No. 22-1525

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

JOHN DOE,

Plaintiff – Appellee,

v.

EUGENE VOLOKH,

Intervenor – Appellant.

On Appeal from the United States District Court for the District of New Hampshire
Case No. 1:21-cv-944 (Hon. Joseph N. Laplante)

MOTION OF THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS AND 15 MEDIA ORGANIZATIONS FOR LEAVE TO FILE AMICI CURIAE BRIEF IN SUPPORT OF INTERVENOR-APPELLANT URGING REVERSAL

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The Reporters Committee for Freedom of the Press and 15 media organizations (collectively "amici") move for leave to file the attached proposed amici curiae brief in support of Intervenor-Appellant Eugene Volokh pursuant to Federal Rules of Appellate Procedure 27 and 29.[1] Intervenor-Appellant Volokh and Defendant Town of Lisbon assent to the filing of the amici brief. Plaintiff-Appellee John Doe does not assent to the filing of the amici brief.

The proposed amici brief addresses matters "relevant to the disposition" of this appeal. Fed. R. App. P. 29(a)(3) (providing that a motion for leave to file an amicus brief during a court's initial consideration of a case on the merits must state "the reason why an amicus brief is desirable and why the matters asserted are relevant to the disposition of the case"). Specifically, amici write to highlight for the Court the strong presumption against pseudonymous litigation and the importance of access to litigants' names to the news media's ability to fully inform the public about judicial proceedings of public concern. As members and representatives of the news media, amici have a significant interest in ensuring that courts uphold the strong presumption in favor of open proceedings and against pseudonymous litigation. The brief will aid the Court by providing amici's informed perspective on these issues, which affect journalists and news

[1] A list of all amici and corporate disclosures for all amici are included in the attached proposed amici brief.

organizations across the country.

As set forth in the proposed amici brief, the Court should exercise jurisdiction pursuant to the collateral order doctrine to review the district court's ruling permitting Doe to proceed using a pseudonym. Allowing Doe to continue to litigate pseudonymously will likely necessitate additional access restrictions that will hinder the ability of the news media to meaningfully report on this case—including by requiring future redaction or sealing of judicial records and/or courtroom closures to preserve Doe's anonymity. Doe has presented no evidence of a privacy interest sufficient to overcome the strong public interest in transparency, particularly where, as here, the matter concerns investigations of police misconduct. Access to this information is of paramount importance for news reporting on ongoing judicial proceedings and to the public's active participation in the oversight of law enforcement agencies.

For these reasons, amici respectfully request leave to file the attached proposed amici curiae brief in support of Intervenor-Appellant.

Dated: September 19, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Katie Townsend, hereby certify that I have filed the foregoing Motion for Leave to File Amici Curiae Brief electronically with the Clerk of the Court for the United States Court of Appeals for the First Circuit using the appellate CM/ECF system. I certify that all participants in this case are registered as CM/ECF Filers and that they will be served by the CM/ECF system.

Dated: September 19, 2022

/s/ Katie Townsend
Katie Townsend
Counsel of Record for Amici Curiae

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BRIEF OF AMICI CURIAE THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS AND 15 MEDIA ORGANIZATIONS IN SUPPORT OF INTERVENOR-APPELLANT URGING REVERSAL

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IDENTITY AND INTERESTS OF AMICI CURIAE, AND THE SOURCE OF THEIR AUTHORITY TO FILE THIS BRIEF

Pursuant to Federal Rules of Appellate Procedure 27 and 29, amici have filed a motion for leave to file this amici curiae brief in support of Intervenor-Appellant.

Pursuant to Federal Rule of Appellate Procedure 29(a)(4), amici state that no party's counsel authored this brief in whole or in part, and no party, party's counsel, or any other person, other than the amici curiae, their members, or their counsel, contributed money that was intended to fund preparing or submitting the brief.

Amici are the Reporters Committee for Freedom of the Press (the "Reporters Committee"), The Associated Press, Boston Globe Media Partners, LLC, Californians Aware, The Center for Investigative Reporting (d/b/a Reveal), Gannett Co., Inc., Investigative Reporting Workshop at American University, The Media Institute, New England First Amendment Coalition, New Hampshire Center for Public Interest Journalism, The New York Times Company, News/Media Alliance, Online News Association, Pro Publica, Inc., Society of Environmental Journalists, and Union Leader Corporation. Lead amicus the Reporters Committee was founded by journalists and media lawyers in 1970, when the nation's press faced an unprecedented wave of government subpoenas forcing reporters to name

confidential sources. Today, its attorneys provide pro bono legal representation, amicus curiae support, and other legal resources to protect First Amendment freedoms and the newsgathering rights of journalists.

Amici file this brief in support of Intervenor-Appellant Eugene Volokh (hereinafter, "Professor Volokh"). As members of the news media or organizations that advocate for the First Amendment and newsgathering rights of the news media, amici have a significant interest in ensuring that courts uphold the strong presumption in favor of open proceedings and against pseudonymous litigation. To permit Plaintiff-Appellee (hereinafter, "Doe") to proceed using a pseudonym would hinder the ability of the news media to meaningfully report on this case—including by requiring future redaction or sealing of judicial records and/or courtroom closures to preserve Doe's anonymity—contrary to the presumption of access guaranteed by the First Amendment and the common law. Open judicial proceedings serve the interests of the public and enable the news media to report fully and accurately on matters pending in federal courts. And where, as here, those proceedings relate to law enforcement, the public's strong interest in access is even weightier.

SUMMARY OF ARGUMENT

This case presents a critical question: whether civil litigants may pursue their cases anonymously because they allege, without proof, that their lawsuit will

damage their reputation. This Court may, and should, exercise jurisdiction pursuant to the collateral order doctrine to review the district court's ruling in this matter. Permitting Doe to litigate this case pseudonymously will hinder the news media's ability to fully inform the public about ongoing judicial proceedings of substantial public concern. Our nation's long tradition of open courts facilitates accountability for judges and participants in litigation, public trust in the judicial process, and accurate fact-finding. Pseudonymity is a form of court closure; it withholds from the press and public valuable information about cases pending before courts—specifically, the names of the parties.

In addition, as discussed below, allowing Doe to proceed pseudonymously will likely necessitate additional access restrictions. Because Doe asserts fact-specific claims alleging that state procedures for identifying police misconduct were unfairly applied to him, proceedings in this matter will almost certainly include individualized information about Doe. *Doe v. Town of Lisbon*, No. 21-CV-944, 2022 WL 2274785, at *2 (D.N.H. June 23, 2022). If Doe is permitted to proceed pseudonymously, he may ask the district court to seal documents and/or close the courtroom to protect his anonymity, causing journalists and the public to lose access to additional, valuable information.

Amici recognize that a court may permit a plaintiff to proceed pseudonymously in exceptional cases where the plaintiff's privacy interest

overwhelms the public's strong interest in access. Here, however, Doe failed to establish that he has any exceptional privacy interests warranting pseudonymity, including under the four paradigms recently articulated by this Court in which pseudonymity may, in certain circumstances, be permissible. *Doe v. Mass. Inst. of Tech*. ("*MIT*"), No. 22-1056, 2022 WL 3646028, at *7–8 (1st Cir. Aug. 24, 2022). The only misconduct Doe claims to stand falsely accused of is failing to complete a fitness test and not turning off lights, and he has submitted no affidavits or evidence supporting his claims that severe harm would flow from disclosure of his identity. Am. Compl. ¶¶ 18–19. On the other side of the balance, there is a strong public interest in this case, which involves governmental processes for identifying and investigating alleged police misconduct.

Access to information about this case and others like it, including litigants' names, enables the news media to produce timely and informative reporting for the benefit of the public. Permitting Doe to proceed pseudonymously in this case would set a dangerously low bar for anonymity that is wholly at odds with the strong presumption of public access to court proceedings, and recent decisions of this Court. For these reasons, amici respectfully urge the Court to reverse the district court's decision below.[1]

[1] Amici urge this Court to reverse instead of remand given the paucity of Doe's showing in support of his request to proceed pseudonymously, and the importance of timely adjudication of motions for access. *See, e.g.*, *Doe v.*

ARGUMENT

I. This Court has jurisdiction over the appeal under the collateral order doctrine.

The collateral order doctrine allows for immediate appellate review of interlocutory orders that are "too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949). To fall within the doctrine's scope, "the order must [1] 'conclusively determine the disputed question'; it must [2] 'resolve an important issue completely separate from the merits of the action'; and it must [3] 'be effectively unreviewable on appeal from a final judgment.'" *MIT*, 2022 WL 3646028, at *2 (quoting *Will v. Hallock*, 546 U.S. 345, 349 (2006)).

This Court recently held that "an order *denying* a litigant's motion to proceed by pseudonym is immediately appealable under the collateral order

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Shibinette, 16 F.4th 894, 901 (1st Cir. 2021) (reversing, and rejecting remand request, where "[t]he record . . . is sufficiently developed for us to resolve those issues now, thereby obviating the possible need for wasteful future appeals"); *Scarfo v. Cabletron Sys., Inc.*, 54 F.3d 931, 965 (1st Cir. 1995) (where "we do not even know what arguments the appellants would make on remand because they have failed to make those arguments to the trial court or to us, we conclude that it would be improper to give appellants another bite at the apple"); *In re Globe Newspaper Co.*, 920 F.2d 88, 98 (1st Cir. 1990) (reversing, not remanding, district court's order sealing jurors' information "given the absence here of particularized findings reasonably justifying non-disclosure").

doctrine." *Id.* at *3 (italics added). The reasons underlying this holding apply equally to orders *permitting* a litigant to proceed pseudonymously.

First, "[s]uch orders conclusively determine the pseudonym question" and, second, "that question is quite separate from the merits" and is "of considerable importance." *Id.* As discussed below, *see infra* Part II, this Court has expressly recognized the importance of the "'strong presumption against the use of pseudonyms in civil litigation.'" *Id.* at *4 (quoting *Does 1-3 v. Mills*, 39 F.4th 20, 25 (1st Cir. 2022)). Pseudonymous litigation undermines "the values underlying the right of public access to judicial proceedings and documents under the common law and First Amendment." *Id.* at *5. Access to judicial records, including parties' names, "'allows the citizenry to monitor the functioning of our courts, thereby insuring quality, honesty and respect for our legal system.'" *Id.* (quoting *F.T.C. v. Standard Fin. Mgmt. Corp.*, 830 F.2d 404, 410 (1st Cir. 1987)). Further, with pseudonymity comes the threat of additional access restrictions as a case unfolds, such as courtroom closures and the sealing of judicial records, to protect the pseudonymous plaintiff's identity.

Third, orders permitting pseudonymity are "effectively unreviewable without the help of the collateral order doctrine." *MIT*, 2022 WL 3646028, at *3; *see also Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 119 (2d Cir. 2006) ("[I]t is patently clear that the denial of 'prompt public disclosure' the Newspapers

seek will be unreviewable, not to mention any damage irreparable, on appeal from a final judgment."). Interlocutory review is particularly important for an intervenor, since "if no party appeals the eventual final judgment, it may be precluded from gaining review at any time." *In re San Juan Star Co.*, 662 F.2d 108, 113 (1st Cir. 1981).[2]

Moreover, the public's right of access is a right of timely access. *See United States v. Wecht*, 537 F.3d 222, 229 (3d Cir. 2008). Even if a court later requires a plaintiff to disclose their identity, "delay[ing] or postpon[ing] disclosure undermines the benefit of public scrutiny and may have the same result as complete suppression." *Grove Fresh Distribs., Inc. v. Everfresh Juice Co.*, 24 F.3d 893, 897 (7th Cir. 1994). Indeed, for the news media, "[t]ime is of the essence" to "covering effectively an ongoing judicial proceeding of significant hard news interest." *In re San Juan Star Co.*, 662 F.2d at 113 (granting interlocutory review of access-restricting order). "[T]he news value of the information" sought,

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[2] For similar reasons, at least nine other circuit courts of appeals have determined that orders sealing or denying a motion to unseal judicial documents are immediately appealable. *See Lugosch*, 435 F.3d at 119; *Leucadia, Inc. v. Applied Extrusion Techs., Inc.*, 998 F.2d 157, 160 (3d Cir. 1993); *Bradley ex rel. AJW v. Ackal*, 954 F.3d 216, 222–23 (5th Cir. 2020); *In re Nat'l Broad. Co.*, 828 F.2d 340, 343 (6th Cir. 1987); *United States v. Blagojevich*, 612 F.3d 558, 560 (7th Cir. 2010); *Oliner v. Kontrabecki*, 745 F.3d 1024, 1025 (9th Cir. 2014); *United States v. Walker*, 838 F. App'x 333, 336 (10th Cir. 2020); *Romero v. Drummond Co.*, 480 F.3d 1234, 1242 (11th Cir. 2007); *In re Reporters Comm. for Freedom of the Press*, 773 F.2d 1325, 1330 (D.C. Cir. 1985).

including the plaintiff's name, "decline[s] over time, lending the interlocutory appeal urgency." *In re Bos. Herald, Inc.*, 321 F.3d 174, 178 (1st Cir. 2003) (granting interlocutory review of sealing order); *see also United States v. Chin*, 913 F.3d 251, 255 (1st Cir. 2019) (same, as to order denying request for access to juror names).

Professor Volokh's appeal warrants interlocutory review under the collateral order doctrine. The district court's ruling conclusively determined his request for access. Although the order notes that the district court may revisit pseudonymity, *Town of Lisbon*, 2022 WL 2274785, at *8, it satisfies the finality prong because it "conclusively resolve[d] a disputed issue—whether [intervenor] had a right of *immediate* access to the contested" information, *Lugosch*, 435 F.3d at 118. Second, this appeal raises important—and separate—access questions. Professor Volokh intervened "'for the limited purpose of moving to unseal the state court record and moving to oppose pseudonymity.'" *Town of Lisbon*, 2022 WL 2274785, at *2. The order appealed from addresses only those issues and has no bearing on the merits. Moreover, the pseudonymity question is important and urgent. Professor Volokh sought access to Doe's name "to more effectively write about the case in his academic work and on his blog." *Id.* at *1. Denials of access requests by those seeking to publish the information present one of the "clearest

case[s] of urgency." *In re San Juan Star Co.*, 662 F.2d at 113. Accordingly, this Court has jurisdiction over this appeal under the collateral order doctrine.

II. There is a strong presumption against pseudonymous litigation, which undermines the public's right of access to judicial proceedings and documents.

Upon exercising jurisdiction, amici urge the Court to reverse the decision below. As this Court has recognized, there is a strong presumption against pseudonymity, which "springs from our Nation's tradition of doing justice out in the open, neither 'in a corner nor in any covert manner.'" *MIT*, 2022 WL 3646028, at *5 (quoting *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 567 (1980)). Access to plaintiffs' identities is essential to the news media's ability to fully inform the public about ongoing litigation, the functioning of the courts and, in this case, the efficacy of processes for identifying police misconduct. Pseudonymity is warranted only in exceptional cases; this is not such a case.

A. Public access is a bedrock principle of our judicial system.

Openness is "one of the essential qualities of a court of justice." *Richmond Newspapers*, 448 U.S. at 567 (quoting *Daubney v. Cooper*, 109 Eng. Rep. 438, 440 (K.B. 1829)); *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 598–99 (1978). Said to predate the Constitution itself, the public's right to observe judicial proceedings is deeply rooted in American history and is "an indispensable attribute" of our justice system. *Richmond Newspapers*, 448 U.S. at 564–68, 569,

580 n.17. As the Supreme Court has held, "[a] trial is a public event." *Craig v. Harney*, 331 U.S. 367, 374 (1947). Accordingly, "[t]he 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).

Access is also essential for members of the press, who act as "surrogates for the public" in gathering and disseminating information about court cases. *Richmond Newspapers*, 448 U.S. at 573. By reporting on newsworthy proceedings, the press helps "the public to participate in and serve as a check upon the judicial process—an essential component in our structure of self-government." *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 606 (1982). Openness "enhances both the basic fairness of [a] trial and the appearance of fairness so essential to public confidence in the system." *Press-Enter. Co. v. Superior Court*, 464 U.S. 501, 508 (1984).

The benefits of open courts—such as assuring that proceedings are fair and providing the public with important context—are undermined when the public cannot tell who has invoked the power of the courts to resolve their disputes. Anonymity greatly hinders, for example, a journalist's ability to research a litigant's background, including any business or political interests and people who know the litigant and may help contextualize the dispute. Knowing a litigant's identity may illuminate details concerning the litigant's credibility, motivation for

suing, or relationship with other trial participants. Further, "[a]nonymizing the parties lowers the odds that journalists" and others might uncover "judicial conflicts of interest, ex parte contacts, and the like." *MIT*, 2022 WL 3646028, at *5.

As cases proceed, anonymity may breed further access restrictions. If filings contain identifying information, a district court might seal or redact them. A district court could even find itself cornered into closing *all* proceedings where a pseudonymous litigant is in attendance, testifies, or is testified about by others—lest members of the press or public recognize them by sight or piece together the litigant's identity. Such concomitant sealing and closure would even more substantially impair the public's First Amendment and common law rights of access to judicial proceedings and records, and would stymie the news media's ability to inform the public on matters of significant interest. *Id.* at *4.

B. A plaintiff may proceed using a pseudonym only if the plaintiff can show a privacy interest that outweighs the public's strong interest in transparency.

Recognizing that pseudonymity undermines the public's right of access, this Court recently held that there is a "'strong presumption against the use of pseudonyms in civil litigation.'" *MIT*, 2022 WL 3646028, at *4 (quoting *Does 1-3*, 39 F.4th at 25). A civil "plaintiff instigates the action, and, except in the most exceptional cases, must be prepared to proceed on the public record." *Doe v. Bell*

Atl. Bus. Sys. Servs., Inc., 162 F.R.D. 418, 422 (D. Mass. 1995). To assess whether a case is exceptional, courts "should balance the interests asserted by the movant in favor of privacy against the public interest in transparency, taking all relevant circumstances into account." *MIT*, 2022 WL 3646028, at *8. These "scales tilt decidedly toward transparency." *Nat'l Org. for Marriage v. McKee*, 649 F.3d 34, 70 (1st Cir. 2011). "The party seeking pseudonymity bears the burden of rebutting the strong presumption against it," which "[i]n most cases . . . should require a declaration or affidavit" by the movant or another knowledgeable individual. *MIT*, 2022 WL 3646028, at *9.

To aid district courts' analysis, this Court recently identified four paradigms in which pseudonymity may, in limited circumstances, be warranted. *Id.* at *7–8. These "rough cuts" are meant to be "useful tools" rather than "sharp, categorical exceptions," and courts must consider them in light of the strong presumption against pseudonymity. *Id.* at *5–6, *8. They are:

> 1) Cases "involv[ing] a would-be Doe who reasonably fears that coming out of the shadows will cause him unusually severe harm (either physical or psychological)." *Id.* at *7.
>
> 2) "[C]ases in which identifying the would-be Doe would harm innocent non-parties." *Id.* (internal quotation marks and citation omitted).
>
> 3) "[C]ases in which anonymity is necessary to forestall a chilling effect on future litigants who may be similarly situated . . . to an unacceptable degree." *Id.* at *8.

> 4) "[S]uits that are bound up with a prior proceeding made confidential by law . . . when denying anonymity in the new suit would significantly undermine the interests served by that confidentiality." *Id.*

Even if one of these paradigms is present, a court may find that "the need for openness . . . overwhelms the movant's privacy concerns." *Id.* Overall, courts "must not lose sight of the big picture. Litigation by pseudonym should occur only in 'exceptional cases.'" *Id.* at *7 (quoting *Doe v. Megless*, 654 F.3d 404, 408 (3d Cir. 2011)).

C. The strong presumption against pseudonymity applies in this case and is not overcome.

This is not an exceptional case, and the "'customary and constitutionally-embedded presumption of openness in judicial proceedings'" must prevail here. *Doe v. Univ. of Rhode Island*, No. 93-CV-560B, 1993 WL 667341, at *2 (D.R.I. Dec. 28, 1993) (quoting *Doe v. Frank*, 951 F.2d 320, 323–24 (11th Cir. 1992)).

Doe was a police officer for Lisbon, New Hampshire. *Town of Lisbon*, 2022 WL 2274785, at *1. He claims his inclusion on the statewide Exculpatory Evidence Schedule ("EES")—"'a list of police officers who have engaged in misconduct reflecting negatively on their credibility or trustworthiness'"—violated his due process rights and constituted defamation. *Id.* (quoting *N.H. Ctr. for Pub. Int. Journalism v. N.H. Dep't of Just.*, 247 A.3d 383, 387 (N.H. 2020)). He also seeks an award of attorney's fees. *Id.* at *2. Doe's claims seeking injunctive relief

from the town—that is, removal from the EES—and claims against the New Hampshire Department of Justice were remanded to state court. *Id.*

While Doe's arguments in favor of pseudonymity touch on elements of paradigms one (unusually severe harm), three (unacceptable chilling effect), and four (related confidential proceedings), this case does not fit within any of the four paradigms identified by this Court in *MIT*, 2022 WL 3646028, at *5–8. And, crucially, Doe has presented no evidence of a privacy interest sufficient to overcome the strong public interest in transparency, particularly where, as here, the matter concerns investigations of police misconduct.

1. There is a strong public interest in this case.

To start, the Court "must acknowledge the thumb on the scale that is the universal interest in favor of open judicial proceedings." *Megless*, 654 F.3d at 411. That interest is particularly strong in cases involving police misconduct. Access to the names of officers accused of misconduct is an essential component of the public's ability to oversee and track police behavior. Without access to officer names, the public cannot evaluate whether officers have faced multiple misconduct investigations and whether police oversight boards are effectively remedying or proactively identifying patterns of misconduct.

For example, in Chicago, the Citizens Police Data Project provides access to the names and records of officers investigated for possible misconduct. *See*

Invisible Institute, *Citizens Police Data Project*, https://perma.cc/YN7U-QUP7. The Intercept analyzed these records to reveal striking trends regarding the rise of misconduct complaints when new officers were exposed to the problematic tendencies of senior officers. *See, e.g.*, Rob Arthur, *Bad Chicago Cops Spread Their Misconduct Like a Disease*, The Intercept (Aug. 16, 2018), https://perma.cc/3SQU-524T. Through access to both the names and records of the officers, The Intercept was able to identify connections between officers in the same chain of command to reveal how the behavior of senior officers may negatively impact junior officers. *See id.* As a result of these revelations, Illinois and Chicago entered into a consent decree to formalize an "early intervention" program to "proactively identify at-risk behavior by officers." Consent Decree at 177, *Illinois v. City of Chicago*, No. 17-CV-6260 (N.D. Ill. Jan. 31, 2019), ECF No. 703-1.

Pseudonymity also hinders journalists from reporting on the fairness and efficacy of police misconduct investigations by threatening to impose additional access limitations—such as sealing, redactions, and courtroom closures—to protect an officer's anonymity. Such access restrictions leave the public unable to evaluate whether police oversight boards are effectively investigating potential misconduct, to the detriment of the public and police alike. For example, in 2018, BuzzFeed News published and analyzed a collection of disciplinary findings for

approximately 1,800 named New York Police Department ("NYPD") officers, including records of disciplinary proceedings in which officers were found not guilty. Kendall Taggart & Mike Hayes, *Here's Why BuzzFeed News Is Publishing Thousands of Secret NYPD Documents*, BuzzFeed News (Apr. 16, 2018), https://perma.cc/XK2L-9NZB. BuzzFeed revealed an unequal and inconsistent application of NYPD disciplinary policies, *id.*, prompting the commission of an independent panel to investigate the NYPD's disciplinary system. Kendall Taggart, *NYPD Discipline Needs More Transparency, A Panel of Experts Said*, BuzzFeed News (Feb. 1, 2019), https://perma.cc/2MGV-ELUX.

Here, Doe claims that the state's procedures for listing him on the EES violated his constitutional due process rights. But if Doe is permitted to proceed pseudonymously, the district court may be asked to seal or heavily redact information concerning the investigatory process in an effort to shield Doe's identity, depriving the public of necessary information about the EES. Indeed, reporting on the EES has highlighted concerns about the fairness of the procedures for notifying officers of their inclusion and the cost of seeking removal. *See* Nancy West, *Fighting to Get Off 'Laurie List' Under New Law Can Be Costly for Police*, InDepthNH (Mar. 2, 2022), https://perma.cc/3DFJ-5SKV.

"The public has a strong interest in knowing the accusations against its tax-funded entities as well as the identities of the individuals making those

accusations." *Doe v. Cook Cnty.*, 542 F. Supp. 3d 779, 790 (N.D. Ill. 2021); *see also Megless*, 654 F.3d at 411 (holding same). Permitting Doe to proceed pseudonymously in this case will impede the news media's ability to meaningfully report on Doe's claims and prevent the public from accessing information essential to evaluating the processes underlying the EES.

2. Doe has not shown a reasonable fear of unusually severe harm from disclosure.

On the other side of the balance, Doe does not come close to overcoming the public's strong interest in transparency. Starting with what the Court identified as the first type of exceptional case warranting pseudonymity—where the movant reasonably fears unusually severe mental or physical harm from disclosure—Doe claims disclosure "amounts to being publicly branded as a 'dishonest cop' or even worse[,]" and "is a practical invitation for scorn, derision, or worse." Pl.'s Opp'n Mem. at 5. He does not specify what "or worse" means and does not substantiate these vague fears with *any* evidence, in the form of an affidavit or otherwise. Doe submitted only a copy of the EES and a 2017 memorandum from the New Hampshire Attorney General explaining the list's purpose and operation—nothing about his personal circumstances. *See* Dkt. Nos. 33-1, 33-2. The events purportedly leading to Doe's inclusion on the EES involve a dispute over his physical fitness test and a warning about failing to turn off lights—alleged wrongdoing that hardly seems likely to invite severe harm if tied to his name. Am.

Compl. ¶¶ 18–19. Put simply, the record before this Court is devoid of *any* facts on which one could conclude that disclosure of Doe's name would risk severely harming him. *See Standard Fin. Mgmt.*, 830 F.2d at 412 (declining "to accept [a plaintiff's] conclusory assertions as a surrogate for hard facts").

Taking his contentions at face value, Doe's "fundamental concern seems to be embarrassment, which is not, in itself, grounds for proceeding under a pseudonym." *Bell Atl. Bus. Sys. Servs.*, 162 F.R.D. at 422. Potential "economic harm is not enough" either. *Univ. of Rhode Island*, 1993 WL 667341, at *2 (citation omitted). Indeed, Doe's claimed fears of harm mirror those routinely rejected by courts when denying pseudonymity to plaintiffs alleging similar concerns about reputational harm. For example, in *Doe v. Public Citizen*, the Fourth Circuit rejected plaintiff company's pseudonymity request in its suit to enjoin a federal agency from publishing a report blaming its product for an infant's death, holding that the "use of a pseudonym 'merely to avoid the annoyance and criticism that may attend . . . litigation' is impermissible." 749 F.3d 246, 275 (4th Cir. 2014) (quoting *James v. Jacobson*, 6 F.3d 233, 238 (4th Cir. 1993)). Similarly, in *Doe v. Milwaukee County*, the court denied pseudonymity to a plaintiff doctor who alleged that defendants had entered a false report about him into a professional database, and that disclosure would harm his career and reputation. No. 18-CV-503, 2018 WL 3458985, at *1 (E.D. Wis. July 18, 2018);

see also Doe v. Vill. of Deerfield, 819 F.3d 372, 377 (7th Cir. 2016) (rejecting pseudonymity for malicious prosecution plaintiff, who claimed disclosure "would defeat the purpose of his criminal expungement" and cause "embarrassment"); *Megless*, 654 F.3d at 410 (denying pseudonymity to plaintiff suing over defendants' email allegedly implying he was a pedophile, since "Doe would not suffer substantial harm that might sufficiently outweigh the public interest in an open trial"). Put simply, if all plaintiffs suing to clear their names could proceed pseudonymously on that basis, all defamation cases, and many others, would unfold in secrecy. *Cf. Doe v. Bogan*, 542 F. Supp. 3d 19, 23 (D.D.C. 2021) ("[D]efamation cases will very frequently involve statements that, if taken to be true, could embarrass plaintiffs or cause them reputation harm. This does not come close to justifying anonymity . . . .").

Courts also regularly deny pseudonymity to plaintiffs suing their employers if plaintiffs fail to establish severe harm, even if disclosure may invite stigma and retaliation. *See, e.g.*, *Doe v. Coll. of New Jersey*, 997 F.3d 489, 495 (3d Cir. 2021) (denying pseudonymity to former professor suing college, who "argue[d] that she will face harassment, reputational damage, economic harm, and professional stigma, as well as the publicizing of very personal information," which did not outweigh public interest in openness); *Frank*, 951 F.2d at 322 (denying pseudonymity to government employee whose claims against employer would

require him to disclose his alcoholism); *S. Methodist Univ. Ass'n of Women L. Students v. Wynne & Jaffe*, 599 F.2d 707, 713 (5th Cir. 1979) (denying pseudonymity to employment discrimination plaintiffs, who "face no greater threat of retaliation than the typical plaintiff"); *Qualls v. Rumsfeld*, 228 F.R.D. 8, 12 (D.D.C. 2005) ("[F]ears of embarrassment or vague, unsubstantiated fears of retaliatory actions by higher-ups do not permit a plaintiff to proceed under a pseudonym.").[3]

Police officers, specifically, have been denied pseudonymity when they have failed to establish that severe physical or mental harm will result from disclosure. *See, e.g.*, *Doe v. Mckesson*, 945 F.3d 818, 835 n.12 (5th Cir. 2019), *cert. granted, judgment vacated on other grounds*, 141 S. Ct. 48 (2020) (denying pseudonymity to police officer suing protest organizers, given that plaintiff's alleged "danger of additional violence" from disclosure did not exceed "the generalized threat of violence that all police officers face"); *Doe v. Goldman*, 169 F.R.D. 138, 139, 141 (D. Nev. 1996) (denying pseudonymity to police officer plaintiff who claimed disclosure would cause "irreparable harm to his career" due to allegations he

[3] The same has been held as to students challenging school disciplinary proceedings. *See, e.g.*, *Doe v. Trs. of Dartmouth Coll.*, No. 18-CV-690, 2018 WL 5801532, at *4–5 (D.N.H. Nov. 2, 2018); *Doe v. Rider Univ.*, No. 16-CV-4882, 2018 WL 3756950, at *4–5 (D.N.J. Aug. 7, 2018); *Doe v. Va. Polytechnic Inst. & State Univ.*, No. 18-CV-16, 2018 WL 1594805, at *1–2 (W.D. Va. Apr. 2, 2018); *Doe v. Brown Univ.*, 209 F. Supp. 3d 460, 466 n.2 (D.R.I. 2016).

attempted suicide, where officer showed "no risk of physical injury, and . . . any risk of social or economic injury is not enough to overcome the strong presumption against plaintiff anonymity").

Permitting pseudonymity here, on the basis of Doe's paltry showing, would risk setting a dangerous precedent that would allow pseudonymity for any plaintiff who claims that litigating publicly would cause some embarrassment or economic damage.

3. Denying pseudonymity would not unacceptably chill similarly situated litigants.

As to paradigm three, Doe briefly claims that denying his request to proceed pseudonymously would deter law enforcement officers who felt they were wrongly included on the EES from suing to remove their names. Pl.'s Opp'n Mem. at 6–7. Doe is not, however, similarly situated to such officers, and denying him pseudonymity would not deter such litigation. At last count, seventy officers are bringing lawsuits related to their listing on the EES. *RSA 105:13-d Exculpatory Evidence Schedule Compliance Report*, N.H. Dep't of Just. (July 5, 2022), https://perma.cc/7K7H-BD8D. Sixty-nine are proceeding in state court, where they are presumably requesting removal from the list. Only Doe is proceeding in federal court, where he does *not* seek removal from the EES; instead, he raises due process and defamation claims and seeks attorney's fees. A ruling in Doe's case would not affect any state court procedures related to the EES. *See* N.H. RSA

105:13-d. Moreover, police officers regularly bring defamation and due process claims under their real names, including those claiming they faced false or improper accusations of wrongdoing.[4] Requiring Doe to do the same would not "deter, to an unacceptable degree, similarly situated individuals from litigating." *MIT*, 2022 WL 3646028, at *8.

Further, Doe's case does not resemble those in which "[a] deterrence concern typically arises." *Id.* It does not involve "'intimate issues such as sexual activities, reproductive rights, bodily autonomy, medical concerns, or the identity of abused minors,'" but rather the fairness and accuracy of government processes for identifying police misconduct. *Id.* (quoting *In re Sealed Case*, 971 F.3d 324, 327 (D.C. Cir. 2020)). It is not a "case[] in which a potential party may be implicated in 'illegal conduct, thereby risking criminal prosecution.'" *Id.* (quoting *Doe v. Stegall*, 653 F.2d 180, 185 (5th Cir. 1981)). Doe maintains he did nothing wrong, and his alleged wrongdoing has not led to criminal prosecution. And Doe's

[4] *See, e.g.*, *Lambert v. Fiorentini*, 949 F.3d 22 (1st Cir. 2020); *McGunigle v. City of Quincy*, 835 F.3d 192 (1st Cir. 2016); *Piccone v. Bartels*, 785 F.3d 766 (1st Cir. 2015); *Dixon v. Int'l Bhd. of Police Officers*, 504 F.3d 73 (1st Cir. 2007); *McCarthy v. City of Newburyport*, 252 F. App'x 328 (1st Cir. 2007); *Dirrane v. Brookline Police Dep't*, 315 F.3d 65, 68 (1st Cir. 2002); *Drake v. Town of New Bos*., No. 16-CV-470, 2017 WL 2455045 (D.N.H. June 6, 2017); *Pouliot v. Town of Fairfield*, 226 F. Supp. 2d 233 (D. Me. 2002); *Provenza v. Town of Canaan*, No. 2020-0563, 2022 WL 1196296 (N.H. Apr. 22, 2022); *Gantert v. City of Rochester*, 135 A.3d 112 (N.H. 2016) (challenging inclusion on EES); *Duchesne v. Hillsborough Cnty. Att'y*, 119 A.3d 188 (N.H. 2015) (same).

case is not one where "'the injury litigated against would be incurred as a result of the disclosure of the [party's] identity.'" *Id.* (quoting *Frank*, 951 F.2d at 324). He is not seeking removal from the EES in this case, but rather raising constitutional and defamation claims of the sort routinely litigated in the open.

4. Pseudonymity is not required due to New Hampshire's EES statute.

Nor does this case fit the fourth and final paradigm, which concerns "suits that are bound up with a prior proceeding made confidential by law . . . when denying anonymity in the new suit would significantly undermine the interests served by that confidentiality." *MIT*, 2022 WL 3646028, at *8. Doe contends pseudonymity is proper because his case was "brought under a particular statutory scheme—RSA 105:13-d—that specifically contemplates allowing plaintiffs to proceed anonymously." Pl.'s Opp'n Mem. at 8. But this is not so.

First, Doe's case is not "bound up with" or "brought under" the EES statute, RSA 105:13-d. That statute outlines procedures for "lawsuit[s] in [New Hampshire] superior court regarding the officer's placement on the [EES]" *only*. It does not govern procedures in federal courts—nor could it. Nor does it apply to any other types of claims that might in some way be related to the EES. Here, Doe's pending claims—for defamation, attorney's fees, and a declaration that his due process rights were violated—are outside the scope of RSA 105:13-d; his claims seeking removal from the EES have been remanded to state court.

Second, none of the special student confidentiality concerns the Court found may warrant pseudonymity in *MIT* are present here. *MIT*, 2022 WL 3646028, at *10 (finding paradigm four might apply because plaintiff's underlying student disciplinary proceedings were confidential under Title IX of the Education Amendments of 1972 and the Family Educational Rights and Privacy Act of 1974 ("FERPA")). FERPA and Title IX extend a "protective carapace" over student disciplinary records, *id*., in keeping with the "strong public policy favoring the special protection of minors and their privacy where sensitive and possibly stigmatizing matters are concerned," *Webster Groves Sch. Dist. v. Pulitzer Publ'g Co*., 898 F.2d 1371, 1375 (8th Cir. 1990); *see also Stegall*, 653 F.2d at 186 ("[E]mphasiz[ing] the special status and vulnerability of the child-litigants" as favoring pseudonymity). Universities, too, receive special consideration. Their "[s]tudents are adults but often young and vulnerable," and still have some "need for protection." *Nguyen v. Mass. Inst. of Tech*., 96 N.E.3d 128, 141–42 (Mass. 2018). Student disciplinary proceedings are thus unique; they "serve as an effective part of the teaching process" and "exclusively affect the relationship between a particular student and the university," leading courts to accept greater secrecy. *United States v. Miami Univ*., 294 F.3d 797, 823 (6th Cir. 2002).

Police disciplinary proceedings present very different considerations that strongly *favor* transparency. Law enforcement officers are public servants who,

when on duty, wield tremendous power to detain, arrest, jail, and, in extreme circumstances, employ deadly force. As to law enforcement misconduct, "the awesome powers exercised by police create a compelling need for public oversight and review of a police department's internal investigations." *Worcester Telegram & Gazette Corp. v. Chief of Police of Worcester*, 787 N.E.2d 602, 605 (Mass. App. Ct. 2003). Such transparency "promotes the core value of trust between citizens and police essential to law enforcement and the protection of constitutional rights." *Id.* at 607; *see also King v. Conde*, 121 F.R.D. 180, 190–91 (E.D.N.Y. 1988) (Weinstein, J.) ("Lawfulness of police operations is a matter of great concern to citizens in a democracy" and officers' "privacy interest in nondisclosure . . . should be especially limited in view of the role played by the police officer as a public servant who must be accountable to public review").

RSA 105:13-d reflects these concerns. It is fundamentally pro-disclosure. It starts by providing that the EES "shall be a public record." N.H. RSA 105:13-d. It sets strict timelines for officers to challenge their inclusion on the list, after which their names and information "shall be made public" absent a pending lawsuit or judgment in their favor. *Id.* The statute does not set sealing requirements for state courts, but rather permits them to determine the "necessary step[s] to protect the anonymity of the officer" during litigation. *Id.* And the statute expressly directs the New Hampshire Department of Justice to update the EES monthly "on a

publicly accessible website" and release reports about the EES, which "shall be made available to the public." *Id.*

The statute's legislative history underscores its transparency goals. It resulted from an executive order recognizing that, "in the wake of the tragic murder of George Floyd in Minneapolis, MN, our country is engaged in a nationwide conversation regarding . . . the need for reforms to enhance transparency, accountability, and community relations in law enforcement." Exec. Order No. 2020-11 (June 16, 2020), https://perma.cc/2KM9-VHJF. That executive order established a commission on law enforcement accountability and transparency, *id.*, which in turn recommended that the EES be made public. *Report and Recommendations* 19, N.H. Comm'n on Law Enf't Accountability, Community & Transparency (Aug. 31, 2020), https://perma.cc/5W3R-H2VL. State legislators took note and passed the bill making the EES public. 2021 N.H. Laws, ch. 225. The bill further required that police disciplinary hearings be presumptively open to the public. *Id.* It was signed into law alongside other bills that aimed to increase transparency in policing. Ethan Dewitt, *'Laurie List' Bill and Other Law Enforcement Reform Measures Signed into Law*, N.H. Bull. (Aug. 25, 2021), https://perma.cc/68LM-3RL7. Requiring Doe to pursue this case under his real name furthers these laudable goals.

Third, to the extent that RSA 105:13-d reflects New Hampshire's interest in confidentiality for officers seeking removal from the EES, this Court should give less weight to "the interests served by that confidentiality" than to the federal interests at stake in *MIT*. RSA 105:13-d is a state statute, which is outweighed by the federal judicial system's strong interest in openness. *See United States v. One Parcel of Prop. Located at 31-33 York St.*, 930 F.2d 139, 141 (2d Cir. 1991) (holding that a "universally-recognized federal interest . . . prevails over any interest in the confidentiality," under state law, of records admitted into evidence by federal court); *Town of Lisbon*, 2022 WL 2274785, at *3 ("[T]his court is not bound by state court orders when ruling on a procedural motion governed by federal law, and it may dissolve or modify such state court orders," including sealing orders (citing *Granny Goose Foods, Inc. v. Bhd. of Teamsters & Auto Truck Drivers Local No. 70*, 415 U.S. 423, 437 (1974))).

* * *

In sum, amici urge this Court to reject Doe's conclusory, speculative claims in support of pseudonymity and to reinforce the essential precept that "[t]he plaintiff brought this lawsuit, and having done so must proceed under his real name." *Milwaukee Cnty.*, 2018 WL 3458985, at *2.

CONCLUSION

For the foregoing reasons and those stated in Professor Volokh's brief, amici urge the Court to reverse the district court's order denying his motion to unseal and oppose pseudonymity.

Dated: September 19, 2022

Respectfully submitted,

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Dated: September 19, 2022

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I, Katie Townsend, hereby certify that I have filed the foregoing Brief of Amici Curiae electronically with the Clerk of the Court for the United States Court of Appeals for the First Circuit using the appellate CM/ECF system. I certify that all participants in this case are registered as CM/ECF Filers and that they will be served by the CM/ECF system.

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