IN THE OHIO COURT OF APPEALS
EIGHTH APPELLATE DISTRICT
CUYAHOGA COUNTY, OHIO

JANE DOE, Plaintiff-Appellant, v. ROBERT ROE, ET AL, Defendant-Appellee	C.A. No. 23-113488 Appeal From the Court of Common Pleas, Case No. CV-23-981849

Brief of Amicus Curiae Prof. Eugene Volokh in Support of Defendant-Appellee

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* Counsel would like to thank Bhavyata Kapoor, a UCLA School of Law student who worked on the brief.

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Interest of *Amicus Curiae*[1]

The amicus curiae, Eugene Volokh, is a law professor at UCLA School of Law who has written and taught extensively on constitutional law and in particular on First Amendment law, including on the law of pseudonymity, see, *e.g.*, Eugene Volokh, *The Law of Pseudonymous Litigation*, 73 Hastings L.J. 1353 (2022); Eugene Volokh, *If Pseudonyms, Then What Kind?*, 107 Judicature 76 (2023); Eugene Volokh, *Protecting People from Their Own Religious Communities: Jane Doe in Church and State*, 38 J.L. & Religion 354 (2023).

Introduction

This is a garden variety defamation lawsuit of the sort that is routinely litigated in the parties' own names. Many defamation litigants would prefer to avoid being linked with the accusations over which they are suing—just as many plaintiffs and even more defendants would prefer to avoid being linked with the allegations in many kinds of cases, allegations that may reflect badly on one or both parties. But our legal system has chosen to adopt a strong norm of public access to court records, including to the names of the parties, so that the public and the press can better supervise how the legal system operates. And this is not one of the rare cases in which an exception from this norm is warranted. The trial court thus did not abuse its discretion in ultimately deciding to deny

[1] No party or party's counsel has authored this brief in whole or in part, or contributed money that was intended to fund preparing or submitting the brief. No person has contributed money that was intended to fund preparing or submitting the brief, except that UCLA School of Law paid the expenses involved in filing this brief.

pseudonymity. *See Doe v. Cedarville Univ.*, 2d Dist. Montgomery no. C.A. No. 29875, 2024-Ohio-100, ¶18 ("[A] trial court's ruling regarding a party's request to proceed pseudonymously will not be overturned absent an abuse of discretion.") (cleaned up).

Statement of the Case and Statement of Facts

Amicus curiae adopts the Statement of the Case and Statement of Facts in the Appellant's brief.

Argument

I. There is a strong presumption against pseudonymous litigation

"It is the rare exception for a litigant to be allowed to proceed anonymously." *State ex rel. Cin. Enquirer v. Shanahan*, 166 Ohio St.3d 382, ¶36 (2022). "Civ.R. 10(A) requires plaintiffs to provide their names and addresses in the captions of their complaints." *Id.* at ¶30. "The rule ensures that judicial proceedings will be conducted in public, and it supports the principle that 'the public have a right to know who is using their courts.' The public's right to know a litigant's identity derives from the United States and Ohio Constitutions and the common law." *Id.* at ¶30-31 (cleaned up) (quoting *Doe v. Blue Cross & Blue Shield United of Wisconsin*, 112 F.3d 869, 872 (7th Cir.1997)).

The right of access to parties' names is a facet of the broader right of access to court records more generally. "[I]dentifying the parties to the proceedings is an important dimension of publicness." *Doe v. Blue Cross & Blue Shield*, 112 F.3d at 872. The right to public access "protects the public's ability to oversee and monitor the workings of the Judicial

Branch," and "promotes the institutional integrity of the Judicial Branch," *Company Doe v. Pub. Citizen*, 749 F.3d 246, 263 (4th Cir.2014), and that includes the presumption against pseudonymity, *id.* at 273-74. Ohio law is consistent with federal law on this strong presumption against pseudonymity. *Cin. Enquirer* at ¶31 (citing federal appellate cases in explaining Ohio law).

In particular, the names of the parties are often key to investigating the case further—for instance, by helping reporters and researchers who are considering writing about the case (and who are thus "oversee[ing] and monitor[ing] the workings" of the court system in the case) answer questions such as:

- Is the case part of a broad pattern of litigation by, say, an ideological advocate, a local businessperson or professional with an economic interest in the cases, or a vexatious litigant?
- Is there evidence that the litigant is untrustworthy, perhaps in past cases or in past news reports?
- Do past cases brought by the same litigant reveal similar allegations made by the litigant, which past authorities have concluded were not corroborated?
- Does the litigant have a possible ulterior motive—whether personal or political—that isn't visible from the court papers?
- Was the incident that led to the lawsuit covered or investigated in some other context? For instance, if the plaintiff is suing for libel, wrongful firing, or

wrongful expulsion based on accusations that the plaintiff had committed a crime, had the plaintiff been arrested for the crime? How did the police investigation or criminal prosecution turn out?

- Is there online discussion by possibly knowledgeable people about the underlying incident?
- Is there some reason to think the judge might be biased in favor of or against the litigant?

Knowing the parties' names can help a reporter or an interested local activist quickly answer those questions, whether by an online search or by asking around. The parties themselves might be willing to talk; but even if they aren't, others who know them might answer questions, or might voluntarily come forward if the party is identified. *See generally* Eugene Volokh, *The Law of Pseudonymous Litigation*, 73 Hastings L.J. 1353, 1370-71 (2022).

Indeed, based on some public records searches using the addresses included in the trial court docket in this case, it appears to the amicus that the parties had litigated against each other before in a matter that may be related to their family relationship. Indeed, this litigation appears to have yielded five Court of Appeals (Eleventh District) opinions, plus one U.S. District Court opinion, and nine short orders from the Ohio Supreme Court. Any coverage of how this case progresses could thus be enriched by the backstory that the previous litigation provides.

But in the absence of the parties' names in the record, such a link with past litigation is merely conjecture and potentially unreliable. Indeed, if the parties' names aren't in the public record, any reporter writing about this case likely cannot take advantage of the fair report privilege in drawing the likely link to the past litigation. The norm of open access is meant to allow the public and the press to comment on cases safely and based on fact, rather than at some risk and based on conjecture. More broadly, "the public (not just the [intervenors] in these cases) has a right to know who is using the court. Except in rare cases, the public has a right to learn that information from the court itself." *Cin. Enquirer* at ¶41.

And defamation cases are fully governed by the presumption of public access to party names. *See, e.g.*, *Cin. Enquirer* ¶35-42 (refusing to allow pseudonymity in a libel case); *Doe v. Doe*, 85 F.4th 206, 217 (4th Cir.2023) (likewise). Indeed, defamation cases especially implicate the First Amendment, because the defendants may argue that their speech is true and thus constitutionally protected. It is thus especially important that the public be able to monitor how courts deal with defamation litigation.

Naming the parties also helps promote accuracy of the judicial process. *See* Volokh, *supra*, 73 Hastings L.J. at 1384-92. A named 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, 52 (2d Cir.2016); *see also Roe v. Does 1-11*, No. 20-CV-3788-MKB-SJB, 2020 WL 6152174 (E.D.N.Y. Oct. 14, 2020). "Public

access creates a critical audience and hence encourages truthful exposition of facts, an essential function of a trial." *Brown & Williamson Tobacco Corp. v. FTC*, 710 F.2d 1165, 1178 (6th Cir.1983) (so stating in opposition to sealing generally).

Likewise, "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 other witnesses.'" *Doe v. Del Rio*, 241 F.R.D. 154, 159 (S.D.N.Y.2006) (citing *Richmond Newspapers v. Virginia*, 448 U.S. 555, 596-97, 100 S.Ct. 2814, 65 L.Ed.2d 973 (1980) (Brennan, J., concurring) ("Public trials come to the attention of key witnesses unknown to the parties.")); *see also Rapp v. Fowler*, 537 F. Supp. 3d 521, 531 & n.56 (S.D.N.Y.2021) (same); *Doe v. Univ. of Vermont*, No. 2:22-CV-144, 2022 WL 17811359 (D.Vt. Dec. 19, 2022) (same). If the parties are allowed to proceed pseudonymously, this opportunity for witness testimony may be lost.

II. The presumption against pseudonymity is not rebutted here

As with *Doe v. Doe*, 85 F.4th at 217, "[t]his case is no different than a garden variety defamation case, and it does not present the exceptional circumstances necessary for Appellant to proceed by pseudonym." In considering whether the presumption against pseudonymity is rebutted, courts consider "(1) whether the plaintiff seeking anonymity is suing to challenge governmental activity; (2) whether prosecution of the suit will compel the plaintiff to disclose information 'of the utmost intimacy'; (3) whether the litigation

compels plaintiff to disclose an intention to violate the law, thereby risking criminal prosecution; . . . (4) whether the plaintiff is a child," *Doe v. Cedarville Univ.* at ¶17, and "whether threats of retaliation have been made against the plaintiff and the potential prejudice to the opposing party," *id.* at ¶17 (cleaned up).

Factors 1 and 3 do not cut in favor of pseudonymity here, and appellants do not claim any threats of physical retaliation. Nor is "exceedingly intimate information" present here; to be sure, many people would prefer not to have their names linked with allegations of criminal behavior, especially when that might come to the attention of employers, but that is not itself a basis for pseudonymity in cases where the central factual dispute is about such allegations. *Cf. A.B.C. v. XYZ Corp.*, 282 N.J.Super. 494, 503 (App.Div.1995) ("Plaintiff's arguments . . . that he and his family might be isolated from society and that his employment would be in jeopardy are not only somewhat speculative, but any such ramifications are due to his actions and his election to institute litigation over a perceived wrong."). "[W]here the stated purpose is to avoid personal embarrassment or potential damage to future professional or economic well-being, federal courts have denied requests to proceed anonymously." *Doe v. Doe*, 282 Ill. App. 3d 1078, 1084 (1996). *See also A.K. v. Ill. Dep't of Children & Family Servs.*, 2017 IL App (1st) 163255-U, ¶ 24 (refusing to allow pseudonymity in challenge to child abuse findings, because "the privacy concerns that plaintiffs raise exist in many cases in which a party is accused—perhaps wrongly—of some misconduct"). "[M]ost lawsuits will bring up matters that

plaintiffs and defendants would prefer to keep private, including sometimes the identities of the parties. It is well-established, however, that only the 'exceptional circumstance' will allow a plaintiff to proceed under a pseudonym." *Doe v. Cedarville Univ.* at ¶26.

Nor is this a lawsuit brought on behalf of a child, or involving exceptionally private allegations related to a child, such as allegations of sexual abuse. Rather, it is an ordinary lawsuit in which adults sue other adults for injury to themselves, though the injury stems from a statement about the children. The children's names may be redacted in such a situation. *Cf. Doe v. Cedarville Univ.* ¶36 (noting that specific factual details could be "protected . . . through the use of a protective order"). But such cases are routinely litigated with the adults' names disclosed, even where someone might be able to infer the child's name by knowing the adults. *See, e.g., Johnson v. Brown*, No. CV2012020942, 2012 WL 12542161 (Summit C.P. Dec. 14, 2012) (defamation lawsuit stemming from allegations that plaintiff had abused plaintiff's and defendant's child); *Myers v. Steiner*, 2011-Ohio-576, ¶1 (9th Dist.) (defamation lawsuit stemming from allegations that plaintiff had abused plaintiff's child); *Peoples v. Lang*, 2009-Ohio-2693, ¶ 2 (5th Dist.) (likewise); *Cox v. Cox*, 2009-Ohio-1446, ¶ 2 (12th Dist.) (defamation lawsuit stemming from false allegations that plaintiff had sexually abused his stepsister when they were children).

Conclusion

For good reason, the Ohio civil litigation system is characterized by openness, including openness as to the names of parties. The plaintiff in this case is no more entitled

to an exception from this rule than are the vast range of other litigants who routinely have to litigate under their own names, and who have to do so despite the personal and professional difficulties that such litigation may cause.

Respectfully submitted,

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Certificate of Service

I certify under that a copy of the foregoing was served on counsel for all parties by email on the date of filing.

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