of these ethical requirements. Questioning circumcision is therefore highly ethically supported.

US and international law has largely proscribed female infant genital cutting including circumcision. *See, e.g.*, 18 U.S.C. § 116; *but see United States v. Nagarwala*, 350 F.Supp.3d 613 (E.D. Mich. 2018) (holding that Congress exceeded its legislative power under the Commerce Clause in prohibiting female genital mutilation at the federal level). The World

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<sup>7</sup> *See, e.g.*, Yagi Morris, *Why we Didn’t Circumcise Our Second Son*, TABLET, (Mar. 10, 2020), <https://www.tabletmag.com/sections/belief/articles/why-we-didnt-circumcise-our-second-son> [<https://perma.cc/Q5ZQ-XBG7>].

Health Organization (WHO) terms this cutting Female Genital Mutilation (FGM), saying it violates the human rights of girls and women.<sup>8</sup> WHO has noted that religious leaders take varying positions on FGM,<sup>9</sup> but this has not stopped WHO condemning it.

Can it be that FGM is globally condemned as a violation of human rights, but male circumcision—the removal of homologous innervated male anatomic structures—is completely different, and speech opposing it can be punished not protected? This is among the questions Petitioner expressed.

For doing this, he should not be wrongly punished with no chance for due process and a day in court.

#### **IV. Public Policy Requires that a Petitioner who Relied on a University’s Free Speech Guidelines and was then Punished by that University for Expression be Given Due Process and Fair Hearings in Court.**

In an august line of cases, the Court has protected freedom of speech, even if it offends. *See, e.g., Snyder v. Phelps*, 562 U.S. 443, 458 (2011).

The Court has also recognized that “Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned.” *Keyishian v. Bd. of*

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<sup>8</sup> WHO, Sixty-First Assembly Resolution 61.16 (May 24, 2008) [https://apps.who.int/gb/ebwha/pdf\\_files/WHA61-REC1/A61\\_REC1-en.pdf](https://apps.who.int/gb/ebwha/pdf_files/WHA61/REC1/A61_REC1-en.pdf), [<https://perma.cc/N5ZL-53UU>].

<sup>9</sup> WHO, *Female Genital Mutilation Fact Sheet* (Jan. 31, 2023), <https://www.who.int/news-room/fact-sheets/detail/female-genital-mutilation>, [<https://perma.cc/6PMD-AF4L>].

*Regents of Univ. of State of N.Y.*, 385 U.S. 589, 603 (1967).

The Court has noted “The college classroom with its surrounding environs is peculiarly the ‘marketplace of ideas,’ . . .” *Healy v. James*, 408 U.S. 169, 180 (1972). Recognizing the public interest in academic freedom, Justice Frankfurter referred to teachers as “the priests of our democracy” who:

foster those habits of open-mindedness and critical inquiry which alone make for responsible citizens, who, in turn, make possible an enlightened and effective public opinion. Teachers must fulfill their function by precept and practice, by the very atmosphere which they generate; they must be exemplars of open-mindedness and free inquiry.

*Wieman v. Updegraff*, 344 U.S. 183, 196 (1952) (Frankfurter, J., concurring).

Regardless of whether defendant Harvard, a private university that receives substantial government grants, may be considered a state actor for First Amendment purposes, Petitioner alleged retaliation for expression made in reliance on “Harvard’s Free Speech Guidelines” and the assurances and promises of Harvard faculty that those Guidelines would protect him as a member of the Harvard community teaching about circumcision. Instead, Harvard “investigated” Petitioner, ignored his inquiries, refused to answer his free-speech-related questions, and terminated him.

Without due process to litigate alleged breaches of a university’s free speech guidelines, those guidelines



mean much less, if anything. A university can in such case tout a policy as encouraging free speech and promising not to retaliate against members of the community who engage in it, but then punish them for that speech.

University impunity in such matters erodes the “marketplace of ideas” and deprives the citizenry of the benefits of open-mindedness and critical inquiry. If Harvard wants to profess honoring the First Amendment and its Free Speech Guidelines, but not do so in practice when its members rely on the promise, it should have to defend its duplicity in court.

Petitioner should be afforded a due process opportunity to amend his pleading and his day in court.

### CONCLUSION

Amici DOC, GALDEF and JAC respectfully ask this Court to grant a writ of certiorari and to hear Petitioner’s case, or otherwise to take steps to offer guidance on whether due process and the FRCP allow courts to dismiss complaints without leave to amend before expiration of the 21 days parties have to amend their pleadings once as a matter of course.

Respectfully Submitted,

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