IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT

Case No. B344378

JANE ROE and JOHN DOE,
Plaintiffs / Respondents

v.

JENNA SMITH and MOTHER SMITH and DOES 1-10,
Defendants,
and
FIRST AMENDMENT COALITION,
Movant / Appellant

On Appeal from the Superior Court of Los Angeles County
Case No. 24STCV08102, Honorable Frank M. Tavelman, Judge

APPELLANT'S OPENING BRIEF

EUGENE VOLOKH
Counsel of Record
FIRST AMENDMENT CLINIC
HOOVER INSTITUTION
STANFORD UNIVERSITY
434 Galvez Mall
Stanford, CA 94305
(650) 721-5092
volokh@stanford.edu

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

INTRODUCTION

Plaintiffs are suing to silence Defendants, who have accused one of the plaintiffs of sexual assault. As with other civil cases, this defamation lawsuit must be litigated under the plaintiffs' real names. Indeed, courts across the country have recognized that defamation plaintiffs, especially ones suing over accusation of sexual assault, may not litigate pseudonymously. And this case has no special features that would justify an exception to this rule.

STATEMENT OF THE CASE

Plaintiffs Jane Roe and John Doe sued defendants Jenna Smith and Mother Smith in March 2024 for defamation. (AA 4.) They are seeking over $5 million in damages; an injunction prohibiting Defendants "from publishing any future statements about Plaintiffs (whether online, in another written form, or verbal)"; and an order that Defendants "issue apologies to Plaintiffs." (AA 21.) Plaintiffs at first did not seek leave from the court to proceed pseudonymously. (AA 73.)

In July 2024, First Amendment Coalition (FAC) moved under Cal. R. Ct. 2.550-.551 to oppose Plaintiffs' attempt to seal the true names of the parties, citing Rule 2.551. (AA 24.) In September 2024, the superior court concluded that, to proceed pseudonymously, Plaintiffs "must move for permission to do so in accordance with CRC Rule 2.551(b)": "Plaintiffs are to file such a motion within the next 60 days. Should Plaintiffs neglect to do so, the Court will consider an order requiring them to refile the Complaint

with their true names." (AA 74.) Because of this, the court denied the Coalition's motion "without prejudice," and without "opining whether Plaintiffs are allowed to proceed anonymously." (*Ibid*.)

Plaintiffs did move to proceed pseudonymously (AA 75), and FAC opposed that motion (AA 106). Defendants did not file any papers related to Plaintiffs' request to proceed pseudonymously. They did not support Plaintiffs' request, or oppose FAC's position. Rather, they stated that "It is understandable why the law in some instances states that the defamation Plaintiff, who is an adult at the time of filing this action, should be required to disclose his name." (AA 96.) They likewise cited favorably a precedent in which "the court determined that the defamation plaintiff in the case, the alleged sexual assaulter could not proceed via a pseudonym." (AA 99.)

Defendants filed their own motion to proceed pseudonymously on the grounds that Defendant Jenna Smith alleged that she was a rape victim (AA 93). FAC elected not to oppose Defendants' motion (see AA 162).

On January 2, 2025, the superior court issued a tentative order granting Plaintiffs' motion to proceed pseudonymously and rejecting FAC's objections. (AA 135.) The court heard argument on January 3, and on January 7 issued a final order likewise granting Plaintiffs' motion to proceed pseudonymously and rejecting FAC's objections. (AA 144.) The final order was identical to the tentative

order as to the substance of the pseudonymity question, except for correcting a few typos.

The final order, however, differed from the tentative as to standing. The tentative originally concluded that movants lacked standing because they did not move to intervene. (AA 138.) But in the final order, the court was persuaded that FAC did have standing:

> The Court finds no direct authority exists for Coalition's standing to oppose Plaintiffs' motion, but it finds the inferences drawn from DFEH [Department of Fair Employment and Housing v. Superior Court of Santa Clara County (2022) 82 Cal.App.5th 105] to be persuasive. While a motion to proceed anonymously and a motion to seal the record restrict the public's access to the courts in vastly different degrees, DFEH indicates that the same Constitutional principles apply to both. As such, the Court elects to consider Coalition's opposition on grounds of CRC Rule 2.551(h)(2) as viewed through the lens of DFEH.

(AA 146-47.)

STATEMENT OF APPEALABILITY

A. Decisions rejecting objections to pseudonymity, like sealing decisions, are immediately appealable.

On February 5, 2025, FAC timely filed a notice of appeal (AA 152) from the January 7, 2025 order granting Plaintiff's motion to proceed under pseudonym. "Orders concerning the sealing and unsealing of documents are appealable as collateral orders." (*Overstock.com, Inc. v. Goldman Sachs Group, Inc.* (2014) 231 Cal.App. 4th 471, 481, fn. 2 (*Overstock.com*).) Though "an order concerning

the sealing of court records is not made expressly appealable under Code of Civil Procedure section 904.1, . . . the collateral order doctrine is one exception to the one final judgment rule." (*Mercury Interactive Corp. v. Klein* (2007) 158 Cal.App.4th 60, 76.) An "order directing the unsealing" of a court document "is appealable because it is a 'final determination of a collateral matter.'" (*Id.* at 77, quoting *In re Providian Credit Card Cases* (2002) 96 Cal.App.4th 292, 297, fn. 2.) Because the precedents do not "turn on whether an intervener has sought to seal or unseal records," a "sealing order" is likewise "appealable under the collateral order exception." (*Oiye v. Fox* (2012) 211 Cal.App.4th 1036, 1064.)

This logic applies equally to decisions regarding pseudonymity, which is in essence the sealing of an important piece of information: the parties' names. In *Department of Fair Employment and Housing v. Superior Court of Santa Clara County* (2022) 82 Cal.App.5th 105 (*DFEH*), this Court concluded that California sealing law—including Cal. Rules of Court, rules 2.550, 2.551 and *NBC Subsidiary (KNBC-TV), Inc. v. Superior Court* (1999) 20 Cal.4th 1178, 1221 (*KNBC-TV*), on which those Rules are founded—applies to pseudonymity as well as sealing. (82 Cal.App. 5th at pp. 110-12.) This is in part because, "Much like closing the courtroom or sealing a court record, allowing a party to litigate anonymously impacts the First Amendment public access right." (*Id.*, at p. 111.) It thus follows that an order rejecting FAC's oppo-

sition to pseudonymity, "[m]uch like" an order "sealing a court record" (*ibid.*), is similarly appealable as a "final determination of a collateral matter" (*In re Providian Credit Card Cases*, *supra*, 96 Cal.App.4th at p. 297, fn. 2).

B. FAC, as the aggrieved party, has standing to appeal.

FAC did not move to intervene in the superior court, because "intervention pursuant to Code of Civil Procedure section 397 is not a means by which nonparties can participate in proceedings to seal or unseal court records." (*Overstock.com*, *supra*, 231 Cal.App. 4th at p. 489, agreeing on this point with *Savaglio v. Wal-Mart Stores, Inc.* (2007) 149 Cal.App.4th 588, 602-03.) Instead, "[t]he sealed records rules expressly permit the public, which includes members of the press, to seek the unsealing of court records" (*id.,* at p. 488) without the need to intervene. Because pseudonymity decisions are a form of sealing decision, *see* p. 9, *supra*, intervention would likewise have been inappropriate here.

Instead, FAC properly relied on the logic of Rules 2.550 and 2.551 to justify its participation in the case (and the Superior Court agreed, *see* p. 8, *supra*). Under Rule 2.551(h)(2), either "[a] party" or a "member of the public" may move to unseal a record. And the logic of Rule 2.551(h)(2) suggests that FAC should likewise be able to oppose sealing, just as it would be able to seek unsealing. Indeed, it is better for the sound administration of justice for members of the public to oppose sealing in the first instance—and thus give the court an opportunity to avoid a possible error—rather

than having to wait until the court seals records and then seeking to unseal those records.

And once FAC's arguments under Rules 2.550-.551 were rejected, FAC, as the party aggrieved by the order allowing pseudonymity, became entitled to appeal that loss. "Any party aggrieved may appeal in the cases prescribed in this title." (Cal. Code Civ. Proc., § 902). FAC is "aggrieved" because it has "a legally cognizable interest"—the First Amendment right of access, as recognized in *DFEH*, *supra*—"that is injuriously affected by the decision." (*In re C.P.* (2020) 47 Cal.App.5th 17, 26.)

Thus, for instance, objectors to sealing were allowed to appeal the sealing decision in *Savaglio v. Wal-Mart Stores, Inc.* (2007) 149 Cal.App.4th 588, where a media organization objected to records having been sealed, the trial court granted the plaintiff's motion to seal, and the media organization successfully appealed. (*Id.*, at p. 592-93.). Indeed, such objectors to sealing must be able to appeal the rejection of those objections, so that they can have an opportunity to vindicate their First Amendment rights. And, as noted above, *DFEH* treats pseudonymity as a form of sealing.

STANDARD OF REVIEW

Orders sealing the record are subject to de novo review. "Our review of the decision to deny a request to proceed under a pseudonym involves a constitutional question, and we therefore use our independent judgment to determine whether the trial court's ruling is correct." (*DFEH*, *supra*, 82 Cal.App.5th at 112.) This likewise

stems from the conclusion that "[m]uch like closing the courtroom or sealing a court record, allowing a party to litigate anonymously impacts the First Amendment public access right." (*Id.*, at 111.)

In cases such as this one (see AA 143), where the trial court "did not take testimony" and "there is no credibility of witnesses to determine," but rather "considered the court record that [the appellate court] review[s]," "independent review is the equivalent of de novo review." (*People v. Jackson* (2005) 128 Cal.App.4th 1009, 1021 (*Jackson*) [holding that an order sealing the record is subject to de novo review and noting in dicta that orders unsealing the record are reviewed for abuse of discretion].) Indeed, the court in *Jackson* employed de novo review "because the sealed records rules are grounded in the First Amendment right of access." (*Overstock.com*, *supra*, 231 Cal.App.4th at p. 492 [discussing the *Jackson* reasoning].)

LEGAL ARGUMENT

I. Pseudonymity is highly disfavored, because it interferes with the public's constitutional right of access to court proceedings.

"Outside of cases where anonymity is expressly permitted by statute, litigating by pseudonym should occur 'only in the rarest of circumstances.'" (*DFEH, supra,* 82 Cal.App.5th at pp. 111-12, quoting *KNBC-TV, supra,* 20 Cal.4th at 1226.) This is because an "important constitutional right is implicated when a party is allowed to proceed anonymously: the right of public access to court

proceedings. Among the guarantees of the First Amendment to the United States Constitution is that court proceedings are open and public." (*Id.*, at p. 110.)

And this is true despite the Superior Court's conclusion that "[m]otions to seal restrict public access in far greater ways than motions to proceed anonymously" (AA 149). Rather, "the [public's] right to access court proceedings necessarily includes the right to know the identity of the parties." (*DFEH*, *supra*, at p. 111, citing *KNBC-TV*, *supra*, 20 Cal.4th at p. 1211.) This right to know the true names of litigants derives from "the critical importance of the public's right to access judicial proceedings." (*Ibid.*) "[T]he public has an interest, in *all* civil cases, in observing and assessing the performance of its public judicial system, and that interest strongly supports a general right of access in ordinary civil cases." (*KNBC-TV*, *supra*, 20 Cal.4th at p. 1210.)

In this respect, California law coincides with federal law (see *DFEH*, *supra*, 82 Cal.App.5th at p. 110 [citing federal precedent]), under which the strong presumption is that "[p]laintiffs' use of fictitious names runs afoul of the public's common law right of access to judicial proceedings." (*Does I thru XXIII v. Advanced Textile* (9th Cir. 2000) 214 F.3d 1058, 1067.) Courts may allow parties "to litigate under a pseudonym" only if "extraordinary circumstances support such a request." (*Doe v. Public Citizen* (4th Cir. 2014) 749 F.3d 246, 274 (*Public Citizen*).) "It is the exceptional case in which a plaintiff may proceed under a fictitious name." (*Doe v. Frank*

(11th Cir. 1992) 951 F.2d 320, 323.) "The normal presumption in litigation is that parties must use their real names." (*Doe v. Kamehameha Schools/Bernice Pauahi Bishop Estate* (9th Cir. 2010) 596 F.3d 1036, 1042.)

This presumption serves an important purpose: It preserves the benefits that flow from public supervision of the judiciary. "First, the right [of public access to the courts] protects the public's ability to oversee and monitor the workings of the Judicial Branch. . . . Second, [it] promotes the institutional integrity of the Judicial Branch." (*Public Citizen*, *supra*, 749 F.3d 246, 263, citation omitted.) Litigating under parties' real names "allows the citizenry to monitor the functioning of our courts, thereby [e]nsuring quality, honesty and respect for our legal system." (*Does 1-3 v. Mills* (1st Cir. 2022) 39 F.4th 20, 25, citation omitted.) For instance, the true identity of litigants is essential for the public and the media to assess the parties' credibility; to evaluate whether they are frequent or vexatious litigants; to determine whether they have been involved in previous civil or criminal cases that might have arisen from the same or similar facts; and to identify potential sources of bias in the adjudicative process. (See, e.g., Eugene Volokh, *The Law of Pseudonymous Litigation* (2022) 73 Hastings L.J. 1353, 1370-71.)

Conversely, confidence in the judiciary "'. . . cannot long be maintained where important judicial decisions are made behind closed doors and then announced in conclusive terms to the public,

with the record supporting the court's decision sealed from public view.'" (*Public Citizen*, *supra*, 749 F.3d at p. 263, citation omitted.) The logic of this principle extends to pseudonymous litigation and explains why "proceeding by pseudonym is a rare dispensation." (*Id.*, at p. 273, internal quotations and citation omitted.) "Judges have a responsibility to avoid secrecy in court proceedings because 'secret court proceedings are anathema to a free society.'" (*Doe v. Roe* (D.Colo. July 17, 2023, No. 23-CV-01149-NYW-KLM) 2023 WL 4562543, p. *2 [rejecting pseudonymity in a defamation case brought over allegations of sexual assault], citation omitted.)

II. There is no exception to the right of access for defamation cases, including ones deriving from sexual assault claims.

In particular, plaintiffs may not sue pseudonymously in defamation cases, including when they allege that the defendants have falsely accused them of sexual assault. The Superior Court thus erred in granting pseudonymity on the grounds that alleged sexual assault involves "matters which are both highly sensitive and personal" (AA 148); that "Plaintiffs' fear that future employers, among others, may discover these allegations is well founded" (AA 149); and that, "[i]f Jenna Smith is allowed to assert a privacy interest in her identity as an alleged sexual assault victim, it follows that John Doe should be allowed to assert a privacy interest in his identity as an alleged perpetrator of sexual assault" (*ibid.*).

To begin with, the risk of future employment harms does not justify pseudonymity. "[A]nonymity 'has not been permitted when only the plaintiff's economic or professional concerns are involved.'" (*United States ex rel. Little v. Triumph Gear Sys., Inc.* (10th Cir. 2017) 870 F.3d 1242, 1249, fn. 10, citation omitted.) "That a plaintiff may suffer embarrassment or economic harm is not enough" to warrant a pseudonym. (*Doe v. Megless* (3d Cir. 2011) 654 F.3d 404, 408.) "[W]e have refused to allow plaintiffs to proceed anonymously merely to avoid embarrassment," including when a plaintiff's "asserted interest lies in protecting his reputation." (*Doe v. Trustees of Indiana University* (7th Cir. 2024) 101 F.4th 485, 491, internal quotation marks and citation omitted.)

This principle applies equally to defamation cases: "[A]llegations in defamation cases will very frequently involve statements that, if taken to be true, could embarrass plaintiffs or cause them reputation[al] harm. This does not come close to justifying anonymity." (*Doe v. Bogan* (D.D.C. 2021) 542 F.Supp.3d 19, 23; see also *Doe v. Doe* (4th Cir. 2023) 85 F.4th 206, 214, 217 [rejecting pseudonymity despite allegations that identifying the plaintiff would cause, among other things, damage to "reputation" and "career opportunities"]; *Doe v. Washington Post* (D.D.C. Feb. 26, 2019, No. 1:19-cv-00477-UNA) 2019 WL 2336597, *3 [likewise]; *Roe v. Does 1-11* (E.D.N.Y. Oct. 14, 2020, No. 20-CV-3788-MKB-SJB) 2020 WL 6152174, *2-3 [likewise]; *P.D. & Assocs. v. Richardson* (N.Y.Sup.Ct. 2019) 104 N.Y.S.3d 876, 880 [likewise].)

Indeed, even courts that have allowed pseudonymity in certain situations have expressly held that *reputational* harm does not generally suffice to justify pseudonymity:

> [C]ourts—in balancing the relevant interests—must not lose sight of the big picture. Litigation by pseudonym should occur only in "exceptional cases." Lawsuits in federal courts frequently invade customary notions of privacy and—in the bargain—threaten parties' reputations. The allegations are often serious (at least to the parties) and motivated adversaries do not lack for procedural weapons. Facing the court of public opinion under these conditions is sometimes stressful—but that is the nature of adversarial litigation.

(*Doe v. MIT* (1st Cir. 2022) 46 F.4th 61, 70, citations omitted.) Plaintiffs' argument would do what *Doe v. MIT* expressly rejected: It would transform many ordinary plaintiffs into "exceptional" ones, inverting the judicial system into an institution where "anonymity would be the order of the day . . . [and] Does and Roes would predominate," "invit[ing] cynicism and undermin[ing] public confidence in the courts' work." (*Id.*, at pp. 69-70.)

More broadly, many plaintiffs in many sorts of cases—even beyond defamation cases—would like to be able to sue pseudonymously, in order to protect their reputations against the allegations that had been made against them. Even more defendants would want the same protection: "[A]ny doctor sued for medical malpractice, any lawyer sued for legal malpractice, or any individual sued for sexual molestation can assert that the plaintiff's allegations will cause harm to his reputation, embarrassment and stress

among his family members, and damage to his business as a result of the litigation." (*Doe v. Doe* (Ill.Ct.App. 1996) 668 N.E.2d 1160, 1167.) Yet "it is difficult to see how defendant"—who, similar to Plaintiffs here, sought pseudonymity to conceal what he claimed were false allegations of sexual misconduct with a minor—"has set himself apart from any individual who may be named as a defendant in a civil suit for damages." (*Ibid.*) Allowing pseudonymity in this case, and therefore in other cases that involve comparably damaging accusations, would thus violate the principle that pseudonymity is allowed "'only in the rarest of circumstances.'" (*DFEH*, *supra*, 82 Cal.App.5th at p. 112, quoting *KNBC-TV*, *supra*, 20 Cal.4th at p. 1226).)

And this principle—that defamation cases must be litigated in public—applies equally to defamation cases involving allegations of sexual assault, even though such cases necessarily involve "matters which are both highly sensitive and personal" (AA 148), and even when the defendants (who claim they were victims of sexual assault) are pseudonymous. In such cases, as in other defamation cases, courts conclude that a defamation plaintiff may not summon the power of the courts to "'clear his name' and wield a potential [judgment] against [defendant] but hide under a shield of anonymity if unsuccessful." (*Doe v. Doe*, *supra*, 85 F.4th at p. 215; *Doe v. Roe*, *supra*, 2023 WL 4562543, at p. *3.)

"Plaintiff does not identify any case law where a plaintiff bringing claims of libel or defamation was allowed to proceed using

pseudonyms against the purported victim of the sexual assault." (*DL v. JS* (W.D. Tex. Nov. 21, 2023, No. 1:23-CV-1122-RP) 2023 WL 8102409, at p. *2.) "The Court finds it highly persuasive that Plaintiff fails to and is unable to cite a single case in which a plaintiff, suing for defamation and alleging he was falsely accused of sexual assault, was allowed to proceed anonymously against the victim of the purported assault." (*Roe v. Does 1-11* (E.D.N.Y. Oct. 14, 2020, No. 20-CV-3788-MKB-SJB) 2020 WL 6152174, *6.) When "[t]he only potential harm articulated by Plaintiff in his Motion is that further attention would be brought to the defamatory article, thereby exacerbating the harm to his reputation," "it is well-established that the potential for embarrassment or public humiliation does not, without more, justify a request for anonymity." (*Sebastian v. Doe* (S.D.N.Y., Mar. 19, 2025, No. 25-CV-0911 (JAV)) 2025 WL 856242, *3, cleaned up.)

Indeed, in this particular defamation case, "the critical importance of the public's right to access judicial proceedings" is further heightened. (*DFEH*, *supra*, 82 Cal.App.5th at p. 111.) Besides seeking to impose over $5 million in damages on Defendants (AA 21), Plaintiffs seek an injunction that is extremely unusual and possibly unconstitutional: Plaintiffs seek to prohibit Defendants "from publishing *any* future statements about Plaintiffs," in any "written . . . or verbal" manifestation. (*Ibid.* [emphasis added]; see *Balboa Island Village Inn, Inc. v. Lemen* (2007) 40 Cal.4th 1141, 1162 [holding injunction against defamation must be limited to

"prohibiting defendant from repeating statements about plaintiff that were determined at trial to be defamatory"].) Plaintiffs also seek that the Court require Defendants to "issue apologies to Plaintiffs" (AA 21), a remedy that may constitute an unconstitutional speech compulsion and may exceed the court's equitable powers. (*Kramer v. Thompson* (3d Cir. 1991) 947 F.2d 666, 680-82.)

Such remedies, if approved, would set a dangerous precedent for anyone who publicly raises allegations of sexual misconduct in the future—allegations that, if true, remain constitutionally protected and publicly valuable. When such broad and novel remedies are being considered, it is especially important that the public be able to monitor the judicial process, so as to "promote[] trust in the integrity of the court system, and . . . expose[] abuses of judicial power to public scrutiny" (*DFEH*, *supra*, 82 Cal.App.5th at pp. 110-111).

This concern about public trust is especially significant in defamation suits regarding allegations of sexual assault. If a court is to impose massive liability, a potentially overbroad gag order, and a forced apology on someone levying allegations of sexual assault, doing so under the cloak of secrecy would understandably yield public skepticism about the fairness of the proceedings. And indeed, such defamation lawsuits related to sexual assault allegations are routinely litigated with the alleged assailant being named. (See, e.g., *Dickinson v. Cosby* (2019) 37 Cal.App.5th 1138;

Schwern v. Plunkett (9th Cir. 2017) 845 F.3d 1241; *Blatt v. Pambakian* (C.D.Cal. 2020) 432 F.Supp.3d 1141, *affd. in part, revd. in part* (9th Cir. Sep. 24, 2021, No. 20-55084) 2021 WL 4352329.)

If Plaintiffs' libel claim is valid, then in victory, Roe and Doe would demand an apology from the Smiths (AA 21), presumably alerting the public to the Plaintiffs' true identities. Yet in defeat, Plaintiffs would deny the public access to their identities, information that would have been helpful to allow the public to assess Plaintiffs' credibility, any possible involvement by them in other litigation or other controversies, and potential sources of judicial bias.

III. Plaintiffs are adults and cannot litigate pseudonymously simply because they are suing over things said when they were minors.

When Plaintiffs sued Defendants for libel, seeking broad restrictions on Defendants' future speech and potentially ruinous damages, Plaintiffs were adults. (AA 6.) They were legally competent to decide whether to sue Defendants for their speech, and to weigh the downside of being publicly identified as plaintiffs in this case (a downside that flows from the precedents discussed in Parts I and II). "[B]y submitting a dispute to resolution in court, litigants should anticipate the proceedings will be adjudicated in public." (*DFEH*, *supra*, 82 Cal.App.5th at p. 111.) The special solicitude offered to minor plaintiffs, who lack the ability to make this calculation, thus does not apply here. Indeed, the Superior Court's order

did not rely on the ages of Plaintiffs at the time the libel took place. (AA 144-51.)

No precedents allow adults to sue pseudonymously for defamation simply because they were defamed when they were minors. Nor are Plaintiffs suing for sexual assault, based on sexual acts allegedly committed against them when they were minors, a fact pattern that some courts see as particularly calling for privacy. (See, e.g., *Doe v. St. John's Episcopal Parish Day School, Inc.* (M.D.Fla. 2014) 997 F.Supp.2d 1279, 1290.)

DL v. JS, supra, 2023 WL 8102409, also cuts against defendants' position. The relevant passage discussing the parties' age is:

> Plaintiff also raises the fact that he was a minor at the time of the alleged sexual misconduct. The Fifth Circuit has noted that "[t]he gravity of the danger posed by the threats of retaliation" must be "assessed in the light of the special vulnerability of [ ] child-plaintiffs." Plaintiff only cites case law where anonymity was allowed to plaintiffs who were still minors at the time of the suit and who were challenging governmental authority. These cases are inapplicable to Plaintiff, who has since turned 18, and who was an adult when the alleged libel occurred.

(*Id.*, at p. *2, citations omitted.) Though the passage in *DL v. JS* notes that Plaintiff "was an adult when the alleged libel occurred," it is the age at the time of the *lawsuit*, not of the *libel*, that was apparently primarily significant to the court: The court relied on the policy of protecting "child-plaintiffs," and faulted Plaintiff for "only cit[ing] case law where anonymity was allowed to plaintiffs

who were still *minors at the time of the suit*." (*Ibid.* [emphasis added].)

IV. The narrow exception for situations where pseudonymity is necessary to prevent the injury litigated against does not apply here.

This is also not a case where "the injury litigated against would be incurred as a result of the disclosure of the plaintiff's identity," at least to such an extent that it becomes the sort of "exceptional case[]" where pseudonymously is warranted. (*M.M. v. Zavaras* (10th Cir. 1998) 139 F.3d 798, 803, citation omitted.) Courts have occasionally granted anonymity in such situations—but not in defamation cases. This is likely in part because *virtually all* defamation cases amplify the plaintiff's injury at least to some degree when litigated publicly. Allowing pseudonymity to prevent such harm would reverse the clear presumption against pseudonymity, and make broad pseudonymity the standard. (Perhaps for this reason, the Superior Court's order does not rely on this "injury litigated against" argument.)

Instead, this exception generally applies when "[p]reventing disclosure of [plaintiff's] identity is . . . the *basis* of [the] lawsuit." (*Raiser v. Church of Jesus Christ of Latter-Day Saints* (10th Cir. 2006) 182 F.App'x 810, 812, fn. 2 [emphasis added].) Such suits typically involve a cause of action in which litigants attempt to remove their names from public databases or registries. (See, e.g., *Doe v. Harris* (9th Cir. 2011) 640 F.3d 972, 973, fn. 1 [holding that,

in a lawsuit challenging plaintiff's inclusion on sex offender registry, pseudonymity was justified because "drawing public attention to his status as a sex offender is precisely the consequence that he seeks to avoid by bringing this suit"]; *Doe v. Bonta* (S.D.Cal. Jan. 20, 2022, No. 22-CV-10-LAB (DEB)) 2022 WL 184652, at p. *2 [holding that, in a lawsuit alleging that a statute's disclosure requirements for firearms purchases and license records were unlawful, "[p]rotection of the Plaintiffs' identities is at the core of this case," and thus warranted pseudonymity].)

And indeed, courts reject this "injury litigated against" rationale in libel cases where "[p]reventing disclosure of [plaintiff's] identity is not the basis of [the] lawsuit," but plaintiff instead "seeks monetary compensation for a disclosure that has already occurred." (*Luo v. Wang* (10th Cir. 2023) 71 F.4th 1289, 1300 [libel case quoting and endorsing *Raiser*, *supra*, 182 F.App'x at 812, fn. 2].) The rationale has likewise been rejected for defamation suits that involve sexual assault accusations, where "[the] defamation has already occurred," and "the basis of [plaintiff's] suit is that he is *already* publicly identified with these allegations." (*Doe v. Valencia College* (M.D.Fla. Nov. 2, 2015, No. 6:15-cv-1800-Orl-40DAB) 2015 WL 13739325, at p. *3.)

Here, Plaintiffs' complaint describes their concrete injuries as retrospective ones. (AA 6, 14-18 [using past-tense verbs such as "tarnished," "tainted," "suffered," "banned," "defamed," and "missed out"].) To justify the existence of a *future* and ongoing

harm from Defendants, Plaintiffs claim that Defendants' "attacks have not stopped"—but, when they offer examples, can provide only a vaguely described harm. (AA 15-16, ¶¶ 96-100.) Defendant Smith's continuing posts cited in the Complaint, for instance, appear not to mention Doe or Roe by name, if indeed, she is even mentioning them or the incident at all. (AA 16, ¶¶ 97, 99 [describing, for instance, posts that mention "'the thing' [that] happened" or the "'most honest song yet'"].)

Courts have also commonly noted that defamation plaintiffs' litigating under their real identity is an essential step to *clearing* their good name—which, after all, is a primary purpose of libel suits. (Indeed, here Plaintiffs seek an order that Defendants "issue apologies." (AA 21.)) "[T]o the extent that the [defendant's comments] publicly accused him of being a pedophile, litigating publicly will afford Doe the opportunity to clear his name in the community." (*Doe v. Megless*, *supra*, 654 F.3d at p. 410.) If such a plaintiff prevails, he "will have proven the defamatory nature of Defendant's previous statements and will likely want to publicize his own name." (*Doe v. Roe*, *supra*, 2023 WL 4562543, at p. *3.) "Plaintiff cannot possibly 'clear his name' if he is unwilling to disclose it." (*Doe v. Valencia College*, *supra*, 2015 WL 13739325, at p. *3.) When a plaintiff "brings . . . suit" for "defamation" "to clear his name" through a "publicly state[d]" admission of error on the defendants' part, that "relief is inconsistent with proceeding anonymously." (*Ibid.*)

CONCLUSION

The Fourth Circuit's analysis in *Doe v. Doe*—which likewise involved a libel lawsuit brought over allegations of sexual assault—is on point here. Plaintiffs both there and here are simply "suing . . . private individual[s] for defamation," so "[t]his case is no different than a garden variety defamation case, and it does not present the exceptional circumstances necessary for [plaintiffs] to proceed by pseudonym." (*Doe v. Doe*, *supra*, 85 F.4th at p. 217.) The plaintiffs have not articulated interests that warrant the "extraordinary" step of pseudonymity.

They therefore have no right to conceal key facts (their identities) that would prevent the public from monitoring the functioning and fairness of their public courts. That is especially so when they seek relief (a public apology) that would publicize their allegations against Defendants if they win yet keep private the allegations against themselves if they lose.

If Plaintiffs want to enjoin Defendants' future speech, and punish their past speech, they have to accept what other defamation plaintiffs have to accept: Litigation is a public process. When "'a matter is brought before a court for resolution, it is no longer solely the parties' case, but also the public's case.'" (*Callahan v. United Network for Organ Sharing* (11th Cir. 2021) 17 F.4th 1356, 1365, citation omitted.) If Defendants' speech is to be muzzled by the legal system, the litigation that leads to such muzzling has to be

fully public, so the public can have maximal confidence in the process.

DATED: April 24, 2025

Respectfully Submitted,

By: s/ Eugene Volokh

Eugene Volokh
First Amendment Clinic
Hoover Institution
Stanford University
434 Galvez Mall
Stanford, CA 94305
(650) 721-5092
volokh@stanford.edu
Counsel for Appellants

CERTIFICATE OF COMPLIANCE

I certify that pursuant to Rule 8.204(c)(1) of the California Rules of Court, the enclosed brief is produced using 13-point Century Schoolbook font including footnotes and contains 5,086 words, which is less than the total words permitted by the rules of court. I rely on the word count of Word for Office 365, the computer program used to prepare this brief.

DATED: April 24, 2025

Respectfully Submitted,

By: s/ Eugene Volokh

Eugene Volokh
First Amendment Clinic
Hoover Institution
Stanford University
434 Galvez Mall
Stanford, CA 94305
(650) 721-5092
volokh@stanford.edu
Counsel for Appellants

CERTIFICATE OF SERVICE

STATE OF CALIFORNIA, COUNTY OF SANTA CLARA

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Santa Clara, State of California. My business address is 434 Galvez Mall, Stanford, CA 94305. On April 24, 2025, I served true copies of the Appellant's Opening Brief on the interested parties by e-mail:

S. Michael Kernan & Paul Katrinak
The Kernan Law Firm
9663 Santa Monica Blvd., #450
Beverly Hills, CA 90210
(310) 490-9777
mkernan@kernanlaw.net
katrinaklaw@gmail.com

Mark M. Hathaway & Jenna E. Parker
Hathaway Parker
445 S. Figueroa St., 31st floor
Los Angeles, CA 90071
(213) 529-9000
mark@hathawayparker.com
jenna@hathawayparker.com

Andrew T. Miltenberg & Christine D. Brown
Nesenoff & Miltenberg, LLP
363 Seventh Ave., 5th floor
New York, NY 10001
(212) 736-4500
amiltenberg@nmllplaw.com
cbrown@nmllplaw.com

Regina M. Federico
Nesenoff & Miltenberg, LLP
101 Federal St., 19th floor
Boston, MA 02110
(617) 209-2188
rfederico@nmllplaw.com

Executed on April 24, 2025, in Santa Clara County, California.

s/ Eugene Volokh
Eugene Volokh