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

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF

This Court has never provided lower courts any guidance on the proper test for allowing a plaintiff to proceed under a pseudonym. In this void, twelve circuits courts have now split three ways, applying different tests that lead to disparate results for similarly situated parties in cases collaterally attacking Title IX proceedings. Faced with this reality, the University's brief in opposition refuses to acknowledge that a split—let alone a three-way split—exists at all. Instead, the University claims that all the circuits analyze the propriety of pseudonymity by "balancing the harms" and agree that pseudonymity is appropriate only in "exceptional cases." But that misses the point. Everyone agrees that the circuits, in analyzing pseudonymity, balance the plaintiff's interest in pseudonymity against the public's interest in full disclosure. The question presented by this petition—the one that has split the circuits three ways—is *how* courts should balance these competing interests.

The University tries to portray the Seventh Circuit as having long applied the multifactor test employed by many circuits, but the court's decision below acknowledges that it had *not* "adopted" the "multifactor approach" and outright rejects several factors considered by its sister circuits. And the University cannot explain why district courts within the Seventh Circuit have understood the decision below as announcing a rigid test that makes pseudonymity appropriate only when the Title IX plaintiff is a minor, at risk of physical harm, or faces improper retaliation. With this test, the court's decision breaks with all its sister circuits in becoming the only circuit in the country that refuses to consider whether pseudonymity is appropriate based on the potential harm to

third parties, even in Title IX cases where pseudonymity protects both the accused and the accuser.

Having chosen not to engage with the circuit split, the University half-heartedly claims a vehicle problem. But the supposed vehicle problem is simply a motion *the University* filed in the district court seeking to frustrate this Court's review by forcing petitioner to reveal his identity. The district court is aware of this pending petition and has rightly ignored the University's baseless motion.

Finally, the University argues that pseudonymity "constitutes a narrow and infrequent aspect of federal litigation" that does not "deserv[e] this Court's attention." BIO. 16. But as the author of the panel opinion has recognized, "anonymity [is] common in Title IX suits," *Doe* v. *Loyola Univ. Chi.*, 100 F.4th 910, 912–13 (7th Cir. 2024) (Easterbrook, J.), and the question presented affects thousands of cases. Because the circuits are fractured on how to analyze that question, the Court should grant the petition.

I. The Decision Below Applies A Rigid Test For Pseudonymity In Title IX Cases That Further Fractures The Circuits.

As Judge Easterbrook emphasized, the "multifactor approach" applied by ten of its sister circuits "has not been adopted by this circuit." Pet. App. 8a. In rejecting the lower court's analysis using this approach, the court held that a district court abuses its discretion when it permits a plaintiff "to conceal his name without finding that he is a minor, is at risk of physical harm, or faces improper retaliation," *id.* at 10a, and expressly rejected consideration of several factors examined by its sister circuits. With the circuits already divided, this decision creates a three-way split that cries out for this Court's guidance.

1. The University says that the decision below "did not announce a new test" or "overrule [the court's] prior decisions," which the University claims align with its sister circuits' decisions affording "district judges discretion to permit pseudonymous litigation when the balance of harms justifies it." BIO. 7–9. But as petitioner has explained, *every* court conducts this inquiry by "balancing the plaintiff's stated interest in anonymity against the public's countervailing interests in full disclosure." Pet. 15. The issue on which the circuits have divided is *how* courts should balance those interests. As it stands, ten circuits apply a non-exhaustive multifactor test that examines nearly a dozen factors, Pet. § I.A; one circuit has eschewed the multi-factor tests employed in other circuits and applies a totality of the circumstances analysis, Pet. § I.B.; and one circuit, the Seventh Circuit, applies a rigid test that examines only three factors, Pet. § I.C.

In trying to fight this reality, the University confirms that the decision below did exactly what petitioner says: it examines just three factors, rejecting other factors analyzed by its sister circuits that employ the multifactor approach. With no circuit precedent to follow, the magistrate below applied the non-exhaustive multifactor approach, examining the six factors raised by petitioner, drawn from the tests of other circuits. Pet. App. 39a; see Pet. 22–23. But as the University recognizes, BIO. 9, the decision below rejects consideration of several of those factors in crafting its own test. Unlike its sister circuits, the decision below confines consideration of whether the suit reveals information of the utmost intimacy to suits that concern "what happened during sexual relations," *id.* at 8 (quoting Pet. App. 8a), and it outright rejects consideration of the risk of mental injury

to the plaintiff, *id.* (citing Pet. App. 8a–9a). More still, while other circuits consider whether the plaintiff brought suit against an educational institution collaterally attacking Title IX proceedings, the decision below concludes that this "consideration" is not "pertinent" to the pseudonymity analysis. *Id.* at 7 (quoting Pet. App. 8a).

The University, moreover, stands alone in its view that the decision below did not "announce a new test." BIO. 2. Judge Easterbrook acknowledged that the Seventh Circuit had not "adopted" the "multifactor approach." Pet. App. 8a. Had the panel meant to adopt that approach and join its sister circuits, one might have expected the panel to say so. Cf. *Chavarria-Reyes* v. *Lynch*, 845 F.3d 275, 278 (7th Cir. 2016) (Easterbrook, J.) ("We join the Second, Fifth, and Ninth Circuits."); *Estremera* v. *United States*, 724 F.3d 773, 777 (7th Cir. 2013) (Easterbrook, J.) ("We now join other circuits …."); *Douglas* v. *Agric. Stabilization & Conservation Serv.*, 33 F.3d 784, 785 (7th Cir. 1994) (Easterbrook, J.); *McNeil* v. *United States*, 964 F.2d 647, 648 (7th Cir. 1992) (Easterbrook, J.).

Lower courts, too, have recognized that the decision below charts a new course. A few have already held that, to grant a Title IX plaintiff pseudonymity, the court "must find that John 'is a minor, is at risk of physical harm, or faces improper retaliation.'" *Doe* v. *Univ. of S. Ind.*, No. 3:21-cv-00144, 2024 WL 3410801, at *4 (S.D. Ind. July 11, 2024) (Pratt, C.J.) (quoting Pet App. 10a), *appeal docketed*, No. 24-2245 (7th Cir. July 22, 2024); see *Doe I* v. *S. Madison Cmty. Sch. Corp.*, No. 1:24-cv-00476, 2024 WL 4476294, at *1–2 (S.D. Ind. Oct. 11, 2024); see also Pet. 24–25 (collecting cases). And others have ordered parties to address whether pseudonymity is appropriate "under the standard recently set forth

by" the decision below. *Doe 1* v. *NCAA*, No. 1:23-cv-00542, 2024 WL 3293591, at *1 n.1 (S.D. Ind. July 2, 2024); see Dkt. 251, No. 1:23-cv-00542, at 1–2 (S.D. Ind. June 7, 2024) (noting a "conflict" between the "pronouncements" and "more stringent standard set forth in" the decision below and prior Seventh Circuit case law); see also *Univ. of S. Ind.*, 2024 WL 3410801 at *1.

The University ignores the district courts' treatment of the decision below and instead points to *Doe* v. *Loyola University Chicago*, 100 F.4th 910 (7th Cir. 2024), which followed the decision below and makes "no mention of some new 'narrow' or 'rigid' test." BIO. 9. Instead, the University says, the court there "carefully examine[d] and analyze[d]" the "three reasons given for anonymity." *Id.* But the court examined those "three reasons" only because they were the reasons the district court had given in its "brief oral explanation" authorizing "Doe to proceed under a pseudonym," a ruling made before the lower court's decision in petitioner's case. *Loyola Univ.*, 100 F.4th at 912. And the *Loyola University* court concluded that none of the district court's reasons could justify pseudonymity—an outcome consistent with other district courts' interpretation of the decision below as a new and more stringent standard. Cf. *Doe* v. *Purdue Univ.*, 928 F.3d 652 (7th Cir. 2019) (Barrett, J.) (permitting pseudonymity in Title IX case without discussion).

2. The University's attempts to assure this Court that there is "no circuit court split" fare no better. To start, the University ignores the First Circuit, which has openly "eschewed the multi-factor tests employed in other circuits." Pet. 22 (citing *Doe* v. *Town of Lisbon*, 78 F.4th 38, 46 (1st Cir. 2023) and *Doe* v. *MIT*, 46 F.4th 61, 70 (1st Cir. 2022)). Remarkably, the

University fails even to try and explain how the First Circuit's decision in *MIT* did not split the circuits. Nor could it. See *MIT*, 46 F.4th at 76 (remanding for the district court to "evaluate whether this case is exceptional in light of the four paradigms we have identified").

Even more fundamentally, the University's entire argument builds off the claim that petitioner "exaggerates" any differences between the circuits because "each circuit considers the same core elements—balancing the need for anonymity against the public's interest in open proceedings, harm to the parties, and the broader implications for justice." BIO. 9–10. But again, no one disputes that *every single circuit court* balances those relevant interests. Pet. 15; *see* Eugene Volokh, *The Law of Pseudonymous Litigation*, 73 Hastings L.J. 1353, 1366 (2022) (explaining that, before the First Circuit split the circuits, "[d]ifferent circuits ha[d] come up with similar but differently worded multifactor balancing tests for pseudonymity.") (footnote omitted). The question that divides the circuits is, again, *how* they should go about balancing those interests.

For this reason, petitioner does not dispute that every circuit (i) says that pseudonymity should be granted only in "exceptional cases," BIO. 10, and (ii) "considers some degree of risk of harm to a party if disclosure of its identity is required," *id.* at 11. That does not mean the circuits apply uniform standards for (i) what cases qualify as "exceptional" or (ii) how to weigh the relevant risks.

Petitioner does dispute, however, that every circuit "considers the impact of disclosure on innocent nonparties." BIO. 13. That is true—for every circuit but the Seventh Circuit. See Pet. 25 (noting that "the Seventh Circuit [is] the *only* circuit in the country

that refuses to consider" this factor). This is inexplicable, particularly in Title IX cases, where pseudonymity "protects not only Doe, but also his classmate and accuser, Roe." *Id.* In fact, as the University recognizes, the First Circuit's decision in *MIT* actually flipped the presumption in such cases, holding that "anonymity will ordinarily be granted" in cases where identification could harm innocent non-parties. BIO. 13; see *MIT*, 46 F.4th at 71–72.

Notably, the University does not (and cannot) point to any language in the decision below considering the impact of unmasking on innocent non-parties, including Jane Roe. Instead, the University strains to make the Seventh Circuit's opinion in *Loyola University* do the job. BIO. 13–14. But it cannot shoulder the load. As explained, that case simply reviewed the district court's oral ruling on the pseudonym question and concluded, consistent with the decision below, that the plaintiff was not entitled to proceed under a pseudonym.

Even if the University were correct that the Seventh Circuit considers harm to innocent non-parties, the court still does not consider another critical factor examined by its sister circuits—the unique Title IX context. As the First Circuit explained, "federal law aims to keep [Title IX] proceedings largely under wraps," and "it would be a mistake to conclude that the confidentiality attending Title IX proceedings is unimportant." *MIT*, 46 F.4th at 75. Indeed, the First Circuit concluded that, "[i]n federal suits that amount to collateral attacks on Title IX proceedings, a full appreciation of the public's interest in transparency *must factor in* the choice by Congress and the Department to inhibit a school's disclosure of private information, such as the name of an accused student." *Id.* at 76 (emphasis added).

In sum, while everyone agrees that the circuits' approaches overlap to a large degree in the factors they balance, the circuits are "chaotically split" "into three groups" on how to balance them. See Amici Br. of Pseudonymous Litigation Scholars 16–17 ("Amici Br."). Even if the University were right that the precise contours of that split are hazy, this Court still should grant certiorari. The Court has "'yet to address the issue of when a pseudonym may be used' in federal civil litigation." Pet. 4–5 (quoting 5a Wright & Miller, *Federal Practice and Procedure Civil* § 1321 (4th ed.)). And this area of the law is "deeply unsettled." Volokh, *supra*, at 1353. This case allows the Court to provide broad guidance on the proper test for pseudonymity in all civil suits, or to craft guidance specific to suits collaterally attacking Title IX proceedings.

II. This Case Presents An Exceptionally Important And Recurring Question That Warrants Review By This Court.

The University claims that the propriety of pseudonymity "constitutes a narrow and infrequent aspect of federal litigation, representing just .294% of cases," so this "issue has minimal practical significance" and "does not present the type of far-reaching legal question typically deserving of this Court's attention." BIO. 16. But even crediting the University's .294% statistic, that means the pseudonymity issue arises in *thousands of cases* each year. And amici amply explain the importance of the pseudonymity issue when it does arise. See Amici Br. 2–3 (explaining the importance of pseudonymity determinations, including that they "affect the incentives to bring or not bring a case, and to defend or settle it," and noting that this circuit split leads to "different results for similarly situated litigants").

With nowhere left to turn, the University half-heartedly suggests that this case is a poor vehicle because the issue could become moot—because the University has petitioned the district court to thwart this Court's review. In brief, the University waited until petitioner timely filed his petition for certiorari and—the very next day—filed a baseless motion asking the district court to direct petitioner to reveal his identity or dismiss the case because petitioner had not sought to stay the Seventh Circuit's mandate.[1] In the nearly three months since the University filed this motion—which petitioner promptly opposed—the district court has rightly ignored it and left the case marked "CLOSED" on PACER. This case presents an ideal vehicle to clarify the test for allowing a plaintiff to proceed under a pseudonym.

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[1] A party need not seek a stay of the mandate to obtain review of this Court. *See* 28 U.S.C. § 1254(1) (permitting "any party to any civil or criminal case" to petition the Court for certiorari); Sup. Ct. R. 13; *see also* Fed. R. App. P. 41(d)(1). "Nor does the fact that the mandate of the Circuit Court of Appeals has issued defeat this Court's jurisdiction." *Aetna Cas. & Sur. Co.* v. *Flowers*, 330 U.S. 464, 467 (1947); *see Carr* v. *Zaja*, 283 U.S. 52, 53 (1931) (Holmes, J.) (same). If the district court ever chooses to reopen the case and entertain the University's motion, that would not moot this case. And if this Court grants certiorari, it will divest the lower court of jurisdiction. *Robles* v. *Domino's Pizza, LLC*, No. 2:16-cv-06599, 2019 WL 6482232, at *3 n.1 (C.D. Cal. July 30, 2019) ("If the Supreme Court does grant certiorari in the instant case, that decision will divest this Court of jurisdiction, and the litigation before this Court will necessarily be stayed.").

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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