No. 22-1525

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

JOHN DOE,
Plaintiff-Appellee,

v.

TOWN OF LISBON; NEW HAMPSHIRE DEPARTMENT OF JUSTICE, *Defendants*,

EUGENE VOLOKH,
Intervenor-Appellant.

ON INTERLOCUTORY APPEAL
FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE
Civil Action No. 1:21-cv-00944-JL

REPLY BRIEF OF INTERVENOR-APPELLANT EUGENE VOLOKH

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I. This Court has jurisdiction over this interlocutory appeal, because orders denying motions to unseal and oppose pseudonymity are collateral orders

A. Orders allowing pseudonymity are "of a piece" with orders denying access to court records

"[A]n intervenor . . . may appeal the District Court's order denying its request for the disclosure of juror names and addresses." *United States v. Chin*, 913 F.3d 251, 256 (1st Cir. 2019); *see* Appellant Brief at 9. "[T]he collateral order doctrine" justifies "finding jurisdiction over an appeal by an intervenor" in such a case. *Id.* & n.3. It follows that intervenor Volokh may appeal the District Court's order denying his request for access to Doe's name, whether that access would consist of unsealing the unredacted state court complaint containing Doe's name, Appellee Brief at 2, or of ordering Doe to proceed without a pseudonym.

"[T]he right of public access to judicial documents is of a piece with . . . the judicial stance against litigants' use of pseudonyms." *Doe v. MIT*, 46 F.4th 61, 68 (1st Cir. 2022). Though "it does not directly produce" that stance, the two are closely related. "Courts have distilled [the] presumption [against pseudonymity] 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." *Id.*

Unsurprisingly, then, this Court in *Doe v. MIT* (*id.* at 68) relied on sealing cases like *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 567 (1980), and *FTC v. Standard Fin. Mgmt. Corp*., 830 F.2d 404, 407 (1st Cir. 1987), in concluding that there is a strong presumption against pseudonymity. This link is strengthened by the fact that, to maintain pseudonymity, courts often need to seal documents, whether that is the unredacted complaint in this case or the likely future documents that would need to be redacted to preserve Doe's continued pseudonymity. "[W]ith pseudonymity comes the threat of additional access restrictions as a case unfolds, such as courtroom closures and the sealing of judicial records, to protect the pseudonymous plaintiff's identity." Amici Brief of Reporters Committee for Freedom of the Press and 15 Media Organizations at 6. And because a complaint "is the cornerstone of every case, the very architecture of the lawsuit," *Bernstein v. Bernstein Litowitz Berger & Grossmann*, 814 F.3d 132, 140 (2d Cir. 2016) (cleaned up), any attempts to redact the complaint must be reviewed carefully, even if some such redactions are at times permitted.

Immediate appealability of decisions to allow a party to proceed pseudonymously also serves the same interest as immediate appealability of sealing decisions. Volokh, like any member of the public, has the right of immediate and contemporaneous access to court files, in order to monitor the functioning of our judicial system. Appellant Brief at 10-14 (laying out the precedent supporting immediate appealability

of right-of-access cases, including under the three-part test set forth in *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949)). Delay in vindicating the right of access constitutes denial of the right.

The same logic applies to the right of access to the names of the litigants. In both situations, the "value of the information decline[s] over time, lending to the interlocutory appeal urgency." *In re Bos. Herald, Inc.*, 321 F.3d 174, 177 (1st Cir. 2003). Both rights are "of a piece with" each other. *Doe v. MIT*, *supra*, 46 F.4th at 68. The right of access to the names of litigants is "distilled" in part from "the right of public access to judicial proceedings and documents." *Id.* Here, too, delays in vindicating the right of access to litigants' names constitutes denial of the right.

Nor does it matter that the District Court's denial of Appellant's motion was "limited 'to pretrial proceedings.'" Appellee Brief at 10. The right of access is a right to immediate and contemporaneous access, not a right of access at some point in the future before the trial takes place.

Thus, *Mirpuri v. ACT Mfg., Inc.*, 212 F.3d 624 (1st Cir. 2000), cited at Appellee Brief at 9, is beside the point, since it did not involve a right of contemporaneous access that cannot be vindicated at a later stage of proceedings. Rather, the relevant precedent is *Chin*, which made clear that "the fact that the motion to unseal . . . was denied 'without prejudice'" is not "of jurisdictional significance, under the collateral

order doctrine," so long as the request is understood as having been for prompt release of the information. *Chin*, 913 F.3d at 255 & n.3; Appellant Brief at 14-16.

To be sure, this Court may eventually conclude that Doe's continued pseudonymity, and the accompanying redaction of the complaint, are acceptable. But this Court should make that decision now, rather than delaying it until this case is tried and appealed after the trial. And if this Court makes the decision now, it will become law of the case (and, if published, precedent); the decision would thus govern the litigation going forward, and would likely make any future appeals unnecessary, obviating the concerns about repeated appeals that Appellee raises, Appellee Brief at 12.

B. The pseudonymity order is separate from the merits

Like orders denying access to the record generally, the order rejecting Volokh's opposition to pseudonymity—and rejecting Volokh's attempt to unseal the unredacted state court complaint—relates to an important question "completely separate" from the merits. The parties' only dispute before the District Court is a claim for damages for alleged violations of due process and defamation. Appellant Brief at 13. Any proceedings under the New Hampshire Exculpatory Evidence Schedule ("EES") statute are now entirely in state court. *Id.* Ruling on this appeal will not require this Court to adjudicate the substantive due process and defamation issues.

To be sure, as discussed *infra* p. 6, Doe might find the underlying federal damages action—and the now-separate state court action—less valuable if it turns out

that he cannot proceed pseudonymously. But that is a common consequence of the strong presumption against pseudonymity, and it does not affect the question whether a grant of such pseudonymity is immediately appealable.

II. Doe's case is not the kind of "exceptional" case that justifies pseudonymity

A. This federal case is separate from the state case challenging Doe's placement on the EES

For reasons discussed at Appellate Brief at 17-27, this is not one of "the (relatively few) exceptional cases in which pseudonymity should be allowed, *Doe v. MIT*, *supra*, 46 F.4th at 70. In particular, this is not a "suit[] that [is] bound up with a prior proceeding made confidential by law," *Doe v. MIT*, *supra*, 46 F.4th at 71, nor is it one "in which the injury litigated against would be incurred as a result of the disclosure of the party's identity," *id.*

As noted above, the only issues remaining in this federal case are damages claims for alleged due process violations and alleged defamation. Doe made the decision to bring a federal due process claim alongside his state-law claims, and presumably he or his lawyers were aware that this would likely bring this case to federal court, where openness is the rule. Appellant Brief at 23-25.

Unlike in *Doe v. MIT*, Doe was thus not "left with no redress other than a resort to federal litigation," *Doe v. MIT*, *supra*, 46 F.4th at 76—he could have proceeded solely under state law (and indeed could have even brought his due process claims

if he were willing to limit himself to state constitutional due process claims). But choosing to bring a federal claim necessarily risks removal to federal court, where the norm is public "oversight of judicial performance," including a presumption against "letting a party hide behind a pseudonym." *Id.* at 68.

Likewise, this Court's suggestion that pseudonymity may be allowed when it "is necessary to forestall a chilling effect on future litigants who may be similarly situated," *id.* at 71, does not apply here. A decision against pseudonymity in this federal case would not "chill[] . . . future litigants" who want to invoke the New Hampshire statutory scheme for challenging placement on the EES, since they could still sue in state court. And to the extent that such a decision may deter some litigants from suing over federal due process violations (the claim that led to this case being removed to federal court), that is just a necessary consequence of the reality that "[l]awsuits in federal courts frequently invade customary notions of privacy and—in the bargain—threaten parties' reputations." *Doe v. MIT*, *supra*, 46 F.4th at 70.

B. The confidentiality of state court EES proceedings should not affect the openness of federal proceedings

Nor can the state's policy of keeping state court EES proceedings confidential be in effect exported to federal court. Doe's case is unlike *R.F.M. v. Nielsen*, 365 F. Supp. 3d 350 (S.D.N.Y. 2019), or *Doe v. Bates*, No. 3:18-cv-1250-SMY-RJD, 2018 WL 4539034 (S.D. Ill. Sept. 21, 2018), which this Court cited favorably in *Doe v.*

MIT, *supra*, 46 F.4th at 71-72: In both of those cases, the state rules were consistent with federal pseudonymity principles.

As the Court noted in *R.F.M.*, that case involved "matters that are highly sensitive and of a personal nature," which was a factor cutting in favor of pseudonymity under the normal federal pseudonymity balancing test adopted by the Second Circuit. *R.F.M.*, 365 F. Supp. 3d at 370. And *R.F.M.* also involved "immigration matters," which "are treated with sensitivity under the Federal Rules of Civil Procedure and the INA." *Id.* at 371 (citing, among other things, Fed. R. Civ. P. 5.2(c)).

Likewise, the Court in *Doe v. Bates* allowed pseudonymity in order to conceal "Plaintiff's juvenile record," "because of his status as a minor at the time of his juvenile adjudication." 2018 WL 4539034, at *1. Federal law authorizes the use of pseudonyms to conceal the identity of juvenile defendants. *See*, *e.g.*, *United States v. Three Juveniles*, 61 F.3d 86, 91-92 (1st Cir. 1995); *United States v. Doe*, 226 F.3d 672, 674 (6th Cir. 2000); *cf.* Fed. R. Civ. P. 5.2(a)(3) (specifically requiring pseudonymization of "the name of an individual known to be a minor").

There is no federal policy authorizing pseudonymity for professionals—and especially public officials—seeking to sue in federal court to prevent or redress injury to their reputations. *See*, *e.g.*, *Coe v. U.S. Dist. Ct. for Dist. of Colo.*, 676 F.2d 411, 417, 418 (10th Cir. 1982) (rejecting pseudonymity for doctor suing to enjoin a state medical board's public hearings about his alleged sexual misconduct); *Doe v. FBI*,

218 F.R.D. 256, 259 (D. Colo. 2003) (rejecting pseudonymity for state judge suing over the FBI's allegedly improper disclosures of information about its criminal investigation of the judge). A state might be able to provide pseudonymity in its own proceedings of that sort, perhaps by analogy to the state public records statutes that limit the disclosure of information in government employees' personnel files (*see, e.g.*, N.H. Stats. § 91-A:5(IV) (exempting from disclosure "personnel . . . files whose disclosure would constitute invasion of privacy"). Indeed, a state might provide for pseudonymity as to many different kinds of claims brought by many different classes of state employees. But any such state employment decision confidentiality policy should not justify concealment in federal litigation, which is governed by the "strong presumption against the use of pseudonyms in civil litigation." *Doe v. MIT*, *supra*, 46 F.4th at 69 (cleaned up). Otherwise, the judicial system would soon become "replete with Does and Roes," which would "invite[] cynicism and undermines public confidence in the courts' work." *Id.* And the risk of cynicism and loss of confidence would be especially great were secrecy in federal court to stem precisely from a state government's decision to shield its own employees and ex-employees from public scrutiny.

C. The District Court did not properly weigh the public's interest in monitoring how courts deal with claims by former public officials against government entities

The public has a "special interest in understanding and supervising a case related to [a police officer's] alleged past misconduct," especially when the defendant is a government entity. Appellant Brief at 26-27. The District Court reasoned that, while "there is a strong interest in holding public officials like police officers accountable, this is not a suit to hold the plaintiff accountable." Appellant Brief Addendum at 31. But the public's right to know the facts about the case is about holding *the judicial system* accountable, not the plaintiff. Appellant Brief at 27. Pseudonymity undermines such accountability: "Anonymizing the parties lowers the odds that journalists, activists, or other interested members of the public would catch wind of . . . mischief" in the judicial process. *Doe v. MIT*, *supra*, 46 F.4th at 68-69. And such accountability is especially important when the judicial system is resolving disputes involving public officials, or people who once were public officials and aspire to be public officials again.

Conclusion

Orders denying motions to unseal and oppose pseudonymity are immediately appealable under the collateral order doctrine. The presumptions against sealing and against pseudonymity are both rooted in the public's right to monitor what the judiciary is doing, and to do so contemporaneously with the judicial proceedings.

On the merits, this is not one of the "exceptional" cases where pseudonymity is allowed. It is rather the sort of damages claim for alleged defamation and violation of due process that is routinely litigated under a plaintiff's real name. And while Doe would understandably prefer to shield the underlying allegations against him from public view, that is true of a vast range of litigants; allowing Doe to litigate pseudonymously would open the door to the very sort of routine pseudonymization that this Court rejected in *Doe v. MIT*. For these reasons, Volokh asks that this Court reverse the District Court's decision denying his motion to unseal and oppose pseudonymity.

Respectfully Submitted,

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