No. 24-88

In the Supreme Court of the United States

JOHN DOE,

Petitioner,

v.

THE TRUSTEES OF INDIANA UNIVERSITY, ET AL.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

Brief of *Amici Curiae* Pseudonymous Litigation Scholars in Support of Petitioner

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Interest of the *Amici Curiae*[1]

Amici are among the few professors who have written on pseudonymous litigation:

Benjamin Edwards (UNLV), author of *When Fear Rules in Law's Place: Pseudonymous Litigation as a Response to Systematic Intimidation*, 20 Va. J. Soc. Pol'y & L. 437 (2013).

Jayne S. Ressler (Brooklyn), author of *Privacy, Plaintiffs, and Pseudonyms: The Anonymous Doe Plaintiff in the Information Age*, 53 U. Kan. L. Rev. 195 (2005), *Anonymous Plaintiffs and Sexual Misconduct*, 50 Seton Hall L. Rev. 955 (2020), and *#WorstPlaintiffEver: Popular Public Shaming and Pseudonymous Plaintiffs*, 84 Tenn. L. Rev. 779 (2017).

Joan Steinman (Chicago-Kent), author of *Public Trial, Pseudonymous Parties: When Should Litigants Be Permitted to Keep Their Identities Confidential?*, 37 Hastings L.J. 1 (1985).

Eugene Volokh (UCLA), author of *The Law of Pseudonymous Litigation*, 73 Hastings L.J. 1353 (2022), *If Pseudonyms, Then What Kind?*, 107 Judicature 77 (2023), and *Protecting People from Their Own*

[1] No counsel for a party authored this brief in whole or part, nor did any person or entity, other than *amici* or their counsel, make a monetary contribution to the preparation or submission of this brief. The parties had received notice of the planned filing at least 10 days before the deadline.

Religious Communities: Jane Doe in Church and State, 38 J.L. & Religion 354 (2023).

Collectively, these works have been cited in over 40 cases. *Amici* may disagree about when courts should permit pseudonymity, but they agree that this Court should grant review to guide lower courts on the matter.

Summary of Argument

1. In more than a thousand federal cases each year, plaintiffs endeavor to file under a pseudonym.[2] Sometimes, courts explicitly permit this. Sometimes, they do not. Sometimes, they do not address the issue at all.

Decisions about whether to permit pseudonymity are important. They affect the public's right to monitor and supervise the work of the federal courts. They affect the incentives to bring or not bring a case, and to defend or settle it. They affect the accuracy and efficiency of the judicial process. They may cause unfairness to the parties.

2. Yet this Court has never decided whether or when pseudonymity is appropriate. At times it has allowed pseudonymous cases to come before it, but without setting forth any test for when courts should allow pseudonymous litigation. Left adrift, twelve

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[2] A Bloomberg search for U.S. District Court Dockets with plaintiff Doe in the first half of 2024, for instance, yielded over 600 results; though there may be some false positives, the search omits lawsuits brought by people using initials or non-Doe pseudonyms (such as Roe).

circuit courts developed different tests that have led to different results for similarly situated litigants.

Petitioners correctly identify a circuit split. But because many of the factors under the various circuits' tests are so vague, courts also routinely disagree on how to apply those factors, thus often producing inconsistent results. Courts do not agree, for instance, on when pseudonymity should be allowed in cases involving alleged sexual assault, mental illness, or copyright-infringing use of pornography. They do not agree on whether pseudonymity should be available to protect a plaintiff's reputation and employment prospects. And the list goes on.

3. This inconsistency is likely to endure, unless this Court steps in. Every circuit reviews pseudonymity determinations for abuse of discretion, which usually leads to the trial court's determination being upheld: Both a decision to grant pseudonymity and a decision to deny it, on the same facts, could easily be viewed as within the district court's discretion.

As a result, circuit courts generally will not set precedents that harmonize lower court decisions about pseudonymity. Similarly situated litigants will continue to be treated differently. And practitioners and prospective litigants will remain in the dark about whether pseudonymity will be available. This Court should grant certiorari to provide at least some guidance to lower courts on these important matters.

Argument

I. Decisions about whether to permit pseudonymity are important to the public, to litigants, and to the justice system

A. Such decisions are important to the public

Public access to information about civil cases "serves to promote trustworthiness of the judicial process, to curb judicial abuses, and to provide the public with a more complete understanding of the judicial system, including a better perception of fairness." *Littlejohn v. Bic Corp.*, 851 F.2d 673, 682 (3d Cir. 1988). This access "protects the public's ability to oversee and monitor the workings of the Judicial Branch," and the Judiciary's "institutional integrity." *Doe v. Pub. Citizen*, 749 F.3d 246, 263 (4th Cir. 2014). "Any step that withdraws an element of the judicial process from public view makes the ensuing decision look more like a fiat and requires rigorous justification." *Hicklin Eng'g, L.C. v. Bartell*, 439 F.3d 346, 348 (7th Cir. 2006).

"[A]nonymous litigation" thus "runs contrary to the rights of the public to have open judicial proceedings and to know who is using court facilities and procedures funded by public taxes." *Doe v. Village of Deerfield*, 819 F.3d 372, 377 (7th Cir. 2016). "Identifying the parties to the proceeding is an important dimension of publicness. The people have a right to know who is using their courts." *Doe v. Blue Cross & Blue Shield United of Wis.*, 112 F.3d 869, 872 (7th Cir. 1997).

Party names often offer the best clue for discovering further information about the case. Consider journalists who write about civil litigation. Without party names, they are limited to what they can glean from the filings and what the pseudonymous parties' lawyers are willing to reveal.

But armed with the names, they can investigate further. They can contact the parties' coworkers, business associates, or acquaintances. They can search court records in other cases to determine whether the fact pattern in this case had led to other litigation. They can more generally see what other cases have been filed by the plaintiff or against the defendant and see whether the parties have been found to be credible or not credible in the past. They can determine whether the parties might have ulterior motives for litigating. *See* Volokh, *The Law of Pseudonymous Litigation*, at 1370-72.

Pseudonymity also tends to lead to additional restrictions on public access as a case unfolds. Because filed documents will often contain information that indirectly identify a pseudonymous party, courts may need to outright seal other case information or enjoin a party from publicly revealing the pseudonymous party's name (or other details of the lawsuit) in order to maintain effective pseudonymity. *See id.* at 1372-76.

And allowing pseudonymity in one case invites pseudonymization of all other cases that raise similar concerns, "open[ing] the door to parties proceeding pseudonymously in an incalculable number of lawsuits" of that kind. *Doe v. Moreland*, No. 18-cv-800,

2019 WL 2336435, *2 (D.D.C. Feb. 21, 2019); *see also Doe v. Fedcap Rehab. Servs., Inc.*, No. 17-cv-08220, 2018 WL 2021588, *3 (S.D.N.Y. Apr. 27, 2018) ("At bottom, Plaintiff wants what most employment-discrimination plaintiffs would like: to sue their former employer without future employers knowing about it."); Volokh, *supra*, at 1451-56.

Courts have therefore treated litigating under a pseudonym as implicating the right of public access to judicial proceedings. *See, e.g.*, *In re Sealed Case*, 931 F.3d 92, 96 (D.C. Cir. 2019); *Pub. Citizen*, 749 F.3d at 274; *Sealed Plaintiff v. Sealed Defendant*, 537 F.3d 185, 189 (2d Cir. 2008); *Roe v. Aware Woman Ctr. for Choice, Inc.*, 253 F.3d 678, 685 (11th Cir. 2001). And, because of this, all "circuit courts that have considered the matter have recognized a strong presumption against the use of pseudonyms in civil litigation." *Does 1-3 v. Mills*, 39 F.4th 20, 25 (1st Cir. 2022).

B. Decisions about whether to permit pseudonymity are important to enforcement of legal rules

At the same time, denying pseudonymity can also undermine the public policy that the civil causes of action are aimed to serve. Plaintiffs faced with the prospect of being publicly identified might choose not to litigate, and might thus forgo the remedies that civil causes of action exist to provide.

Likewise, defendants who cannot litigate pseudonymously might settle before complaints are filed, even if they have sound legal or factual defenses. The

underlying causes of action (or defenses) may end up being underenforced, and useful precedent may end up being underproduced. Sometimes courts allow pseudonymity in part to avoid this deterrent effect, reasoning, for instance, that

> [D]enying plaintiff the use of a pseudonym[] may deter other people who are suffering from mental illnesses from suing in order to vindicate their rights, merely because they fear that they will be stigmatized in their community if they are forced to bring suit under their true identity. Indeed, unscrupulous insurance companies may be encouraged to deny valid claims with the expectation that these individuals will not pursue their rights in court.

Doe v. Provident Life & Accident Ins. Co., 176 F.R.D. 464, 468 (E.D. Pa. 1997); *see also, e.g.*, *Doe v. Lund's Fisheries, Inc.*, No. 20-cv-11306, 2020 WL 6749972, *3 (D.N.J. Nov. 17, 2020) (sexual assault case); *Doe v. Oshrin*, 299 F.R.D. 100, 104 (D.N.J. 2014) (child pornography case); *Does I thru XXIII v. Advanced Textile Corp.*, 214 F.3d 1058, 1073 (9th Cir. 2000) (employee rights case); *Doe v. Innovative Enters., Inc.*, No. 20-cv-00107, 4-5 (E.D. Va. Aug. 25, 2020) (LEXIS, Dockets) (case alleging wrongful disclosure of expunged criminal records).

Courts sometimes allow pseudonymity based on such concerns and sometimes reject it despite such concerns. But the point for purposes of this petition is that the question of when to allow pseudonymity is important to our civil justice system.

C. Pseudonymity can be unfair to the non-pseudonymous party

1. Pseudonymity can create a "risk of unfairness to the opposing party," even when the defendant knows the plaintiff's identity. *In re Sealed Case*, 931 F.3d at 97. "Fundamental fairness suggests that defendants are prejudiced when required to defend themselves publicly before a jury while plaintiffs make accusations from behind a cloak of anonymity." *Rapp v. Fowler [Kevin Spacey]*, 537 F. Supp. 3d 521, 531-32 (S.D.N.Y. 2021) (cleaned up). "[Plaintiff] has denied [defendant] the shelter of anonymity—yet it is [defendant], and not the plaintiff, who faces disgrace if the complaint's allegations can be substantiated. And if the complaint's allegations are false, then anonymity provides a shield behind which defamatory charges may be launched without shame or liability." *Doe v. Smith*, 429 F.3d 706, 710 (7th Cir. 2005); *see also* Volokh, *supra*, at 1448-51 (citing dozens of cases where courts raise this concern).

2. This risk exists because plaintiffs' complaints that publicly identify defendants may draw attention from the media, defendants' business partners, and others. Defendants might find their reputations sharply undermined by the allegations alone, long before the allegations are ultimately adjudicated. Normally, defendants can respond by arguing why plaintiff's claims are unreliable. But if the plaintiff is pseudonymous, such public self-defense may become much harder:

> The defendants . . . have a powerful interest in being able to respond publicly to defend their

> reputations [against plaintiff's allegations] . . . in . . . situations where the claims in the lawsuit may be of interest to those with whom the defendants have business or other dealings. Part of that defense will ordinarily include direct challenges to the plaintiff's credibility, which may well be affected by the facts plaintiff prefers to keep secret here: his history of mental health problems and his history of substance abuse. Those may be sensitive subjects, but they are at the heart of plaintiff's credibility in making the serious accusations he has made here. He cannot use his privacy interests as a shelter from which he can safely hurl these accusations without subjecting himself to public scrutiny, even if that public scrutiny includes scorn and criticism.

Doe v. Ind. Black Expo., Inc., 923 F. Supp. 137, 142 (S.D. Ind. 1996); *see also* Volokh, *supra*, at 1380-81 (citing other cases making this argument).

Sometimes pseudonymity orders are backed by gag orders that expressly forbid defendants from naming their accusers, and thus forbid defendants from effectively defending themselves against the accusations. *See, e.g.*, *Doe v. Mast*, No. 3:22-cv-00049, 2024 WL 3850450, *10 n.12 (W.D. Va. Aug. 16, 2024) (endorsing such gag orders); Volokh, *supra*, at 1375-76 (discussing them). But even where there is no gag order, few defendants would likely feel safe publicly identifying a plaintiff in whose favor the judge had issued a pseudonymity order. *See* Volokh, *supra*, at 1381.

3. When parties have litigated pseudonymously in past cases, this makes it harder for their current adversaries to uncover relevant information, such as statements that are inconsistent with their claims in a later case, especially ones that could be viewed as judicial admissions, *cf., e.g.*, *Ceglia v. Zuckerberg*, 772 F. Supp. 2d 453, 456 n.1 (W.D.N.Y. 2011) ("Having successfully persuaded a different federal district court that his domicile . . . was New York, [Facebook founder Mark] Zuckerberg would be judicially estopped from denying otherwise now."). And sometimes litigant history is helpful to get a general sense of a party's credibility and behavior. *See, e.g.*, *Bormuth v. County of Jackson*, 870 F.3d 494, 524 (6th Cir. 2017) (en banc) (Sutton, J., concurring) ("[L]ower court decisions . . . show why the council members became frustrated with Mr. Bormuth and confirm that this frustration had little to do with his religious beliefs and more to do with his methods of advocacy. This was not his first legal grievance, to put it mildly.").

4. Permitting pseudonymity can also alter settlement values. "While a publicly accused defendant might be eager to settle in order to get its name out of the public eye, a pseudonymous plaintiff might hold out for a larger settlement because they face no such reputational risk." *Fedcap Rehab. Servs.*, 2018 WL 2021588, *2. This is one reason some courts are reluctant to permit plaintiffs to be pseudonymous when they have named the defendants. *See* Volokh, *supra*, 1381-82 (collecting cases).

To be sure, sometimes this alteration might lead to more just results: In some cases, the plaintiff may risk serious reputational or privacy damage if he or she must be identified, but the defendant does not face such risk. If that is so, then the defendant might be able to get away with an unfairly low settlement, and plaintiff pseudonymity might correct that. But in either case, the decision whether to permit pseudonymity is important to the parties.

D. Pseudonymity can reduce risk of physical, privacy, reputational, and economic harm

While permitting pseudonymity can be unfairly harmful, forbidding it can be as well. Sometimes a party may face the risk of physical harm if the party's identity is disclosed. *See* Volokh, *supra*, at 1397-99. That is often considered for plaintiffs, but may also apply to defendants, for instance if the defendant is accused of a serious offense—sexual assault of a child, fraud against vulnerable clients, and the like—and faces vigilante attacks if identified.

Going forward under one's own name could sometimes require the party to disclose highly private information, such as mental illness, physical illness, sexual orientation, or the fact of a past sexual assault. *See id.* at 1406, 1409-11.

And going forward under one's own name often jeopardizes a party's reputation and economic prospects. Named defendants accused of fraud or malpractice might face financial ruin because of lost business, even if they are eventually vindicated in court.

This is particularly clear for defendants such as celebrities or politicians, since allegations against them may make the news. But it also applies even for ordinary people, given the modern tendency to do online searches to investigate prospective employees or service providers.

Named plaintiffs who sue their ex-employers might be viewed as litigious employees by potential future employers. Named plaintiffs who sue universities over alleged wrongful sexual assault findings in Title IX proceedings will be publicly identified as alleged rapists and may lose job opportunities even if they ultimately win their cases. *See id.* at 1416-23. Named plaintiffs bringing controversial claims may face viral Internet shaming. Ressler, *#WorstPlaintiffEver*, at 781-83.

To be sure, pseudonymity is not always allowed in such cases. Loosely speaking, courts generally allow pseudonymity to avoid serious risk of physical harm, sometimes allow it to avoid privacy harm, and rarely allow it to avoid reputational or economic harm (except in Title IX wrongful discipline cases). But again, the point here is that the law of pseudonymity can be tremendously important to litigants' lives.

E. Pseudonymity can affect the accuracy and efficiency of the judicial process

Pseudonymity can also affect the accuracy of fact-finding.

1. A named witness, including a party acting as a witness, "may feel more inhibited than a

pseudonymous witness from fabricating or embellishing an account." *Doe v. Delta Airlines Inc.*, 310 F.R.D. 222, 225 (S.D.N.Y. 2015), *aff'd*, 672 F. App'x 48 (2d Cir. 2016). And if the party witness is not telling the truth, "there is certainly a countervailing public interest in knowing the [witness's] identity." *Roe v. Does 1-11*, No. 20-cv-3788, 2020 WL 6152174, *5 (E.D.N.Y. Oct. 14, 2020).

2. Pseudonymity may also alienate potential witnesses. Asking a witness questions about the plaintiff requires mentioning the plaintiff's name. But if the court wants to maintain pseudonymity, then the witness would have to be put under a protective order. *See* Volokh, *supra*, at 1385 n.151 (collecting examples). Many people, however, are likely to resist becoming witnesses if that means agreeing to a protective order—especially when the obligation relates to an acquaintance. *See, e.g.*, *S.Y. v. Choice Hotels Int'l, Inc.*, No. 20-cv-118, 2021 WL 4167677, *4-5 (M.D. Fla. Sept. 14, 2021) (rejecting witness gag orders to avoid "a situation where an acquaintance or family member . . . would need to sign an agreement prohibiting them from ever revealing information related to plaintiff's identity, thus making it impracticable and likely to deter witnesses").

3. When this Court recognized a public right of access to criminal trials, Justice Brennan noted that such publicity can cause otherwise unknown witnesses to come forward. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 596-97 (1980) (Brennan, J., concurring). The same might be true in civil cases: "It is conceivable that witnesses, upon the disclosure of

Doe's name, will 'step forward [at trial] with valuable information about the events or the credibility of witnesses." *Delta Airlines*, 310 F.R.D. at 225 (citation omitted). But if one side is pseudonymous, "information about only [the other] side may thus come to light." *Doe v. Del Rio*, 241 F.R.D. 154, 159 (S.D.N.Y. 2006). *But see Doe v. Purdue Univ.*, No. 18-cv-72, 2019 WL 1960261, *4 (N.D. Ind. Apr. 30, 2019) (rejecting this concern as too speculative).

4. Pseudonymity may also prejudice the jury by "risk[ing] . . . giving [the party's] claim greater stature or dignity," *Lawson v. Rubin*, No. 17-cv-6404, 2019 WL 5291205, *3 (E.D.N.Y. Oct. 18, 2019) (quotation marks omitted), or by implicitly "tarnish[ing]" a defendant by conveying to the jury "the unsupported contention that the [defendant] will seek to retaliate against [the plaintiff]." *Tolton v. Day*, No. 19-cv-945, 2019 WL 4305789, *4 (D.D.C. Sept. 11, 2019). "[T]he very knowledge by the jury that pseudonyms were being used would convey a message to the fact-finder that the court thought there was merit to the plaintiffs' claims of intangible harms." *James v. Jacobson*, 6 F.3d 233, 240-41 (4th Cir. 1993).

5. Pseudonymity can also confuse the jury. "[W]itnesses, who know Plaintiff by her true name, may come across as less credible if they are struggling to remember to use Plaintiff's pseudonym." *Doe v. Elson S Floyd Coll. of Med. at Wash. State Univ.*, No. 20-cv-00145, 2021 WL 4197366, *3 (E.D. Wash. Mar. 24, 2021). And "[i]n the event a witness inadvertently testified to a plaintiff's real name, the Court would have to immediately excuse the jury in the middle of

critical testimony, admonish the witness, and provide a limiting instruction, which may signal to the jury that either the attorney or the witness acted improperly." *Lawson*, 2019 WL 5291205, *3.

6. Pseudonymity also impedes courts' ability to identify vexatious litigants by concealing a party's litigation history. *See, e.g.*, *O.L. v. Jara*, No. 21-55740, 2022 WL 1499656, *3 n.1 (9th Cir. May 12, 2022) (noting that "O.L. makes it difficult to track her cases because she uses initials or pseudonyms," and warning that "[f]lagrant abuse of the judicial process" through such tactics "cannot be tolerated" (citation omitted)); Volokh, *supra*, at 1388-90 (giving more examples).

7. The inability to easily find a party's past pseudonymous cases can make it more difficult to "apply legal principles of res judicata and collateral estoppel." *Femedeer* v. *Haun*, 227 F.3d 1244, 1246 (10th Cir. 2000); *see also* Volokh, *supra*, at 1389 n.171 (detailing cases where courts expressed this concern).

Lower courts have of course allowed pseudonymity in certain cases despite those arguments. Among other things, for instance, courts sometimes allow pseudonymity before trial but state that the parties will have to be identified at trial, thus avoiding possibly confusing or prejudicing jurors. *See* Volokh, *supra*, at 1391. But these considerations again help show the importance of decisions about when pseudonymity should be allowed.

II. Lower court decisions are chaotically split

A. This Court has not given lower courts guidance

This Court has never decided when pseudonymity should be allowed. When parties have requested this Court's permission to file a writ of certiorari pseudonymously, this Court has granted or denied that request without explanation. *See, e.g.*, *Doe v. Mich. Att'y Grievance Comm'n*, 519 U.S. 946 (1996) (denying); *Foe v. Cuomo*, 498 U.S. 892 (1990) (granting). This Court has sometimes reviewed pseudonymous cases (*Roe v. Wade* is a famous example), but in doing so it has never discussed in any detail when pseudonymity should be allowed.

This Court has recognized the common-law public right of access to judicial records, *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 597-99 (1978), and the First Amendment right to attend criminal trials, *Richmond Newspapers,* 448 U.S. at 580. But while those rights are connected to the public's right to know the names of parties in civil cases, *see supra* Part I.A, this Court's precedents do not set forth any meaningful guidance on when the interests favoring pseudonymity can overcome that right.

Nor do the Federal Rules of Civil Procedure give much guidance (except by mandating pseudonymity for minors, Rule 5.2(a)(3)). Many courts have inferred a presumption against pseudonymity from Rule 10(a) ("The title of the complaint must name all the parties") and Rule 17(a) ("An action must be prosecuted

in the name of the real party in interest"). *See, e.g.*, *Doe v. Frank*, 951 F.2d 320, 322 (11th Cir. 1992). But the Rules say nothing about when pseudonymity is nonetheless permissible. The lower court cases allowing pseudonymity in some situations have thus proceeded without either this Court's or the Rules' guidance.

B. The circuits are split into three groups on pseudonymity

The petition accurately summarizes the circuit split:

- The Seventh Circuit allows pseudonymity in narrow circumstances, seemingly limited to situations where the litigant "is a minor, is at risk of physical harm, or faces improper retaliation (that is, private responses unjustified by the facts as determined in court)." Pet. 10a.
- Ten circuits apply different non-exhaustive, multifactor tests. *See, e.g.*, *United States v. Pilcher*, 950 F.3d 39, 42 (2d Cir. 2020) (ten factors); *Femedeer*, 227 F.3d at 1246 (10th Cir.) (four factors).
- The First Circuit rejects both a multifactor test and "sharp, categorial exceptions to the strong presumption against pseudonymity," and instead identifies "four general categories of exceptional cases in which party anonymity ordinarily will be warranted." *Doe v. Mass. Inst. of Tech.,* 46 F.4th 61, 70-72 (1st Cir. 2022).

But beyond this formally visible circuit split, lower courts that adopt various multifactor tests disagree

on how to interpret each factor, generally without acknowledging the disagreement.

1. Consider, for instance, a recurring question: Does risk of reputational, economic, or professional harm suffice to let a litigant proceed pseudonymously? Most courts generally say no: "That a plaintiff may suffer embarrassment or economic harm is not enough." *Doe v. Megless*, 654 F.3d 404, 408 (3d Cir. 2011); Volokh, *supra*, at 1420-23, 1457-60 (citing many cases that take this view).

But other courts do permit pseudonymity in some such cases. In one recent sexual assault lawsuit, for instance, the judge let the defendant proceed pseudonymously, reasoning, "[T]he court finds that the chance that [defendant] would suffer reputational harm is significant. The defendant is a partner of a well-known law firm in New York and an adjunct law school instructor." *Doe v. Doe*, No. 20-cv-5329, 2020 WL 6900002, *3 (E.D.N.Y. Nov. 24, 2020).

Likewise, in a lawsuit over an allegedly false credit report, the court let plaintiff proceed pseudonymously, because "[p]ublicly identifying Plaintiff risks impeding her future employment prospects by making the improperly disclosed information public knowledge." *Innovative Enters., Inc.*, No. 20-cv-00107, at 4-5. Another court did the same in a libel lawsuit. *Alexander v. Falk*, No. 16-cv-02268, 2017 WL 3749573, *5 (D. Nev. Aug. 30, 2017). Some cases that discuss a party's mental health condition have likewise permitted pseudonymity on the theory that identifying the plaintiffs could lead to "severe" "economic

and career consequences." *Elson S Floyd Coll. of Med.*, 2021 WL 4197366, *2.

Some courts have also permitted pseudonymity for whistleblowers, out of a concern that being known as a whistleblower might create "a reasonably credible threat of some professional harm." *SEB Inv. Mgmt. AB v. Symantec Corp.*, No. 18-cv-02902, 2021 WL 3487124, *2 (N.D. Cal. Aug. 9, 2021). One court has permitted pseudonymity to a doctor challenging her employer's report of "charge[s] of professional misconduct" to "the National Practitioner Data Bank." *Doe v. Lieberman*, No. 20-cv-02148, 2020 WL 13260569, *3 (D.D.C. Aug. 5, 2020). And one court permitted a defendant who was being accused of trade secret infringement to litigate pseudonymously. *Ipsos MMA, Inc. v. Doe*, No. 21-cv-08929, 2022 WL 451510, *2 (S.D.N.Y. Jan. 25, 2022).

2. Many of the multifactor tests list as one factor "whether the suit . . . challeng[es] the actions of the government or that of private parties." *Sealed Plaintiff*, 537 F.3d at 190. But which way does that factor cut?

Some courts conclude that pseudonymity is less available in suits against *the government*, because "there is a heightened public interest when an individual or entity files a suit against the government." *In re Sealed Case*, 971 F.3d 324, 329 (D.C. Cir. 2020); *see also, e.g.*, *Megless*, 654 F.3d at 411. Others take the opposite view, concluding that pseudonymity is less available in suits against *private parties*, because "[w]hile such [pseudonymous] suits involve no injury to the Government's reputation, the mere filing of a

civil action against other private parties may cause damage to their good names and reputation and may also result in economic harm." *S. Methodist Univ. Ass'n of Women L. Students v. Wynne & Jaffe*, 599 F.2d 707, 713 (5th Cir. 1979); *see also, e.g.*, *Doe v. Skyline Autos.*, 375 F. Supp. 3d 401, 406 (S.D.N.Y. 2019); *Doe v. Va. Polytechnic Inst. & State Univ.*, No. 19-cv-00249, 2020 WL 1287960, *4 (W.D. Va. Mar. 18, 2020); *EW v. N.Y. Blood Ctr.*, 213 F.R.D. 108, 111 (E.D.N.Y. 2003).

3. What about actual or predicted future media interest in a case? Some courts, applying the "public's interest in the litigation" factor of the multifactor tests, say that "the public's interest" in the case "weigh[s] against" pseudonymity. *See, e.g.*, *Doe 1 v. United States*, No. 24-cv-1071, 2024 WL 1885188, *4-5 (S.D.N.Y. Apr. 30, 2024), *reconsideration denied,* No. 24-cv-1071, 2024 WL 3738626 (S.D.N.Y. Aug. 8, 2024); *Doe v. [Harvey] Weinstein*, 484 F. Supp. 3d 90, 95, 97 (S.D.N.Y. 2020). Others downplay the significance of the factor. *See, e.g.*, *Fowler*, 537 F. Supp. 3d at 528 n.38; *Doe v. [Tupac] Shakur*, 164 F.R.D. 359, 362 (S.D.N.Y. 1996). Others treat it as *favoring* pseudonymity, on the theory that such public interest and media attention would unduly harm plaintiff's privacy. *See, e.g.*, *M.J.R. v. United States*, No. 23-cv-05821, 2023 WL 7563746, *2 (N.D. Cal. Nov. 14, 2023); *Trooper 1 v. N.Y. State Police*, No. 22-cv-893, 2022 WL 22869548, *4-5 (E.D.N.Y. June 9, 2022); *Doe v. United Airlines, Inc.*, No. 17-cv-2825, 2018 WL 3997258, *2 (D. Nev. Aug. 21, 2018); *Doe v. County of Milwaukee*, No. 14-C-200, 2015 WL

5794750, *2 (E.D. Wis. Oct. 2, 2015). And all these cases involved a similar reason for pseudonymity: plaintiffs' privacy interest in concealing their identities as alleged sexual assault victims.

4. Consider another commonly cited factor, the age of the plaintiff. Under Rule 5.2, courts generally let minors sue pseudonymously. But what about young adults? Some courts conclude that the age factor counts only in favor of under-18-year-olds. *See*, Volokh, *supra*, at 1401 & n.232 (collecting cases). Others suggest the cutoff should be around age twenty. *See id.* at 1401 & n.233. Still others decline to draw any line. *See id.* at 1401 & n.231; *Doe v. Sheely*, 781 F. App'x 972, 973-74 (11th Cir. 2019) ("[C]ourts should be careful not to draw a bright line between a plaintiff one day shy of her eighteenth birthday and a plaintiff one day past it.").

5. As a result of the vagueness of the factors, lower courts sharply divide on particular applications of the factors, and how they are to be balanced. Consider arguments by plaintiffs who are claiming that universities had wrongly found them guilty of sexual assault. Some courts, even outside the Seventh Circuit, conclude that those plaintiffs have to sue under their own names (just like other plaintiffs who allege that they were wrongly accused of sexual assault). *See, e.g.*, *Doe v. Rider Univ.*, No. 16-cv-4882, 2018 WL 3756950, *5 (D.N.J. Aug. 7, 2018) (describing plaintiff's concerns as "little more than a fear of embarrassment or economic harm").

But most courts do allow pseudonymity, concluding, for instance, that "requiring Plaintiff to disclose

his true identity could cause" "harm to his reputation and future prospects," which "weighs in favor of allowing Plaintiff to proceed pseudonymously." *See, e.g.*, *Doe v. Rollins Coll.*, No. 18-cv-1069-ORL-37, 2018 WL 11275374, *4 (M.D. Fla. Oct. 2, 2018); Volokh, *supra*, at 1423, 1441-48 (citing many cases coming down both ways). And the outcomes in these cases are not even uniform within the same circuit. *Compare Doe v. Kenyon Coll.*, No. 20-cv-4972, 2020 WL 11885928, *1 (S.D. Ohio Sept. 24, 2020) (allowing pseudonymity), *with Student Pid A54456680 v. Mich. State Univ.*, No. 20-cv-984, 2020 WL 12689852, *2 (W.D. Mich. Oct. 15, 2020) (denying pseudonymity).

Indeed, these Title IX cases split lopsidedly in favor of pseudonymity, *see* Volokh, *supra*, at 1441-48 (listing 84 cases where pseudonymity was allowed and 16 cases where pseudonymity was not allowed), though courts generally reject pseudonymity in other "harm to . . . reputation and future prospects" cases (see item 1 above). This is yet another inconsistency to which the vague multifactor tests have led.

6. Likewise, consider another recurring fact pattern, in which both litigants and the public should be able to expect consistency: lawsuits alleging that the plaintiff was sexually assaulted. Protection of privacy is a recurring factor in the multifactor tests. Volokh, *supra*, at 1405-14. And of course a person's having been sexually assaulted is usually seen as a highly private matter. Yet courts are sharply split on when adults who allege that they were sexually assaulted can sue under a pseudonym. *See* Volokh, *supra*, at 1430-37 (citing 67 cases where pseudonymity was

allowed and 39 cases where pseudonymity was not allowed).

7. Courts are likewise divided when a person seeks to prevent disclosure of a mental illness or disorder. *See* Volokh, *supra*, at 1437-41 (listing 16 cases where pseudonymity was allowed and 28 cases where pseudonymity was not allowed, including cases that reach different results for the same mental condition).

8. Courts are divided on when pseudonymity is justified to prevent disclosure of a person's homosexuality or transgender status. *See id.* at 1406.

9. Courts are divided on whether preventing disclosure of a person's communicable disease, such as HIV, justifies pseudonymity. *See id.* at 1410.

10. And courts are divided on whether defendants accused of infringing copyright in pornographic works are entitled to pseudonymity. *See id.* at 1407 & nn.267-68.

III. If this Court does not act, inconsistent pseudonymity determinations will continue

The inconsistency among district court decisions is unlikely to be solved by the circuit courts, particularly because the circuits review the trial court's conclusion only for abuse of discretion. *See, e.g.*, *MIT,* 46 F.4th at 66 (1st Cir); *Pilcher*, 950 F.3d at 41-42 (2d Cir.); *Megless*, 654 F.3d at 407 (3d Cir.); *Doe v. Sidar*, 93 F.4th 241, 247-48 (4th Cir. 2024); *Ford v. City of Huntsville*, 242 F.3d 235, 241 (5th Cir. 2001); *D.E. v. John Doe*, 834 F.3d 723, 728 (6th Cir. 2016); Pet. 8a,

10a (7th Cir.); *Cajune v. Indep. Sch. Dist. 194*, 105 F.4th 1070, 1078 (8th Cir. 2024); *Doe v. Kamehameha Sch.,* 596 F.3d 1036, 1046 (9th Cir. 2010); *M.M. v. Zavaras*, 139 F.3d 798, 804 (10th Cir. 1998); *Frank*, 951 F.2d at 323 (11th Cir.); *In re Sealed Case*, 931 F.3d at 96 (D.C. Cir.).

Because of the lack of de novo review in such cases, there is little opportunity for the "evolutionary process of common-law adjudication" that "give[s] meaning" to legal rules, *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 502 (1984). Instead of marking out two zones—where pseudonymity should be granted and when it should be denied—an abuse of discretion standard leads the Courts of Appeals to mark out three areas: (1) pseudonymity requests that any reasonable judge would grant; (2) pseudonymity requests that any reasonable judge would deny; and (3) pseudonymity requests on which reasonable judges could disagree.

Many pseudonymity determinations fall within that third category. *See, e.g., Megless*, 654 F.3d at 407 ("We will not interfere . . . unless there is a definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached upon a weighing of the relevant factors.") (cleaned up); *MIT*, 46 F.4th at 70 (same); *Cajune*, 105 F.4th at 1078 (same). Under abuse of discretion review, circuit courts allow "'a zone of choice within which' the district court 'may go either way.'" *In re Chiquita Brands Int'l, Inc.*, 965 F.3d 1238, 1246 (11th Cir. 2020). Yet future courts and litigants derive little value from a precedent saying, in effect, that a court may go either

way. And that is especially so when that disagreement concerns the output of vaguely delineated standards that "are not the crown jewels of multifactor tests." *Doe v. Pa. Dep't of Corr.*, No. 19-cv-01584, 2019 WL 5683437, *2 (M.D. Pa. Nov. 1, 2019).

This is thus not an area like, for instance, First Amendment or Fourth Amendment law, where the doctrine is likely to be clarified by appellate decisions that apply independent appellate review. *See Bose*, 466 U.S. at 499, 505 (concluding that independent appellate review in First Amendment cases lets courts set precedents that "confine the perimeters of any unprotected category within acceptably narrow limits"); *Ornelas v. United States*, 517 U.S. 690, 697-98 (1996) (concluding that "independent appellate review" of Fourth Amendment probable cause determinations means that "even where one case may not squarely control another one, the two decisions when viewed together may usefully add to the body of law on the subject"). Only a precedent from this Court providing some guidelines for decisions about whether to permit pseudonymity can potentially yield the clarity and consistency that this field requires.

Conclusion

Pseudonymity questions arise often, and are important to the public, to litigants, and to the sound administration of justice. But lower court decisions are chaotically split on this subject. This Court should grant review and provide further guidance to lower courts.

Respectfully submitted,

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