No. 24A_____

IN THE

Supreme Court of the United States

JOHN DOE, APPLICANT

v.

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

APPLICATION DIRECTED TO THE HONORABLE AMY CONEY BARRETT FOR A STAY PENDING DISPOSITION OF A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

WILLIAM R. LEVI
CODY L. REAVES
Counsel of Record
DAVID H. KINNAIRD
SIDLEY AUSTIN LLP
Washington, D.C. 20005
(202) 736-8000
cody.reaves@sidley.com

Counsel for Applicant John Doe

TABLE OF CONTENTS

APPENDIX

Order on Motion for Order Requiring Plaintiff to Comply with Seventh Circuit's April 26, 2024, Mandate

I. Introduction

This case is before the Court on remand from the Seventh Circuit. The Defendants have filed a motion seeking that this Court order John Doe to timely comply with the mandate handed down by the Court of Appeals. (ECF No. 177.) Because it is the duty of this Court to comport with the "the spirit as well as the letter" of a reviewing court's mandate, the Court **grants** Defendants' motion. *Matter of Cont'l Ill. Sec. Litig.,* 985 F.2d 867, 869 (7th Cir. 1993).

II. Legal Standard

"'The mandate rule requires a lower court to adhere to the commands of a higher court on remand.'" *United States v. Adams*, 746 F.3d 734, 744 (7th Cir. 2014) (quoting *United States v. Polland*, 56 F.3d 776, 777 (7th Cir. 1995)). "Under the mandate rule, 'when a court of appeals has reversed a final judgment and remanded the case, the district court is required to comply with the express or implied rulings of the appellate court.' Said another way, the court must follow 'the spirit as well as the letter of the mandate.'" *In re A.F. Moore & Assocs., Inc.*, 974 F.3d 836, 839–40 (7th Cir. 2020) (first quoting *Moore v. Anderson*, 222 F.3d 280, 283 (7th Cir. 2000); and then quoting *Cont'l Ill.*, 985 F.2d at 869).

"'The law of the case doctrine is a corollary to the mandate rule and prohibits a lower court from reconsidering on remand an issue expressly or impliedly decided

by a higher court absent certain circumstances.'" *Adams,* 746 F.3d at 744 (quoting *Polland*, 56 F.3d at 779).

In the certiorari context, it is beyond a district court's authority to issue a stay of a circuit court's mandate. *See* 28 U.S.C. § 2101(f) ("In any case in which the final judgment or decree of any court is subject to review by the Supreme Court on writ of certiorari, the execution and enforcement of such judgment or decree may be stayed for a reasonable time to enable the party aggrieved to obtain a writ of certiorari from the Supreme Court. The stay may be granted *by a judge of the court rendering the judgment or decree or by a justice of the Supreme Court.*") (emphasis added). Courts that have come upon this issue have interpreted the statute to mean the same. *See In re Time Warner Cable, Inc.*, 470 F. App'x 389, 390 (5th Cir. 2012); *In re Stumes*, 681 F.2d 524, 525 (8th Cir. 1982); *United States v. Lentz*, 352 F. Supp. 2d 718, 726 (E.D. Va. 2005); *see also Whitehead v. Frawner*, No. CV 17-275 MV/KK, 2019 WL 4016334, at *1 (D.N.M. Aug. 26, 2019) ("Virtually every court to have considered this question has reached the same conclusion."). A motion asking a district court "to weigh the likelihood that it might be later vindicated" by a reversal of the circuit court's decision is "only a step removed from a court declaring that it was right all along and entering the judgment just reversed—the most obvious violation of the mandate rule." *In re A.F. Moore & Assocs., Inc.*, 974 F.3d at 841.

III. Discussion

On appeal, the Seventh Circuit found for Doe, holding that Jay Hess violated Doe's due process rights when he unexpectedly expelled Doe from medical school

without affording opportunity for comment. (Mandate 5, ECF No. 172.) At the same time, the Seventh Circuit took issue with the fact that Doe was proceeding pseudonymously and offered Doe a choice: proceed to victory using his legal name, or voluntarily dismiss the case. *Id.* at 10. So far, Doe has done neither. Now, Doe requests that the Court effectively stay proceedings until his petition for certiorari to the Supreme Court is either granted or denied. (Pl.'s Opp'n to Defs.' Am. Mot. for Order Requiring Pl. to Comply with the Seventh Circuit's April 26, 2024, Mandate 10, ECF No. 182.)

As discussed, the Court is bound by 28 U.S.C. § 2101(f) on this issue and is not empowered to grant a stay of the Seventh Circuit's mandate while the Supreme Court considers whether to take up Doe's cert. petition. Doe had ample opportunity to file a motion with the Seventh Circuit requesting a stay, or to try his hand at convincing the Supreme Court to grant one. Fed. R. App. P. 41(d); Rules of the Supreme Court of the United States 23(2). The fact that Doe attempted neither is puzzling but does not alter the limits of the Court's authority. Following the letter and spirit of the Seventh Circuit's mandate, the Court now orders Doe to proceed under his legal name, or otherwise move to dismiss his case.

Given that Doe is faced with a binary choice, the Court must consider how best to proceed if Doe is not willing to unmask himself. Defendants request a dismissal under Federal Rule of Civil Procedure 41(b) on the grounds that Doe has failed to comply with the Seventh Circuit's mandate. (Defs' Am. Mot. for Order Requiring Pl. to Comply with Seventh Circuit's April 26, 2024, Mandate 1-2, ECF

No. 177.) Rule 41(b) allows the Court to enter an *involuntary* dismissal with prejudice as a sanction for plaintiff's "failure to prosecute or to comply with … a court order." Fed. R. Civ. P. 41(b)). But Defendants do not cite to any case law in support of their contention that an appellate mandate constitutes a "court order" under 41(b). Courts in this circuit have dismissed cases under 41(b) for failure to comply with a court's discovery order, scheduling order, order to appear for a deposition, and other trial court orders of a similar nature. *See generally Tennant v. Heckel*, 151 F.R.D. 100, 101 (E.D. Wis. 1993); *Bolanowski v. GMRI, Inc.*, 178 F. App'x 579, 581-2 (7th Cir. 2006); Ladien v. Astrachan, 128 F.3d 1051, 1055 (7th Cir. 1997); *Patterson by Patterson v. Coca-Cola Bottling Co. Cairo-Sikeston*, 852 F.2d 280, 285 (7th Cir. 1988). Based on precedent, it seems that involuntary dismissals for failure to comply are generally reserved for plaintiffs who shirk orders from the *trial court,* creating delays in the stream of litigation and wasting court resources. *See Brown v. Columbia Sussex Corp*., 664 F.3d 182, 191 (7th Cir. 2011) (finding that a case should only be dismissed under 41(b) when "there is a clear record of delay or contumacious conduct, or when other less drastic sanctions have proven unavailing") (quoting *Williams v. Chicago Bd. of Educ.,* 155 F.3d 853, 857 (7th Cir. 1998)). It is the Court's view that an involuntary dismissal under 41(b) is procedurally improper at this stage. However, if Doe fails to comply with *this* Order, or otherwise contumaciously refuses to walk away from the case, he may well open the door to sanctions under 41(b).

If Doe wishes to maintain his anonymity, the Seventh Circuit has left for this Court "to decide, as Rule 41(a)(2) provides, whether the dismissal is with or without prejudice." (Mandate 10, ECF No. 172.) The Seventh Circuit has made clear that Doe is to request a *voluntary dismissal* under Rule 41(a)(2). If Doe decides to do so, the Court is inclined to dismiss his case with prejudice. "Some of the factors justifying denial [of motion for voluntary dismissal without prejudice] are the defendant's effort and expense of preparation for trial, excessive delay and lack of diligence on the part of the plaintiff in prosecuting the action, insufficient explanation for the need to take a dismissal, and the fact that a motion for summary judgment has been filed by the defendant." *Pace v. S. Exp. Co.*, 409 F.2d 331, 334 (7th Cir. 1969). Acknowledging that the Seventh Circuit has found Doe's claim successful, this case has otherwise dragged on for four years and has cost the Defendants and the public significant expense. Since the initiation of this case, the public has been denied its right to know who is using the courts, and for what purpose, without sufficient justification.

Moreover, while Doe complains of facing a "Hobson's choice," (Pl.'s Opp'n to Defs.' Am. Mot. 8, ECF No. 182), this scenario is partly of his own making—Doe did not properly move for a stay of the mandate from the appellate court, and now finds himself asking this Court for favors it cannot grant.

Finally, regardless of the posture of Doe's case upon dismissal, because he was expelled from medical school in 2020, Indiana's two-year statute of limitations will bar Doe from refiling his 42 U.S.C. § 1983 claim against Hess. *See Behav. Inst.*

of Indiana, LLC v. Hobart City of Common Council, 406 F.3d 926, 929 (7th Cir. 2005).

IV. Conclusion

Defendant's Amended Motion, (ECF No. 177), is **granted.** Doe is **ordered** to comply with the Seventh Circuit's mandate and disclose his true name within **14 days** of this Order. If Doe fails to disclose his name by the deadline, this case will be dismissed with prejudice. Defendant's original Motion, (ECF No. 176), is **denied as moot.**

SO ORDERED.

Date: 10/29/2024

/s/ James R. Sweeney II
JAMES R. SWEENEY II, JUDGE
United States District Court
Southern District of Indiana

DEFENDANTS' AMENDED MOTION FOR ORDER REQUIRING PLAINTIFF TO COMPLY WITH THE SEVENTH CIRCUIT'S APRIL 26, 2024 MANDATE

Defendants the Trustees of Indiana University, Indiana University School of Medicine, Indiana University Purdue University – Indianapolis, Indiana University Kelley School of Business, and Gregory Kuester, Bradley Allen, and Jay Hess, in their respective individual and official capacities, by their attorneys, and pursuant to Fed. R. Civ. P. 41(b), respectfully request entry of an Order directing Plaintiff to comply within 14 days, or by a date of this Court's choosing, with the Mandate issued three months ago, on April 26, 2024, by the United States Court of Appeals for the Seventh Circuit, requiring Plaintiff to elect whether to proceed under his own name or dismiss this case with prejudice. In support, Defendants state:

1. On March 31, 2022, this Court entered its Order granting Defendants' Motion for Summary Judgment ("Summary Judgment Order"). Dkt. 154.

2. After an appeal initiated by Plaintiff, on April 26,2024, the Seventh Circuit vacated the Summary Judgment Order on a narrow due process ground and remanded with very specific directions. Dkt. 172, p. 10.

3. The Seventh Circuit ordered, "If Doe elects to continue with the suit, his true name must be disclosed to the public, and the district court must decide what remedy is appropriate . . .If Doe elects not to reveal his name, the complaint must be dismissed." *Id.*

4. After the remand, Plaintiff, through new counsel, inquired whether Defendants will consent to a stay of these proceedings while Plaintiff petitions for a

writ of *certiorari*, seeking review of the Seventh Circuit's Mandate that Plaintiff must reveal his true name to the public. The undersigned advised Plaintiff's counsel that Defendants would not consent to a stay in light of the precedent set forth under *In re A.G. Moore & Assoc.*, 974 F.3d 836, 839 (7th Cir. 2020) (relief from the Court's mandates must be issued by the Seventh Circuit and not sought in the district court) and Fed. R. App. P. 41. *See, generally, In re Cont'l Ill. Sec. Litig.*, 985 F.2d 867, 869 (7th Cir. 1993) (district court must follow the spirit and the letter of the mandate).

5. Plaintiff served on July 25, 2024, his Petition for Writ of Certiorari. Plaintiff has not, however, made any request to the Seventh Circuit for relief from the Mandate. Accordingly, Defendants request that this Court enter an Order directing Plaintiff to comply with the Seventh Circuit's Mandate, within 14 days or by a date set by the Court, by electing either to proceed with this lawsuit under his true name or to dismiss his complaint.[1]

WHEREFORE, Defendants request that this Court order Plaintiff to comply promptly with the Seventh Circuit's Mandate as specified above, and for all other appropriate relief for Defendants.[2]

Respectfully submitted,

/s/ Finis Tatum IV
Finis Tatum IV

[1] If Doe elects to dismiss his Complaint, Defendants submit that the dismissal must be with prejudice pursuant to Rule 41(a)(2), as a dismissal without prejudice would be pointless and evade finality.

[2] Defendants will provide Doe's new counsel with a courtesy copy of this Motion as they have not entered an appearance in this Court.

Wayne C. Turner
Scott E. Murray
Janet Lynn Thompson
HOOVER HULL TURNER LLP
111 Monument Circle, Suite 4400
Indianapolis, IN 46244-0989
Telephone: (317) 822-4400
Facsimile: (317) 822-0234
ftatum@hooverhullturner.com
wturner@hooverhullturner.com
smurray@hooverhullturner.com
jthompson@hooverhullturner.com
Attorneys for Defendants

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was served upon all counsel of record via the Court's Electronic Notification system, this July 30, 2024

/s/ Finis Tatum IV
Finis Tatum IV

PLAINTIFF JOHN DOE'S OPPOSITION TO DEFENDANTS' AMENDED MOTION FOR ORDER REQUIRING PLAINTIFF TO COMPLY WITH THE SEVENTH CIRCUIT'S APRIL 26, 2024 MANDATE[1]

Plaintiff John Doe ("Doe") respectfully submits this Opposition to Defendants' Amended Motion for Order Requiring Plaintiff to Comply with the Seventh Circuit's April 26, 2024 Mandate. Doc. 177. Defendants request that the Court enter an order pursuant to Federal Rule of Civil Procedure 41(b) "directing Plaintiff to comply within 14 days, or by a date of this Court's choosing, with the [Seventh Circuit's] Mandate." *Id.* at 1. But Rule 41(b) permits relief only where a plaintiff fails to prosecute or to comply with the Federal Rules of Civil Procedure or a court order, and Defendants have not (and cannot) argue that either condition is present here. So too, Defendants seek relief that is not permitted under Rule 41(b) and fail to cite a single case setting forth the standard for Rule 41(b) motions, let alone a case granting relief similar to what Defendants seek here. Finally, granting Defendants' motion would be inequitable. After being informed on June 17th—more than 40 days ago—that Doe would be preparing a petition for certiorari, Defendants lied in wait and filed their initial motion *the day after* Doe filed and served his timely petition for certiorari on July 25, 2024. *See* Petition for a Writ of Certiorari, *Doe v. Trs. of Ind. Univ.*, No. 24-88 (U.S. July 25, 2024).[2] This Court should reject

[1] Defendants' amended motion states that the Seventh Circuit's mandate issued on April 26, 2024. *See* Doc. 177 at 1. That is incorrect. The court handed down its opinion and final judgment on that date. *See* CA7 Docs. 70, 71. The appellate court's mandate in fact issued on May 20, 2024. *See* CA7 Doc. 72 ("Herewith is the mandate of this court in this appeal, ..."); Doc. 172.

[2] For the Court's convenience, Doe's petition for certiorari has been attached as Exhibit A. It is also available online at https://www.supremecourt.gov/Search.aspx?FileName=/docket/docketfiles/html/public\24-88.html.

Defendants' meritless and transparent attempt to evade Supreme Court review by requiring Doe to unmask or dismiss his complaint before the Supreme Court can consider his petition for certiorari.

BACKGROUND

In July 2020, John Doe filed suit alleging that Defendants violated Title IX and the Due Process Clause in expelling him from medical school. Docs. 1, 8. Contemporaneously, Doe moved to proceed under a pseudonym. Applying a non-exhaustive multifactor test adopted by district courts within this circuit and—at the time—every circuit court in the country, Magistrate Judge Dinsmore found that all relevant factors weighed in favor of allowing Doe pseudonymity and granted the motion. Doc. 13 at 3–5. In granting Doe pseudonym treatment, the court explained that it would "allow Jane Roe to remain anonymous for the same reasons." Doc. 13 at 5 n.2.

In March 2022, this Court granted Defendants' motion for summary judgment and dismissed Doe's Title IX and due process claims. *See* Doc. 154. Doe timely noticed an appeal to the Seventh Circuit, Doc. 156, and the parties completed briefing on Doe's Title IX and due process claims in August 2022, *see* CA7 Doc. 55. In October 2022, a Seventh Circuit panel of Judges Easterbrook, Ripple, and Wood, heard oral argument. The next day, following questions at oral argument regarding pseudonymity, the court entered an order directing the parties to submit supplemental briefs "addressing whether it is appropriate for Plaintiff-Appellant John Doe to proceed anonymously in this case." CA7 Doc. 64.

On April 26, 2024, nearly twenty-two months after holding oral argument, the Seventh Circuit issued its decision in an opinion by Judge Easterbrook. Doc. 172 at 1–10; *Doe v. Trs. of Ind. Univ.,* 101 F.4th 485 (7th Cir. 2024). The court held that the Defendants violated Doe's due process rights by expelling him from the medical school and vacated the judgment below. The court, however, did not stop there. Instead, the Seventh Circuit turned to the issue of pseudonymity, holding that the court "abused [its] discretion when permitting 'John Doe' to conceal his name without finding that he is a minor, is at risk of physical harm, or faces improper retaliation." Doc. 172 at 10. Notably, the court disagreed with the magistrate judge's decision to apply "a multifactor approach . . . that has not been adopted by this circuit," and reasoned that several factors the court considered were not "pertinent to the proper analysis." *Id.* at 8.

In concluding its opinion, the Seventh Circuit gave Doe a Hobson's choice. If Doe reveals his "true name" the suit can continue and the "district court must decide what remedy is appropriate" for the violation of due process. *Id.* at 10. If Doe "elects not to reveal his name," however, "the complaint must be dismissed," and "[t]he district court then would need to decide" whether the dismissal is "with or without prejudice." *Id.* at 10, 12 ("[A] certified copy of the opinion/order of the court and judgment, if any, and any direction as to the costs shall constitute the mandate.").

On June 17, 2024, Doe's counsel contacted counsel for Defendants to inquire regarding a brief stay pending consideration of Doe's forthcoming petition for

certiorari by the Supreme Court. On July 25, 2024, Doe's counsel timely filed a petition for certiorari in the United States Supreme Court seeking review of a single question—"Whether a district court abuses its discretion when, without a finding of risk of physical harm, improper retaliation, or minor status, it permits a plaintiff to proceed under a pseudonym in a suit collaterally attacking a University's Title IX proceedings?" Ex. A at i—and served a copy of the petition on counsel for Defendants that same day. The next day, Defendants filed a motion requesting that the Court enter an order pursuant to Federal Rule of Civil Procedure 41(b) "directing Plaintiff to comply within 14 days, or by a date of this Court's choosing, with the [Seventh Circuit's] Mandate." Doc. 176 at 1. A few days later, Defendants filed an amended motion seeking the same relief. Doc. 177.

ARGUMENT

Defendants' Rule 41(b) motion is fundamentally and fatally flawed. *First*, Defendants have failed to argue, let alone establish, that any condition precedent for Rule 41(b)'s application is present here, and fail to cite any case applying the standard that governs such motions. *Second*, Defendants seek relief that is unavailable under Rule 41(b). *Third*, beyond these legal deficiencies, fairness and equity considerations cut sharply against granting the order Defendants seek until the Supreme Court resolves Doe's petition for a writ of certiorari. At bottom, this Court should reject Defendants' attempt to thwart Supreme Court review of Doe's timely filed petition for certiorari.

1. Defendants have failed to argue—and, in fact, could not argue—that either condition precedent for the application of Rule 41(b) is present here. Rule 41(b) provides that, "[i]f the plaintiff fails to prosecute or to comply with these rules or a court order, a defendant may move to dismiss the action or any claim against it." Fed. R. Civ. P. 41(b). In other words, a defendant may move under Rule 41(b) only where a plaintiff has failed to prosecute or failed to comply with the Federal Rules of Civil Procedure or a court order. Defendants have not argued that Doe has done either here. Nor could they. Doe sought timely review of the Seventh Circuit's decision through a petition for a writ of certiorari—a right guaranteed to him by law. *See* 28 U.S.C. § 1254(1) (permitting "*any* party to any civil or criminal case" to petition the Court for certiorari (emphasis added)); Sup. Ct. R. 13. There is no plausible argument that the timely exercise of this right constitutes a "fail[ure] to prosecute" or a "failure to comply with" a Federal Rule of Civil Procedure or a court order.

Even more, Defendants fail to provide any citation to the standard that governs Rule 41(b) motions. As the Seventh Circuit has held, dismissal under Rule 41(b) should be granted "only . . . 'when there exists a clear record of delay or contumacious conduct or when less drastic sanctions have proven ineffective.'" *Lewis v. Sch. Dist. #70*, 648 F.3d 484, 488 (7th Cir. 2011) (quoting *Roland v. Salem Cont. Carriers, Inc.*, 811 F.2d 1175, 1177 (7th Cir. 1987)). This standard plainly is not satisfied here, and nothing in Defendants' motion could be construed to advance an argument to the contrary. *See Tracie E. v. Saul*, No. 1:20-CV-00307-SEB-MPB,

2021 WL 1135834, at *2 n.3 (S.D. Ind. Mar. 25, 2021) ("Perfunctory and undeveloped arguments as well as arguments unsupported by pertinent authority are waived." (quoting *United States v. Elst*, 579 F.3d 740, 747 (7th Cir. 2009))). Indeed, Defendants do not cite—and Doe has been unable to find—any case where a court found this standard satisfied and granted relief under Rule 41(b) where (as here) the plaintiff is *actively prosecuting* appellate review.[3]

2. Defendants also seek relief that is not permitted under Rule 41(b). Rule 41(b) provides that "a defendant may move to dismiss the action or any claim against it"—no other relief is permitted. Fed. R. Civ. P. 41(b). Defendants do not seek such relief, instead requesting "pursuant to Fed. R. Civ. P. 41(b) . . . entry of an Order directing Plaintiff to comply within 14 days, or by a date of this Court's choosing, with the Mandate issued [by the Seventh Circuit]." Doc. 177 at 1. This deficiency renders Defendants' Rule 41(b) motion fatally defective. *See Seaboard Sur. Co. v. Grupo Mexico, S.A. de C.V.*, No. CV-06-0134-PHX-SMM, 2007 WL 2815202, at *1 (D. Ariz. Sept. 27, 2007) ("Plaintiff is seeking relief that the Court is not permitted to grant under the Federal Rules, and consequently, the motion is denied."); *Alfaro v. Exec. Mailing Serv., Inc.*, No. 95 C 1421, 1996 WL 351186, at *2 (N.D. Ill. June 21, 1996) ("Because the relief they seek is not permitted under that rule [Fed. R. Civ. P. 60(b)], we deny their motion."); *United States v. Cooper*, 949 F.

[3] In all events, as the Seventh Circuit and a chorus of its sister circuits have made clear, "the judge should not dismiss a case [under Rule 41(b)] without due warning"—*i.e.*, "an explicit warning"—"to plaintiff's counsel." *Ball v. City of Chicago*, 2 F.3d 752, 755 (7th Cir. 1993) (collecting cases). In the absence of such a warning, "[i]nactivity alone" does not amount to a "failure to prosecute" unless the delay spans multiple years—and sometimes not even then. *See, e.g.*, *Tome Engenharia E. Transportes, Ltda v. Malki*, 98 F. App'x 518, 520 (7th Cir. 2004) (affirming denial of 41(b) motion despite delay of "forty months" and collecting other illustrative cases, including one "where a case lay dormant for five and a half years").

Supp. 660, 661–62 (N.D. Ill. 1996) (explaining that the requested "relief is simply not permitted by the literal language of [the] Rule," and that the "Court cannot act where no power to do so is conferred by [the] Rules"); *cf.* Fed. R. Civ. P. 7(b)(1)(B) (requiring that motions requesting a court order "state *with particularity* the grounds for seeking the order" (emphasis added)).

3. Beyond these legal grounds, fairness and equity considerations cut against granting the order Defendants seek until the Supreme Court resolves Doe's petition for a writ of certiorari. *Cf.* Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. Pa. L. Rev. 909, 922 (1987) ("The underlying philosophy of, and procedural choices embodied in, the Federal Rules were almost universally drawn from equity rather than common law."). Granting the Defendants' motion would cause Doe irreparable harm—forcing him to forgo his right to petition for certiorari despite having already incurred the costs of drafting and filing that petition—and would countenance opportunism in motion practice. Denying the motion, on the other hand, would not cause Defendants any prejudice.

Forcing Doe to decide whether to reveal his true name before the Supreme Court has a chance to weigh in would cause Doe considerable and irreversible harm. The Seventh Circuit held that the Defendants violated Doe's due process rights in expelling him from the University. So if Doe were required to move forward now, he would have to reveal his true name (and receive the remedy to which he is entitled) or dismiss a meritorious due process claim without a remedy. This Hobson's choice

ensures that, if the Supreme Court is not given the chance to weigh in on the critically important and recurring legal question raised in Doe's petition—the proper test courts should apply in determining whether to grant a motion to proceed under a pseudonym in a suit collaterally attacking Title IX proceedings[4]—Doe will be irreparably harmed. *Cf. Maness v. Meyers*, 419 U.S. 449, 460 (1975) (noting that appellate vindication "cannot always 'unring the bell' once the information has been released").

What is more, Defendants' tactics here ensured that Doe and his counsel would spend considerable time and money preparing his petition for certiorari. Defendants mention in passing, but without providing any specific date, that Doe's counsel reached out to Defendants regarding a stay pending review of Doe's petition by the Supreme Court. Doc. 177 at 2. That conversation occurred on June 17th—more than 40 days ago. Rather than come to this Court then, Defendants chose to hold their two-page motion until *the day after* Doe filed and served his petition for certiorari. The transparent design of Defendants' motion practice is to pressure Doe into abandoning his petition for certiorari and dropping the case. The Court should not countenance such naked sandbagging. *Cf. Union Sugar Refinery v. Mathiesson*, 24 F. Cas. 680 (Clifford, Circuit Justice, C.C.D. Mass. 1864) ("Abuse of legal process in any form has always been frowned upon by courts of justice, whenever and wherever the fact has been made to appear, and the party practising it is never

[4] As one of the country's foremost legal scholars has explained, the answer to when parties in civil cases may proceed pseudonymously is "deeply unsettled." Eugene Volokh, *The Law of Pseudonymous Litigation*, 73 Hastings L.J. 1353, 1353 (2022). Underscoring the importance of the question presented, on July 28, 2024, Professor Volokh emailed Doe's counsel to provide notice under Supreme Court Rule 37 of his intention to file an amicus brief supporting certiorari in this case.

allowed to reap the fruits of his wrongful act."); *accord Krippendorf v. Hyde*, 110 U.S. 276, 283 (1884) (explaining that "the equitable powers of courts of law over their own process to prevent abuse, oppression, and injustice are inherent and equally extensive and efficient").

By contrast, Defendants will suffer no prejudice whatsoever from this Court permitting the Supreme Court to weigh in—which it will likely do in less than two months at the Court's "long" conference on September 30, 2024.[5] Defendants tacitly acknowledge this reality by requesting that the Court enter its requested order to comply "within 14 days, *or by a date of this Court's choosing*." Doc. 177 at 1 (emphasis added). Even more, unlike Doe, Defendants have not been denied or deprived of any right guaranteed to them by law. There is no relief that they are waiting on—only the resolution of the action.

At bottom, any claimed interest in moving this case along "promptly," *id.* at 3, is belied by Defendants' decision to lie in wait with its motion. Defendants waited over two months—or three months, by their count—from the issuance of the Seventh Circuit's mandate to file the present motion. It does Defendants no harm to wait *even less than* that amount of time to let the Supreme Court decide whether to grant the petition. Moreover, a further less-than-two-month pause is a fraction of the time the parties awaited a decision on appeal, where the Seventh Circuit issued its opinion over *twenty-two months* after the close of briefing and almost twenty

[5] *See* Supreme Court, *Case Distribution Schedule – Summer 2024*, at https://www.supremecourt.gov/casedistribution/casedistributionschedule.aspx.

months after the date of oral argument. Doc. 172 at 1–10; CA7 Doc. 63 (case argued in October 2022).

* * *

The Court may rest assured that Doe is just as desirous as Defendants are for a speedy resolution in this case. He is also desirous, however, to have the full and complete remedy that he believes he is *unconditionally* entitled to by law. To that end, Doe respectfully requests that the Court not enter the order sought by Defendants, which would deny Doe the opportunity to have the Supreme Court consider resolving the entrenched, three-way circuit split on the proper test to apply to a motion to proceed pseudonymously in a case collaterally attacking Title IX proceedings.[6]

CONCLUSION

For the foregoing reasons, the Court should deny the Defendants' motion.

Dated: August 2, 2024

Respectfully submitted,

/s/ William R. Levi
William R. Levi
Cody L. Reaves
David H. Kinnaird
SIDLEY AUSTIN LLP
1501 K Street, NW
Washington D.C. 20005
(202) 736-8000
(202) 736-8711 (facsimile)
william.levi@sidley.com

[6] If the Court grants Defendants' motion, Doe reserves the right to seek a stay from this Court—and, if necessary, from the Supreme Court—pending resolution of his petition for certiorari.

cody.reaves@sidley.com
dkinnaird@sidley.com
Counsel for John Doe

CERTIFICATE OF SERVICE

I hereby certify that on August 2, 2024, I caused this document to be filed with the Clerk of Court through CM/ECF, which will serve copies on all registered counsel.

/s/ William R. Levi
William R. Levi

DEFENDANTS' REPLY IN SUPPORT OF MOTION FOR ORDER REQUIRING PLAINTIFF TO COMPLY WITH THE SEVENTH CIRCUIT'S MAY 20, 2024 MANDATE

On April 26, 2024, the Seventh Circuit Court of Appeals spoke clearly and emphatically when it wrote: "If Doe elects to continue with [this] suit, his true name must be disclosed to the public . . . . If Doe elects not to reveal his name, **the complaint must be dismissed**." (Dkt. No. 172 at 11 (emphasis added).) The Seventh Circuit then issued its Mandate on May 20, 2024. *Id.* at 12.

Plaintiff could have sought a stay from the Seventh Circuit under Fed. R. App. P. 41(d)(2) while he pursued his writ for certiorari. But he didn't.

Alternatively, Plaintiff could have sought a stay from a Justice of the Supreme Court of the United States under 28 U.S.C. § 2101(f). But again, he didn't.

Instead, Plaintiff hopes that this Court will do nothing – i.e., will effectively "stay" this case – while he pursues additional appellate relief. But as set forth in Defendants' opening motion, this Court must follow both the spirit and the letter of the Mandate; it does not have the authority to do otherwise. (Dkt. No. 176 at 2) (citing *In re A.G. Moore & Assoc.,* 974 F.3d 836, 839 (7th Cir. 2020) (relief from the Court's mandates must be issued by the Seventh Circuit and not sought in the district court) and *In re Cont'l Ill. Sec. Litig.,* 985 F.2d 867, 869 (7th Cir. 1993)(district court must follow the spirit and letter of the mandate).)

Rather than attempting to justify his request that this Court sit idle, Plaintiff quibbles over whether Defendants cited the correct rule of civil procedure in their opening motion when they referred to Fed. R. Civ. P. 41(b). Specifically, Plaintiff

argues that he is not in violation of a court order. (Dkt. No. 182 at 5-6.) But he is in violation. The Seventh Circuit has issued its Mandate – i.e., an order – stating that "[i]f Doe elects not to reveal his name, the complaint must be dismissed." (Dkt. No. 172 at 11.) Doe has done neither. He is in violation of the Seventh's Circuit's order, and dismissal would therefore be appropriate under Fed. R. Civ. P. 41(b).

In any event, Defendants' opening motion does not yet seek dismissal. Instead, Defendants ask only that this Court enter an order requiring Plaintiff to comply with the has both the power and the obligation to enter the requested relief: "When an appellate court issues a clear and precise mandate . . . the district court is obligated to follow the instruction." *Litman v. Massachusetts Mut. Life Ins. Co.,* 825 F.2d 1506, 1516 (11th Cir. 1987). Lastly, Plaintiff argues that there is something unfair about expecting him to comply with the mandate while his certiorari petition remains pending. But Plaintiff had tools to prevent any such unfairness – he could have sought *en banc* review by the full Seventh Circuit; he could have sought a stay from the Seventh Circuit; and/or he could have sought a stay from a Justice of the Supreme Court. For whatever reason, Plaintiff chose not to avail himself of any of these tools. And there is nothing unfair about expecting Plaintiff to live with the consequences of that decision. To the contrary, it would be unfair to Defendants to permit Plaintiff to effectively obtain a stay to which he is not entitled by continuing to let this case sit.

Because the Plaintiff has not requested a stay from either the Seventh Circuit or the Supreme Court, this Court must proceed in accordance with the Seventh Circuit's instructions. Defendants respectfully request that this Court set a date for Plaintiff to comply with the mandate and either reveal his identity or dismiss the Complaint.

Respectfully submitted,

/s/ Finis Tatum IV
Finis Tatum IV
Wayne C. Turner
Scott E. Murray
Janet Lynn Thompson
HOOVER HULL TURNER LLP
111 Monument Circle, Suite 4400
Indianapolis, IN 46244-0989
Telephone: (317) 822-4400
Facsimile: (317) 822-0234
ftatum@hooverhullturner.com
wturner@hooverhullturner.com
smurray@hooverhullturner.com
jthompson@hooverhullturner.com
Attorneys for Defendants

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was served upon all counsel of record via the Court's Electronic Notification system, on August 7, 2024.

/s/ Finis Tatum IV
Finis Tatum IV

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Everett McKinley Dirksen
United States Courthouse
Room 2722 - 219 S. Dearborn Street
Chicago, Illinois 60604

Office of the Clerk
Phone: (312) 435-5850
www.ca7.uscourts.gov

FINAL JUDGMENT

April 26, 2024

Before
FRANK H. EASTERBROOK, *Circuit Judge*
KENNETH F. RIPPLE, *Circuit Judge*
DIANE P. WOOD, *Circuit Judge*

No. 22-1576	JOHN DOE, Plaintiff - Appellant v. THE TRUSTEES OF INDIANA UNIVERSITY, et al., Defendants - Appellees
Originating Case Information:	
District Court No: 1:20-cv-02006-JRS-MJD Southern District of Indiana, Indianapolis Division District Judge James R. Sweeney II	

The judgment is **VACATED** and the case **REMANDED** to the district court. If Doe elects to continue with the suit, his true name must be disclosed to the public, and the district court must decide what remedy is appropriate for Dean Hess's failure to allow Doe an opportunity to present his position before expelling him. If Doe elects not to reveal his name, the complaint must be dismissed. The district court then would need to decide, as Rule 41(a)(2) provides, whether the dismissal is with or without prejudice. The above is in accordance with the decision of this court entered on this date. The parties should bear their own costs.

Clerk of Court

form name: **c7_FinalJudgment** (form ID: **132**)