**No. 24A_____**

IN THE

# Supreme Court of the United States

JOHN DOE, APPLICANT

v.

THE TRUSTEES OF INDIANA UNIVERSITY, *et al.*, RESPONDENTS

**EMERGENCY APPLICATION FOR IMMEDIATE STAY OF THE ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF INDIANA PENDING DISPOSITION OF A PETITION FOR A WRIT OF CERTIORARI**

**DIRECTED TO THE HONORABLE AMY CONEY BARRETT, ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT**

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## PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Applicant, the plaintiff below, is John Doe.

Respondents, the defendants below, are the Trustees of Indiana University; Indiana University School of Medicine; Indiana University Purdue University – Indianapolis; Indiana University Kelley School of Business; Gregory Kuester, in his official and individual capacity; Bradley Allen, in his official and individual capacity; and Jay Hess, in his official and individual capacity.

No corporate parties are involved in this case.

## STATEMENT OF RELATED PROCEEDINGS

This application arises from an October 29 district court order requiring Applicant to "disclose his true name within **14 days** of this Order"—*i.e.*, **by November 12, 2024**—or have the case involuntarily dismissed with prejudice. App.8.

This application is related to the petition for a writ of certiorari in *John Doe v. Trustees of Indiana University, et al.*, No. 24-88, filed with this Court on July 25, 2024. The Court ordered a response to the petition, which Respondents filed on October 8, 2024. Applicant filed a reply on October 23, 2024. That same day, the Court distributed the case for the **November 8, 2024** Conference.

The case before this Court, No. 24-88, arises from the following proceedings in the United States District Court for the Southern District of Indiana and the University States Court of Appeals for the Seventh Circuit: *John Doe v. The Trustees of Indiana University, et al.*, Case No. 20-CV-02006 (S.D. Ind.); and *John Doe v. The Trustees of Indiana University, et al.*, Case No. 22-1576 (7th Cir.).

No other proceedings are directly related to this case.

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To the HONORABLE AMY CONEY BARRETT, Associate Justice of the Supreme Court of the United States and Circuit Justice for the United States Court of Appeals for the Seventh Circuit:

Pursuant to Rules 22 and 23 of the Rules of this Court and 28 U.S.C. § 1651(a), Applicant John Doe respectfully requests a stay of the district court's October 29, 2024 order directing Applicant to "disclose his true name within **14 days** of this Order"—by November 12, 2024—or have the case involuntarily dismissed with prejudice. App. 6a. Applicant requests this stay pending consideration and disposition of Applicant's petition for a writ of certiorari filed on July 25, 2024, and any further proceedings in this Court.

## INTRODUCTION

Applicant filed a petition for certiorari in July, raising a question on which the circuits are intractably split: the proper test for pseudonymity in suits collaterally attacking Title IX proceedings. In the decision below, the Seventh Circuit held that the University violated due process in expelling Doe from medical school. But the court then went on to conclude that Doe did not meet the court's new, rigid test for pseudonymity. The court therefore remanded the case to give Doe a Hobson's choice—reveal his true name to receive a remedy or dismiss the complaint.

Doe's petition for certiorari (No. 24-88) has now been fully briefed and was distributed for the Court's Conference *this Friday*, November 8, 2024. In an effort to thwart the Court's review of Doe's petition, the University filed a motion with the district court *the day after Doe filed his petition for certiorari* seeking to force Doe to reveal his identity or have his case dismissed with prejudice. The district court has

now granted that motion and ordered Doe to "disclose his true name" within 14 days—by November 12, 2024—or have the case involuntarily dismissed with prejudice. Given that order, absent a stay from this Court, Doe will be forced—with his certiorari petition fully briefed and set for Conference in just *three days*—to reveal his identity or give up the remedy to which he is entitled for the University's violation of his due process rights. All relevant factors favor granting a stay of the district court's order.

*First*, there is a reasonable probability that the Court will grant Doe's petition for certiorari, which has already been fully briefed and was distributed for Conference. A grant of certiorari is likely because, by sharply diverging from the tests applied by its sister circuits, the Seventh Circuit created a three-way split on a recurring, important issue this Court has "yet to address." 5a Wright & Miller, *Federal Practice and Procedure Civil* § 1321 (4th ed.); *see* Eugene Volokh, *The Law of Pseudonymous Litigation* 73 Hastings L.J. 1353, 1353 (2022) (explaining that the answer to when parties in civil cases may proceed pseudonymously is "deeply unsettled").

*Second*, there exists a fair prospect that the Court will vote to reverse the Seventh Circuit. Were this Court to grant certiorari, there is a fair prospect of reversal because the Seventh Circuit's test sharply departs from the customary practice of the federal courts, rejecting several considerations examined by all its sister circuits in a way that undermines federal policy with respect to the confidentiality of Title IX proceedings. Indeed, as courts have explained, "[i]t makes little sense to

lift the veil of pseudonymity that—for good reason—would otherwise cover these proceedings simply because *the university* erred and left the accused with no redress other than a resort to federal litigation." *Doe v. MIT*, 46 F.4th 61, 76 (1st Cir. 2022) (quoting *Doe v. Rector & Visitors of George Mason Univ.*, 179 F. Supp. 3d 583, 593 (E.D. Va. 2016)).

*Third*, Doe will be irreparably harmed absent a stay from this Court. The Seventh Circuit's decision gave Doe a Hobson's choice: reveal "his true name" to receive a remedy for the constitutional violation, or elect "not to reveal his name" and dismiss the complaint. Pet. 4. The district court's order puts Doe to this choice immediately. Without a stay, Doe will be forced to real his identity or dismiss his case by November 12, 2024. App. 6a. If Doe refuses to unmask by that date, he will be left without a remedy for the University's violation of his constitutional rights. App.8. Although unmasking arguably would not formally moot the case, Doe would be irreparably harmed because this Court could not "unring the bell" once Doe's real name has been disclosed. *Maness v. Meyers*, 419 U.S. 449, 460 (1975).

*Fourth*, the balance of the equities cuts sharply in favor of a stay. While the harm to Doe is both severe and irreparable, the University would suffer no harm at all—it is Doe, after all, not the University, who is currently being deprived of rights guaranteed by law. A stay protecting the Court's ability to rule on Doe's petition for certiorari and refusing to reward opportunistic motion practice will not harm the University.

## ORDER BELOW

The Southern District of Indiana's order directing Applicant to disclose his true name or have his case dismissed with prejudice is unreported, but reproduced at App. 1a–8a.

## JURISDICTION

Applicant petitioned for a writ of certiorari on July 25, 2024 (No. 24-88). This Court has jurisdiction over this Application under 28 U.S.C. §§ 1254(1) and 1651(a).

## STATEMENT OF THE CASE

The facts are fully set out in Applicant's petition for a writ of certiorari. Pet. 6–14. Because Doe's case is fully briefed and has been distributed for Conference, he presents an abbreviated Statement of the Case.

**1.** In the fall of 2017, Doe matriculated to Indiana University School of Medicine. Shortly thereafter, Doe began a romantic relationship with his medical school classmate, Jane Roe. That relationship ended in October 2018.

After Roe reported Doe to the medical school's Associate Dean for Student Affairs for two alleged episodes of physical violence, the University launched a formal Title IX investigation into those incidents. In May 2019, a three-person administrative hearing panel found Doe responsible for one episode but not the other, and suspended him from the medical school for one year. Later, the medical school's Student Promotions Committee recommended to the Dean of the School of Medicine that Doe be dismissed from the medical school. Doe appealed both these decisions; both were denied. *Id.* at 8–10.

In March 2020, after a meeting with Doe, the Dean of the School of Medicine granted Doe's appeal and rejected the recommendation of dismissal—something the Dean had only done one other time in his seven-year tenure. The Dean imposed an additional year of administrative leave as a condition of rejecting the Committee's recommendation. During this meeting, Doe and the Dean also discussed the possibility of Doe applying to Indiana University's Kelley School of Business, where he could attend while serving his suspension from the medical school. *Id.* at 10.

About a month later, Doe applied for admission to the MBA program at Indiana University's Kelley School of Business. Before submitting his application, Doe twice reached out to school officials seeking direction regarding how to "go about accurately presenting the outcome of this [Title IX] matter" in his application. He never received a response. Doe disclosed the Title IX proceedings and its outcome in his application, which triggered a review of his application by the Prior Misconduct Review Committee. He also signed two FERPA disclosure forms, permitting review of all information relating to the Title IX investigation. *Id.* at 11.

A couple weeks later, the Prior Misconduct Review Committee informed Doe it had discovered inconsistencies between his application statements and the letter from the Dean of the School of Medicine. After the Committee asked for clarification, Doe provided a supplemental disclosure statement, conveying his understanding of the situation. After reviewing his application and supplemental disclosures, the Committee concluded that he "withheld pertinent information and gave false or incomplete information," and denied his MBA application on that basis. The Com-

mittee also notified the Dean of the medical school, who thereafter summarily informed Doe that he was being dismissed from the medical school, effective immediately. *Id.* at 11–12.

**2.** In July 2020, Doe brought suit against the University and several University officials for damages and injunctive relief, alleging violations of Title IX and due process. Alongside his complaint, Doe moved to proceed under a pseudonym, prompting the court to order Doe to file under seal a disclosure statement providing his true name and the true name of Jane Roe, his classmate, former girlfriend, and accuser. Doe's pseudonymity motion was referred by the district court to a magistrate judge. *Id.* at 12.

Consistent with the prevailing practice in the federal courts, the magistrate judge considered six factors in making the determination of whether Doe should be permitted to proceed under a pseudonym: (1) whether the plaintiff challenges governmental activity; (2) whether the action requires disclosure of information of the utmost intimacy; (3) whether the action requires plaintiff to disclose an intention to engage in illegal conduct; (4) whether identification would put plaintiff at risk of suffering physical or mental injury; (5) whether pseudonymity would prejudice the defendant; and (6) the interests of the public and of third parties not privy to the proceedings. After finding the third factor irrelevant and all other factors in favor, the magistrate judge held that Doe had "overcome the strong presumption" against pseudonymity and granted his motion. *Id.* at 12–13.

Merits proceedings in the district court did not go as well for Doe, and the district court granted summary judgment to the University and entered final judgment. Doe timely appealed to the Seventh Circuit, arguing that the University violated Title IX and the Due Process Clause in reaching the decision to expel Doe. Neither party mentioned pseudonymity in its briefing. At oral argument, Judge Easterbrook questioned Doe's counsel on the propriety of proceeding under a pseudonym in this case. After argument, the court ordered—and the parties filed—supplemental briefing addressing that issue. *Id.* at 13.

In April 2024, the Seventh Circuit issued its decision. On the merits, the court found in Doe's favor, holding that the University violated Doe's due process rights by expelling him in a summary manner without an opportunity to be heard. With respect to pseudonymity, however, the court found that the district court abused its discretion in permitting Doe to conceal his name "without finding that he is a minor, is at risk of physical harm, or faces improper retaliation," rejecting the multifactor approach adopted by the magistrate judge and employed by the majority of its sister circuits. In particular, the court rejected consideration of whether the defendant is a public educational institution and whether identification of Doe would reveal information of the utmost intimacy, and gave no weight to whether identification would harm innocent non-parties. The court topped off its unusual opinion with an unusual remedy: "If Doe elects to continue with the suit, his true name must be disclosed to the public, and the district court must decide what reme-

dy is appropriate . . . . If Doe elects not to reveal his name, the complaint must be dismissed." *Id.* at 14; Pet. App. 10a.

**3.** On July 25, 2024, Doe petitioned this Court for a writ of certiorari to review the Seventh Circuit's decision.[1] The very next day, the University filed a motion with the district court under Fed. R. Civ. P. 41(b) requesting that Doe be ordered "to comply with the Seventh Circuit's Mandate, within 14 days or by a date set by the [district court], by electing either to proceed with this lawsuit under his true name or to dismiss his complaint." App. 8a. In response to this motion, Doe argued that (1) relief under Rule 41(b) was improper because neither condition precedent for its application was satisfied; (2) Rule 41(b) did not authorize the relief the University sought; and (3) fairness and equity considerations cut against granting the relief sought prior to resolution of Doe's petition for certiorari. App. 13a–19a.

On August 5, 2024, the University waived their response to Doe's petition for certiorari, but this Court ordered a response four days later. On August 26, the University moved this Court to extend the deadline for their response, and this Court granted that motion a day later. The University filed their brief in opposition on October 8, and Doe filed his reply on October 23.

On October 29, 2024, the district court granted the University's Rule 41(b) motion. The district court reasoned that it was bound by "the spirit as well as the

[1] On June 17, 2024, Doe's counsel contacted counsel for the University to inquire regarding a brief stay pending consideration of Doe's forthcoming petition for certiorari by the Supreme Court. App. 12a–13a. In a brief phone call, counsel for the University advised Doe's counsel that they would oppose such a motion. *Id.* at 7a–8a. Based on, among other reasons, the date of undersigned counsel's involvement in this case, a decision was made not to request a stay until absolutely necessary.

letter" of the Seventh Circuit's mandate to order that Doe disclose his name within the timeline requested by the University. App. 1a–2a. Although the district court acknowledged Doe's arguments that dismissal—the only available relief under Rule 41(b)—was improper, it construed Doe's remaining arguments as a request for it to "effectively stay proceedings until his petition for certiorari to the Supreme Court is either granted or denied," a request it considered itself powerless to grant. App. 2a–4a. If the district court's order is allowed to stand, Doe will be required to disclose his name by November 12, 2024. Given that Monday is Veterans Day, the next order list issuance day is not until November 12, making it is unlikely that Doe's petition for certiorari will be resolved before the district court's deadline.

**REASONS FOR GRANTING THE APPLICATION**

"Stay applications are nothing new," and "seek a form of interim relief perhaps 'as old as the judicial system of the nation.'" *Ohio v. EPA*, 603 U.S. 279, 290 (2024) (quoting *Scripps-Howard Radio, Inc. v. FCC*, 316 U.S. 4, 17 (1942)). "To obtain a stay pending the filing and disposition of a petition for a writ of certiorari, an applicant must establish (1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari; (2) a fair prospect that a majority of the Court will vote to reverse the judgment below; and (3) a likelihood that irreparable harm will result from the denial of a stay." *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010); *see Bagley v. Byrd*, 534 U.S. 1301, 1302 (2001) (Stevens, J., in chambers) (explaining that a stay also may issue where lower court proceedings would "affect this Court's jurisdiction to act on [the] certiorari petition"). "In close cases the Circuit Justice or the Court will balance the equities and weigh the rela-

tive harms to the applicant and to the respondent." *Id.* Those requirements are readily satisfied here.

## I. THERE IS A REASONABLE PROBABILITY THAT THIS COURT WILL GRANT CERTIORARI.

As explained in Doe's petition for certiorari and reply to the University's brief in opposition, the Court is likely to grant Doe's petition. The petition presents a deeply unsettled question this Court has never addressed: the proper test to be applied when a plaintiff moves to proceed under a pseudonym in a suit collaterally attacking Title IX proceedings. *See* Pet. *i.* The Seventh Circuit's decision marked an abrupt departure from the customary practice of its sister circuits, leaving the circuits "chaotically split" "into three groups." Amici Br. of Pseudonymous Litigation Scholars ("Amici Br.") 16–17. So too, unlike most pseudonymity cases, this case features extended analysis from the lower courts, and the lone vehicle issue manufactured by the University will be fully and permanently addressed by this stay.

### A. The Seventh Circuit's decision creates a three-way circuit split.

Twelve of the thirteen circuit courts have weighed in on the proper test to apply when a plaintiff collaterally attacking Title IX proceedings in federal court seeks to proceed under a pseudonym. Ten circuits apply a non-exhaustive, multifactor balancing test, examining up to ten factors. *See* Volokh, *supra*, at 1366 (noting that the tests used by these circuits are "similar but differently worded"); *cf. James v. Jacobson*, 6 F.3d 233, 238 (4th Cir. 1993); *see also Doe v. Sidar*, 93 F.4th 241, 247–48 (4th Cir. 2024) (noting that these factors are "nonexhaustive"); *Doe v. Stegall*, 653 F.2d 180, 185–86 (5th Cir. 1981, Unit A) (setting forth similar, four-factor test); *Does I Thru XXIII v. Advanced Textile Corp.*, 214 F.3d 1058, 1068 (9th

Cir. 2000) (basing test off *James* and *Stegall*); *Doe v. Megless*, 654 F.3d 404, 408–10 (3d Cir. 2011) (endorsing test modeled after *Stegall* and other cases); *Doe v. Porter*, 370 F.3d 558, 560 (6th Cir. 2004) (adopting test from *Stegall*); *In re Sealed Case*, 931 F.3d 92, 96–97 (D.C. Cir. 2019) (endorsing the five factors set forth in *James* as "guideposts from which a court ought to begin its analysis"); *Doe v. Frank*, 951 F.2d 320, 323 (11th Cir. 1992) (adopting test from *Stegall*); *Sealed Plaintiff v. Sealed Defendant*, 537 F.3d 185, 189–90 (2d Cir. 2008) (enumerating ten factors for consideration, drawing from the decisions of its sister circuits); *Cajune v. Indep. Sch. Dist. 194*, 105 F.4th 1070, 1077 (8th Cir. 2024) (crafting a seven-factor test pulled from the factors "identified" by its "sister circuits").

The First Circuit has "eschewed the multi-factor tests employed in other circuits." *Doe v. Town of Lisbon*, 78 F.4th 38, 46 (1st Cir. 2023). Seeing "little upside in endorsing one multi-factor test or another, and still less in inventing a new one," the court has declined "to festoon the easily understood 'totality of the circumstances' standard with any multi-factor trappings." *Doe v. MIT*, 46 F.4th 61, 70 (1st Cir. 2022). Instead, the court has offered "some general guidelines may be helpful to the district courts." *Id.* The court explained that "[l]itigation by pseudonym should occur only in exceptional cases," "sketch[ed] four general categories of exceptional cases in which party anonymity ordinarily will be warranted," including "suits that are bound up with a prior proceeding made confidential by law." *Id.* at 70–72 (internal quotation marks omitted). The court added that "these four paradigms … capture

the vast majority of affected cases," and would serve as "useful tools" for district courts in the exercise of their discretion. *Id.* at 72.

The Seventh Circuit's decision below marks a stark departure from the prevailing standards. The magistrate judge employed the non-exhaustive multifactor approach, finding that all relevant factors weighed in favor of pseudonymity. Pet. App. 39a–40a. On appeal, the Seventh Circuit reasoned that the "multifactor approach . . . has not been adopted by this circuit," and expressly rejected consideration of several factors examined by its sister circuits. *Id.* at 6a–9a (deeming "government action" factor irrelevant, dismissing "utmost intimacy" factor unless the suit concerns "what happened during sexual relations," and limiting the "risk of injury" factor to risk of *physical* injury).

The court then put forward a rigid test: 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. No other considerations matter—not mental harm, not harm to third parties, not protection of policy choices made by Congress. And lower courts in the Seventh Circuit have taken note of this new standard. *See, e.g.*, *Does 1–14 v. NCAA*, No. 1:23-cv-00542, ECF No. 251, mem. op. at 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); *Doe v. Univ. of S. Ind.*, No. 3:21-cv-00144, 2024 WL 3410801, at *4 (S.D. Ind. July 11, 2024) ("The Court must find that John 'is a minor, is at risk of physical harm, or faces improper retaliation.'").

This entrenched three-way split makes this Court likely to grant certiorari. The circuits have hashed it out for decades now, and all eleven regional circuits, plus the D.C. Circuit, have weighed in. The subject-matter of this split, too, and the distance between the Seventh Circuit's approach and the other leading approaches, makes certiorari likely here. Over the course of this country's history, "tradition and consensus have mediated the growth of uniform federal procedural common law. . . . To the extent that courts have changed these doctrines, the changes have not been unilateral and abrupt departures from tradition." Amy Coney Barrett, *Procedural Common Law*, 94 Va. L. Rev. 813, 886 (2008). Not so here. The Seventh Circuit's change in approach was stark, sudden, and idiosyncratic. Whether a party can proceed under a pseudonym will be a vastly different determination if a case is brought in South Bend instead of Kalamazoo. *Accord* Amici Br. 2–3. And given the context-sensitive, case-specific nature of the inquiry, this is not a subject-matter readily amenable to uniformity through legislative rule; the disparity is one that this Court is peculiarly positioned to correct. For these reasons, a grant of certiorari is not merely "reasonably probable," but highly likely.

### B. This case is an unusually good vehicle to resolve an important and recurring issue that this Court has yet to address.

In addition to the sharp circuit split, this Court is likely to grant certiorari due to the importance of this recurring issue and how rarely the Court sees as good a vehicle as this case.

**1.** "[B]ecause court records are more visible than ever, including to casual Internet searchers," the question whether a litigant may proceed under a pseudonym

is critically important. Volokh, *supra*, at 1358; *see also* Amici Br. 6–7 (noting that inability to proceed under a pseudonym can cause plaintiffs to "forgo the remedies that civil causes of action exist to provide" and defendants to "settle before complaints are filed, even if they have sound legal or factual defenses"). This is especially true in collateral challenges to Title IX disciplinary proceedings, which are required by federal law to be conducted confidentially. *See MIT*, 46 F.4th at 74 ("[B]oth Congress and the Executive Branch have given careful thought to the proper conduct of Title IX proceedings. Confidentiality is an important aspect of that vision.").

The ability of accused students to proceed under a pseudonym in these collateral challenges is vital for keeping federal policy on Title IX proceedings intact. If forced to proceed under their real name, accused students might be chilled from bringing those suits to federal court. The ones who aren't chilled might nonetheless suffer all the negative effects of disciplinary sanctions, even if their challenges are ultimately successful. Nor are the adverse effects of lifting the veil of pseudonymity limited to the accused: "unauthorized disclosure of Title IX proceedings 'may chill reporting of sex discrimination or participation in the [college's] efforts to address sex discrimination.'" *MIT*, 46 F.4th at 76 (quoting Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 132 Fed. Reg. 41390, 41453 (July 12, 2022)). The substantive importance of this procedural issue strongly favors the likelihood of this Court granting certiorari.

**2.** This case is the ideal vehicle for resolution of this issue. Because of the abuse-of-discretion standard employed by the circuit courts, it is rarely worthwhile for litigants to challenge a district court's pseudonymity decision—appellate courts "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." *Megless*, 654 F.3d at 407 (quoting *Oddi v. Ford Motor Co.*, 234 F.3d 136, 146 (3d Cir. 2000)). Even when litigants do bring such a challenge, the standard of review "usually leads to the trial court's determination being upheld." Amici Br. 3. And because "[m]any pseudonymity determinations fall within . . . 'a zone of choice within which the district court may go either way,'" *id.* at 24 (quoting *In re Chiquita Brands Int'l, Inc.*, 965 F.3d 1238, 1246 (11th Cir. 2020)) (cleaned up), there is little need in such cases for the appellate court to conduct an in-depth analysis. Put together, these factors make it unlikely for the pseudonymity issue to be presented in a clean vehicle.

This case has no such warts. The initial pseudonymity determination from the magistrate judge was thoroughly explained in a well-reasoned, eight-page memorandum opinion dedicated solely to this issue. *See* Pet. App. 37a–45a. Although the University did not appeal the issue, Doe's use of a pseudonym caught the attention of Judge Easterbrook at oral argument, and the court consequently ordered supplemental briefing on the question. On the basis of this briefing, Judge Easterbrook's opinion for the court gave an extended analysis on the subject, practically engaging in de novo review of the magistrate judge's opinion. *Id.* at 6a–10a. Even

more, the unusual posture of the Seventh Circuit's reversal of the pseudonymity determination ensures that this question will be meaningful to the parties—the Seventh Circuit conditioned the availability of Doe's remedy for the University's violation of due process on Doe's unmasking.

In their brief in opposition, the University failed to raise any meaningful vehicle problems. Indeed, the only difficulty they could conjure up was that "the [question presented] should become moot" if the district court granted the order at issue here. BIO. 14–15. As explained in Doe's reply and elsewhere in this application, the University is wrong about the effect of the district court's order. But that issue aside, to the extent that the district court's order could pose a vehicle problem, it is one that would be completely and permanently resolved by this Court granting a stay. In light of the foregoing, there is a "reasonable probability" that this Court will grant certiorari.

## II. A FAIR PROSPECT EXISTS THAT THIS COURT WILL REVERSE.

A "fair prospect of reversal" exists when "[t]he issues underlying th[e] case are important and difficult." *Times-Picayune Publ'g Corp. v. Schulingkamp*, 419 U.S. 1301, 1309 (1974). Put differently, a stay is appropriate if "petitioner's position . . . cannot be deemed insubstantial." *McLeod v. General Elec. Co.*, 87 S. Ct. 5, 6 (1966) (Harlan, J., in chambers). The Justice-in-Chambers need not consider the likelihood of reversal to be "more probable than not." *Certain Named & Unnamed Non-Citizen Child. & Their Parents v. Texas*, 448 U.S. 1327, 1332 (1980) (Powell, J., in chambers). This requirement is plainly met here.

Although many courts 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) (collecting cases), it is unclear precisely where that presumption comes from. "No federal statute prohibits litigants from filing civil actions under fictitious names. By the same token, such a presumption is not perfectly traceable to any federal constitutional provision or rule." *MIT*, 46 F.4th at 67. Some courts have inferred the existence of such a presumption from the penumbras of Rule 10(a) and Rule 17(a), *see* Amici Br. 16–17 (citing *Doe v. Frank*, 951 F.2d 320, 322 (11th Cir. 1992)), but other courts have dismissed the notion on the grounds that the language of those rules would seem to give rise to a "mandate that a complaint state the parties' true names, . . . [not] a rebuttable presumption." *MIT*, 46 F.4th at 67. Another possibility is that this doctrine is justified by Rule 5.2(e)(1), which allows a court to order redaction of any information in a filing "[f]or good cause." But "good cause" hardly seems to justify a "strong" presumption.

"More to the point is the right of public access to judicial proceedings and documents," which has sometimes been described as being derived from the First Amendment, and at other times from the common law. *MIT*, 46 F.4th at 67 (citing *Courthouse News Serv. v. Quinlan*, 32 F.4th 15, 20 n.8 (1st Cir. 2022), then *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 597–98 (1978)). But whatever the source of that right, it has never been held to be absolute, such that the use of a pseudonym in civil litigation would be forbidden. *Id.*; *see also* Jud Campbell, *Natural Rights and the First Amendment*, 127 Yale L.J. 246, 277 (2017) ("[N]atural rights [like the

freedom of speech] were always implicitly qualified, with the scope of their qualifications often turning on assessments of public policy.").

The better view is that the traditional presumption against pseudonymity is a creature of "procedural common law," a doctrine fashioned "from norms generally accepted by the legal community." Barrett, *supra*, at 823 n.23. As the First Circuit has explained, "[c]ourts have distilled such a presumption from a brew of custom and principle, including the values underlying the right of public access to judicial proceedings and documents under the common law and First Amendment." *MIT*, 46 F.4th at 68. As a doctrine of the common law, its features are not fixed in stone. Rather, changes are permissible to the extent that they are "responses to emerging consensus about the need for a new approach." Barrett, *supra*, at 886.

In a similar vein, such doctrines should be expected to morph alongside changes to the "brew of custom and principle" from additions and revisions to positive law by the hand of the legislature. But "articulating rules of decision as a matter of common law" does not entail "unfettered discretion [for judges] to create whatever rules they please." Caleb Nelson, *The Legitimacy of (Some) Federal Common Law*, 101 Va. L. Rev. 1, 9 (2015). The changes to such doctrines emanating from any one court's decision should not be "unilateral and abrupt departures from tradition." Barrett, *supra*, at 886. Such changes would be illegitimate. *Cf.* Stephen E. Sachs, *Originalism as a Theory of Legal Change*, 38 Harv. J. L. & Pub. Pol'y 817, 840 (2015) ("One important consequence of having rules of change is that, until something happens to trigger those rules, everything that's already in the sys-

tem is supposed to stay the same. That's what it *means* to have rules of change: if the rules aren't satisfied, there's no change.").

The Seventh Circuit's decision was not forged through the common-law fires of tradition, consensus, and incremental change. The court eschewed the traditional and widely practiced core principles of the doctrine—the doctrine's open-ended, non-categorical approach to analysis. It emphatically rejected the relevance of a consensus on the issue. *See* Pet. App. 9a ("[T]he assertion 'this is how things have been done' is not a justification for doing them that way."). And it made this departure not on the prompting of a party in the case, but on its own motion. The Seventh Circuit's doctrine takes an unduly narrow view of factors relevant to the pseudonymity determination, wrongly excluding consideration of congressional policy with respect to Title IX.

No matter the validity or source of this presumption, this Court's precedent is clear: When courts are called on to balance private interests against the public's right of access to court records, they must consider *all* "relevant facts and circumstances." *Nixon*, 435 U.S. at 599. Whether through the First Circuit's paradigms approach or the multifactor tests applied elsewhere, all other circuits have heeded this command. In holding that the district court abused its discretion in allowing Doe to proceed under a pseudonym, the Seventh Circuit ignored it.

The Seventh Circuit's failure is most stark in its refusal to honor the policy choices that the political branches have made with respect to Title IX. As Judge Easterbrook has recognized, "anonymity is the norm in Title IX litigation." *Doe v.*

*Loyola Univ. Chi.*, 100 F.4th 910, 913 (7th Cir. 2024). That practice is quite justified. Universities are required by federal law to keep Title IX disciplinary proceedings "largely under wraps." *MIT*, 46 F.4th at 75. Much like with statutes that prohibit federal agencies from disclosing certain information, Title IX "represent[s] a congressional judgment about the importance of maintaining the confidentiality of [certain] nonpublic information," and that judgment should firmly guide a district court's exercise of discretion. *MetLife, Inc. v. Fin. Stability Oversight Council*, 865 F.3d 661, 675 (D.C. Cir. 2017).

As multiple courts have explained, "[i]t makes little sense to lift the veil of pseudonymity that—for good reason—would otherwise cover these proceedings simply because *the university* erred and left the accused with no redress other than a resort to federal litigation." *MIT*, 46 F.4th at 76 (quoting *Doe v. Rector & Visitors of George Mason Univ.*, 179 F. Supp. 3d 583, 593 (E.D. Va. 2016)). Not only might compelling disclosure of the accused student-plaintiff's identity chill similarly situated individuals from bringing meritorious suits, but it also might chill legitimate *victims* from coming forward to the college, out of fear that a collateral attack on the subsequent proceedings would make *their* name public. *Id.* at 73, 76. This Court need not—and, indeed, perhaps should not—establish a categorical rule that challenging the fairness of Title IX disciplinary proceedings *always* warrants pseudonymity.[2] But it should be clear that the considered judgment of the political

[2] For instance, even if the mine-run Title IX case warrants pseudonymity, a court would be well within its discretion to unmask the plaintiff *sua sponte* were it to find "that his claim was frivolous, unreasonable, or groundless, or that the plaintiff continued to litigate after it clearly became so. And, needless to say, if a plaintiff is found to have brought or continued such a claim in bad faith, there

branches on keeping Title IX proceedings out of the public eye is worthy of respect. In making pseudonymity determinations, courts should factor that policy judgment into account. By failing to do so, the Seventh Circuit erred. Accordingly, there is a fair prospect of reversal in this case.

## III. IRREPARABLE HARM WILL RESULT ABSENT A STAY OF THE DISTRICT COURT'S ORDER, WHICH THREATENS THE EFFICACY OF REVIEW OF THE DECISION BELOW.

Doe will suffer irreparable harm without a stay from this Court of the district court's order, which threatens the efficacy of review of the Seventh Circuit's decision. The Seventh Circuit held that the University violated Doe's due process rights in expelling him, but conditioned his ability to receive a remedy for that constitutional violation on his discarding pseudonymity and proceeding under his real name. Pet. App. 10a. In other words, the Seventh Circuit's decision gave Doe a Hobson's choice: reveal "his true name" and receive a remedy for the violation of his due process rights, or elect "not to reveal his name" and dismiss the complaint. Pet. 4. The district court's order makes the effect of the Seventh Circuit's decision immediate—absent a stay from this Court, Doe will be forced to make an election regarding the condition imposed on his remedy by November 12, 2024. App. 6a. If he refuses to unmask, the case will be involuntarily dismissed with prejudice, leaving Doe without any remedy for the University's violation of his constitutional rights. App. 8a.

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will be an even stronger basis for [doing so]." *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 422 (1978).

In their brief in opposition to Doe's petition for certiorari, the University effectively concedes that the district court's order would irreparably harm Doe and interfere with this Court's jurisdiction, arguing that compliance with the order would render the issue presented by the petition "moot." BIO. 14–15; *Genesis Healthcare Corp. v. Symczyk*, 569 U.S. 66, 71–72 (2013) (explaining that mootness deprives a court of subject-matter jurisdiction). For all practical purposes, that is correct—compliance with the order would deprive Doe of the *practical* benefit of a favorable ruling from this Court. To be sure, "[r]emedies for judicial error may be cumbersome but the injury flowing from an error generally is not irreparable"—case captions can be changed, docket entries can be expunged, and unsealed exhibits can be resealed. *Maness*, 419 U.S. at 460. But "[w]hen a court [orders a party] to reveal information," a "different situation may be presented." *Id.*

Particularly in this day and age, "[c]ompliance [w]ould cause irreparable injury because appellate courts cannot always 'unring the bell' once the information has been released. Subsequent appellate vindication does not necessarily have its ordinary consequence of totally repairing the error." *Id.* This would be all the more true if the Court were to grant certiorari, given the media attention dedicated to this Court's docket, not to mention First Amendment limitations on restraining private dissemination of information learned from a public record. *See The Florida Star v. B.J.F.*, 491 U.S. 524, 534 (1989) (discussing how governments have significant power to prevent release of sensitive information in their custody, but consid-

erably less power to restrict publication of such information once it is lawfully in private hands).

At bottom, the district court's order sticks Doe between Scylla and Charybdis. Either Doe can reveal his name and seek a remedy from the district court, albeit at the expense of the practical benefit of a favorable ruling by this Court, or he can dismiss the case against the University, foregoing not only the remedy to which he is entitled under law but also appellate review of the unfair condition placed upon his remedy, not to mention the waste of time and significant expense incurred seeking this Court's review. *Cf. Philipp v. Fed. Republic of Germany*, 436 F. Supp. 3d 61, 68 (D.D.C. 2020) (finding that wasting "the time and expenses of litigation" constitutes irreparable harm favoring issuance of a stay pending petition for certiorari). Accordingly, this requirement, too, is met.

## IV. THE BALANCE OF THE EQUITIES FAVORS A STAY.

The foregoing reasons demonstrate that issuing a stay here is not a close call; that the balance of the equities favors staying the district court's order is merely "extra icing on a cake already frosted." *Van Buren v. United States*, 593 U.S. 374, 394 (2021) (quoting *Yates v. United States*, 574 U.S. 528, 557 (2015) (Kagan, J., dissenting)). If the Court were to balance the equities here, they favor issuing a stay.

**1.** The harm to Doe here could hardly be more severe: Without a stay, he will forced to reveal his true name and have the district court decide the appropriate remedy for the University's violation of his due process rights, or keep his pseudonym and have his meritorious case involuntarily dismissed with prejudice. Granting this application, moreover, would not circumvent the regular appeals pro-

cess. The district court's order does not alter the legal relations of the parties or make a judgment on the merits of the case; it simply sets a timeline for proceedings that would deprive Doe of an opportunity for meaningful appellate review. That is the paradigmatic use case for a stay. *See, e.g.*, *Houchins v. KQED, Inc.*, 429 U.S. 1341, 1346 (1977) (Rehnquist, J., in chambers) ("[T]he preservation of that status quo is an important factor favoring a stay.").

**2.** On the other side, a stay protecting the Court's ability to rule on Doe's petition for certiorari and refusing to reward opportunistic motion practice will not harm the University in the slightest. *See Johnson v. Hix Wrecker Serv., Inc.*, 528 F. App'x 636, 639 (7th Cir. 2013) ("A civil party does not suffer prejudice when a [] court spoils its attempts to secure a tactical advantage through such gamesmanship."). As things stand, the district court's order does not compel Doe to convey any property or take any action with respect to the University. The Seventh Circuit's judgment, which the order purported to implement, did not vest in the University any rights or entitlements. A stay would not alter the *status quo ante* for the University; rather, it would preserve it.

More still, any harm the University could claim from delay in the ultimate resolution of this suit is belied by its litigation conduct in this case. Despite being informed that Doe would be filing a petition for certiorari, the University waited to file the two-page motion resulting in this order until *the day after* Doe filed the petition for certiorari in this case. There is no obvious, legitimate reason for the timing of this filing. *See Knox v. Serv. Emps. Int'l Union, Loc. 1000*, 567 U.S. 298, 307

(2012) ("[P]ostcertiorari maneuvers designed to insulate a decision from review by this Court must be viewed with a critical eye."); *City of Erie v. Pap's A.M.*, 529 U.S. 277, 288 (2000) ("Our interest in preventing litigants from attempting to manipulate the Court's jurisdiction to insulate a favorable decision from review further counsels against a finding of mootness here."). Such tactics ensured that, if successful, Doe would spend considerable time and money preparing the petition for certiorari. Given these equitable considerations, a stay should issue.[3]

Doe seeks to have the full and complete remedy that he believes he is *unconditionally* entitled to by law. He petitioned this Court for certiorari in order to vindicate that belief, and he seeks a stay to preserve his right to do so. Given the weight of the equities, the propriety of issuing a stay is clear.

[3] Adequate relief is not available here from any other court or judge. Doe's opposition to the University's Rule 41(b) motion asked the district court to stay its hand and not grant the motion "until the Supreme Court resolves Doe's petition for a writ of certiorari." App. 16a–18a. The district court thus already effectively ruled on a motion to stay when it construed Doe's arguments in its opposition as a de facto motion to stay proceedings. *See* App. 3a ("Doe requests that the Court effectively stay proceedings until his petition for certiorari to the Supreme Court is either granted or denied."). The district court has made it abundantly clear that a stay will not be granted; asking the court to reconsider its position on the propriety of the stay would be an exercise in futility. *Cf. Ohio v. Roberts*, 448 U.S. 56, 74 (1980) ("The law does not require the doing of a futile act."); *Darby v. Cisneros*, 509 U.S. 137, 149–50 (1993) (holding that requesting reconsideration is not required to exhaust available remedies). Nor does Doe have the option of appealing the district court's order to the Seventh Circuit, as it does not qualify as a "final decision" under 28 U.S.C. § 1291. A stay from this Court thus is the only form of relief meaningfully available to Doe.

## CONCLUSION

For the foregoing reasons, John Doe respectfully requests that this Court stay the district court's order pending the consideration and disposition of the fully briefed petition for a writ of certiorari and any further proceedings in this Court.

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Respectfully submitted,

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