UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

JANE DOES 1-6, et al.,

Plaintiffs,

v.

JANET T. MILLS, Governor of the State of Maine, et al.

Defendants.

Civil Action 1:21-cv-00242-JDL

MEDIA INTERVENORS' REPLY IN SUPPORT OF THEIR MOTION TO UNSEAL PLAINTIFFS' IDENTITIES

Because "[p]seudonymous litigation undermines the public's right of access to judicial proceedings," it is warranted only "in exceptional circumstances." *Doe v. Pub. Citizen*, 749 F.3d 246, 274 (4th Cir. 2014) (internal quotation omitted). Plaintiffs seeking to proceed pseudonymously bear the burden of showing a compelling need for confidentiality that "overcomes the constitutional preference for openness in judicial proceedings." *MacInnis v. Cigna Grp. Ins. Co. of Am.*, 379 F. Supp. 2d 89, 90 (D. Mass. 2005). Here, despite having had every opportunity to put forth evidence to justify their purported need for such extraordinary relief, Plaintiffs rely solely on conclusory assertions in an attorney affidavit that are entitled to no evidentiary weight. At no point have any of the more than one thousand Plaintiffs submitted any actual evidence that unsealing their names would subject them to severe reprisal. Their generic arguments for confidentiality, if accepted, would make pseudonymity the rule in cases concerning important constitutional rights, without any requirement that litigants demonstrate the need for such extreme confidentiality in any specific case. Instead, pseudonymity requires

litigants to satisfy a heavy evidentiary burden that Plaintiffs have failed to meet. Accordingly, Media Intervenors' Motion to Unseal Plaintiffs' Identities[1] should be granted.

ARGUMENT

I. Because pseudonymous litigation contravenes the public's rights of access, Plaintiffs bear the burden of justifying this exceptional measure.

Pseudonymous litigation infringes the public's First Amendment and common law rights of access to judicial records and proceedings. *See, e.g.*, *Does I Thru XXIII v. Advanced Textile Corp.*, 214 F.3d 1058, 1067 (9th Cir. 2000); *Courthouse News Serv. v. Glessner*, No. 21-CV-40 (NT), 2021 WL 3024286, at *15 (D. Me. July 16, 2021). It is a rare exception, permitted only if "the plaintiff has a substantial privacy right which outweighs the customary and constitutionally-embedded presumption of openness in judicial proceedings." *MacInnis*, 379 F. Supp. 2d at 90 (internal quotation omitted). To guide that analysis, circuit courts use various multi-factor tests, which include factors such as the severity of the threatened harm to plaintiffs, the reasonableness of their fears, whether their identity has been kept confidential, and the public's interest in openness. *See, e.g.*, *Advanced Textile*, 214 F.3d at 1068–69; *Doe v. Megless*, 654 F.3d 404, 409 (3d Cir. 2011). Regardless of the test applied, however, the Constitution and common law place a heavy thumb on the scale in favor of access. Economic harm, embarrassment, criticism, and vitriol are insufficient; rather, "the plaintiff must show both a fear of severe harm and that the fear is reasonable." *Doe v. Trs. of Dartmouth Coll.*, No. 18-CV-40 (LM), 2018 WL 2048385, at

[1] Plaintiffs contend that the Motion to Unseal exceeds the page limit under Local Rule 7(d). *See* Plaintiffs' Objections to Media Intervenors' Motion to Unseal at 1 n.2, *Does 1-6 v. Mills*, No. 21-CV-242 (JDL) (D. Me. filed Feb. 28, 2022). Plaintiffs are incorrect. Rule 7(d) provides that a "memorandum of law in support of . . . a nondispositive motion shall [not] exceed 10 pages" and a memorandum of law in support of a dispositive motion, such as a motion for summary judgment, "shall [not] exceed 20 pages." L.R. 7(d). The Motion to Unseal is dispositive and this Court's ruling on it is immediately appealable under the collateral order doctrine. *In re Bos. Herald, Inc.*, 321 F.3d 174, 178 (1st Cir. 2003) (noting, *inter alia*, that any order granting or denying access "disposes the . . . claim of an access right with finality"). Because the Motion to Unseal is dispositive, the memorandum of law complies with Rule 7(d). However, if the Court nevertheless concludes the Motion to Unseal exceeds the page limit, Media Intervenors respectfully request leave to file an overlength memorandum of law.

*3 (D.N.H. May 2, 2018); *see also Oklahoma v. Biden*, No. 21-CV-1136 (SPF), 2022 WL 356736, at *4 (W.D. Okla. Feb. 2, 2022).

In all cases, "it is the burden of the party asking for secrecy to make a showing sufficient to overcome the presumption" of access, *Trs. of Dartmouth Coll.*, 2018 WL 2048385, at *3, such as by providing "evidence that psychological damage or violent threats are anticipated if a party's identi[t]y is disclosed." *Doe v. Trs. of Indiana Univ.*, No. 21-CV-2903 (JRS), 2022 WL 36485, at *6 (S.D. Ind. Jan. 3, 2022) (internal quotations and citations omitted). Speculative or conclusory claims are insufficient; when, as here, plaintiffs offer nothing more, the presumption of openness must prevail. *See, e.g.*, *Doe v. City Univ. of N.Y.*, No. 21-CV-9544 (NRB), 2021 WL 5644642, at *3 (S.D.N.Y. Dec. 1, 2021); *Doe v. Vanderbilt Univ.*, No. 20-CV-356 (JSF), 2021 WL 6496833, at *1 (M.D. Tenn. Mar. 11, 2021); *MacInnis*, 379 F. Supp. 2d at 90.

II. Plaintiffs have failed to meet their burden to overcome the "constitutionally-embedded presumption of openness."

Although the Court permitted Plaintiffs to proceed under pseudonyms during the "preliminary stage" of the litigation—reserving the right to "revisit" Plaintiffs' use of pseudonyms "should the case proceed beyond the preliminary-injunction stage"—it did so while noting "the limited record available at th[at] point." *Does 1-6 v. Mills*, No. 21-CV-242 (JDL), 2021 WL 4005985, at *2 (D. Me. Sept. 2, 2021). At no time in the intervening six months have Plaintiffs supplemented that record. To date, not one Plaintiff has offered an affidavit testifying to their alleged fears. The sole affidavit is from Plaintiffs' counsel, Daniel J. Schmid. *See* Declaration of Daniel J. Schmid in Support of Plaintiffs' Motion to Proceed Using Pseudonyms ("Schmid Decl."), Dkt. 21-1, *Does 1-6 v. Mills*, No. 21-CV-242 (JDL) (D. Me. filed Aug. 31, 2021). By contrast, in the few cases Plaintiffs cite where courts permitted COVID-19-related

litigation to proceed pseudonymously, plaintiffs submitted declarations.[2] Moreover, the Schmid Declaration consists almost entirely of inadmissible hearsay, relaying second-hand information about what some of the Plaintiffs told counsel. *Id.* ¶¶ 2–11. Yet attorney affidavits are not entitled to any evidentiary weight unless they are based on first-hand knowledge. *See, e.g.*, *United States v. Lewis*, 40 F.3d 1325, 1332 (1st Cir. 1994); *Albright v. F.D.I.C.*, 21 F.3d 419 (1st Cir. 1994); *Clermont v. Cont'l Cas. Co.*, 778 F. Supp. 2d 133, 143–44 (D. Mass. 2011) (disregarding as hearsay attorney's affidavit stating what plaintiff told attorney); Fed. R. Evid. 602. For this reason alone, the Court should disregard those averments in the Schmid Declaration. But even if the Court were to accept them, they are insufficient to overcome the strong presumption of access. The Schmid Declaration generalizes and speculates about Plaintiffs' collective "fears of retribution, reprisal, and ostracization" and their desire to conceal "personal religious beliefs" and "personal medical decisions." Schmid Decl. ¶¶ 4–6, 9. It offers no particularized facts regarding the specific beliefs or fears held by any individual Plaintiff. This showing falls short.

First, as to retribution, Plaintiffs make no showing that any one of them—let alone all of them—has a reasonable basis for fearing severe harm if named. Unsurprisingly, given the lack of individualized testimony, Plaintiffs do not recount facing a single instance of harm based on their views regarding vaccination. *Cf. NorthShore Univ. HealthSystem*, 2021 WL 5578790, at *10 (noting that plaintiff challenging vaccine mandate "was harassed by an individual to the

[2] *See, e.g.*, *Navy Seal 1 v. Austin*, No. 21-CV-2429 (SDM), 2022 WL 520829, at *1 (M.D. Fla. Feb. 18, 2022); *id.* at Dkts. 60-1–60-2 (declarations); *Air Force Officer v. Austin*, No. 22-CV-9 (TES), 2022 WL 468030, at *2 (M.D. Ga. Feb. 15, 2022); *id.* at Dkt. 47-1 (declaration); *Doe 1 v. NorthShore Univ. HealthSystem*, No. 21-CV-5683 (JFK), 2021 WL 5578790, at *9 (N.D. Ill. Nov. 30, 2021); *id.* at Dkts. 37-1–37-9 (declarations); Declaration of Student A, Dkt. 3-1, *Does 1 through 11 v. Bd. of Regents of Univ. of Colorado*, No. 21-CV-2637 (RM) (D. Colo. filed Sept. 19, 2021).

point where law enforcement [was] required to come and rescue [Plaintiff] from that situation").[3] As numerous courts addressing pseudonymity motions in COVID-19-related cases have held, generalized claims of feared retaliation are simply not enough. *See* Order, Dkt. 53, *Am.'s Frontline Doctors v. Wilcox*, No. 21-CV-1243 (JGB) (C.D. Cal. filed Jan. 7, 2022) (rejecting pseudonymity request where plaintiffs' "vague, conclusory" allegations "do not plausibly allege harm or any future harassment"); Order, Dkt. 49, *Coker v. Austin*, No. 21-CV-1211 (AW) (N.D. Fla. filed Dec. 1, 2021) ("To the extent [plaintiffs] argue that their participation in the litigation will subject to them to retaliation, they simply have not shown this to be so."); *Doe v. Trump*, No. 20-CV-2531 (SJC), 2020 WL 8258737, at *1 (N.D. Ill. July 1, 2020) (finding no "particularized fear of retribution").

Even looking beyond their personal circumstances, "Plaintiffs cite no instances, and none are known to the court, in which persons choosing to go unvaccinated have, for that reason, faced . . . a 'real danger of physical harm'." *Oklahoma*, 2022 WL 356736, at *4. To the contrary, people "routinely speak out in favor of or against vaccine requirements without facing the kinds of retaliation that plaintiffs hypothesize," Order, *Doe v. Raimondo*, No. 21-MC-27 (UNA) (D.D.C. filed Oct. 14, 2021), and use their own names when challenging those requirements in court.[4] Plaintiffs present no evidence that their case merits different treatment.

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[3] The sole plaintiff-specific allegation in the Schmid Declaration is that "Jane Doe 2 . . . has faced termination for the mere act of requesting a religious exemption . . . ." Schmid Decl. ¶ 11. This statement "does not establish (nor does Plaintiff allege) any 'greater threat[s] of retaliation' than any other . . . employee who does not wish to be vaccinated, or any other plaintiff challenging the vaccine mandate." Order, Dkt. 122, *Brnovich v. Biden*, No. 21-CV-1568 (MTL) (D. Ariz. filed Dec. 15, 2021) (quoting *Advanced Textile*, 214 F.3d at 1070–71). If Jane Doe 2's claim is that she fears retaliation at work if named, "Plaintiff's supervisor is most likely already aware that Plaintiff does not wish to get the vaccine, as Plaintiff admits [s]he has already requested a[n] exemption." *Id.*; *see also* Order, *Doe v. Raimondo*, *supra* (finding plaintiffs could not credibly fear retaliation where "plaintiffs' supervisors will likely already know about plaintiffs' vaccine hesitancy" given mandate). Nor have Plaintiffs indicated what Jane Doe 2's job is, or whether she has kept that job given the vaccine mandate, or provided any other basic facts about her.

[4] For COVID-19-related litigation and protests post-dating the Motion to Unseal, see, for example, *Poffenbarger v. Kendall*, No. 22-CV-1 (TMR), 2022 WL 594810 (S.D. Ohio Feb. 28, 2022); *Kozlov v. City of Chicago*, No. 21-CV-6904 (SLE), 2022 WL 602221 (N.D. Ill. Feb. 28, 2022); *Ferretti v. Nova Se. Univ., Inc.*, No. 20-CIV-61431 (RAR),

Although they make much of various quotes from politicians and online commenters, these are classic examples of "'frustration' or 'political commentary' as opposed to 'a true intent to harm' Plaintiff[s]." Order, *Brnovich*, *supra* (quoting *Doe v. Kamehameha Sch./Bernice Pauahi Bishop Est.*, 596 F.3d 1036, 1044 (9th Cir. 2010); *see also Vanderbilt Univ.*, 2021 WL 6496833, at *2. In sum, Plaintiffs present no evidence of reprisal other than generalized concerns and online hyperbole—a showing that is insufficient to meet their burden to set aside the constitutionally required presumption of openness.

Second, the types of religious beliefs found to warrant pseudonymity are those "'shown to have invited an opprobrium analogous to the infamy associated with criminal behavior'"; a far cry from a plaintiff "disclosing that he is Christian in a country where the majority of the population also identifies as Christian." *City Univ. of N.Y.*, 2021 WL 5644642, at *5 (quoting *Doe v. Stegall*, 653 F.2d 180, 186 (5th Cir. 1981)). Plaintiffs have not offered any individualized testimony as to what their religious beliefs and affiliations are, much less how these beliefs justify granting the rare dispensation of pseudonymity. Third, as to medical privacy, even courts granting pseudonymity agree that "[v]accination status simply is not at that level" of the "very private matters" that may overcome the presumption of access. *Air Force Officer*, 2022 WL 468030, at *2 (quoting Order, *Coker*, *supra*); *see also Bd. of Regents of Univ. of Colorado*, 2022 WL 43897, at *3; *Navy Seal 1*, 2022 WL 520829, at *1.

Moreover, pseudonymity is improper if Plaintiffs have publicly shared their anti-vaccine views or role in the litigation. *See, e.g.*, *Trs. of Dartmouth Coll.*, 2018 WL 2048385, at *5

2022 WL 471213 (S.D. Fla. Feb. 16, 2022); *Broecker v. New York City Dep't of Educ.*, No. 21-CV-6387 (KAM), 2022 WL 426113 (E.D.N.Y. Feb. 11, 2022); *Abadi v. City of New York*, No. 21-CV-8071 (PAE), 2022 WL 347632 (S.D.N.Y. Feb. 4, 2022); *Hundreds Rally in Kennebunk for Truck Convoy Protesting COVID Mask, Vaccine Mandates*, WGME (Mar. 2, 2022), https://perma.cc/9LH9-2ZBF; *Group of Maine Truckers to Join National Protest in Washington, DC*, WGME (Mar. 1, 2022), https://perma.cc/6ZQJ-T3UR.

(assessing "'the extent to which the identity of the litigant has been kept confidential'") (quoting *Megless*, 654 F.3d at 409)); *City Univ. of N.Y.*, 2021 WL 5644642, at *5 (asking if plaintiff "has disclosed to others in the relevant community that he is not vaccinated"). The burden is on Plaintiffs to show they have not made such disclosures, whether on social media, at a protest, in conversation, or otherwise. Yet not a single Plaintiff has submitted evidence to that effect, nor does the Schmid Declaration—even overlooking its hearsay problems—offer such attestations.

Permitting Plaintiffs to remain anonymous will require increased secrecy as the case proceeds. To maintain Plaintiffs' anonymity as they pursue their as-applied challenges, for example, undoubtedly will require Plaintiffs to seek additional access restrictions, such as closing the courtroom during their testimony or sealing identifying information in court filings. This case implicates statewide policy, constitutional law, and public health. For such a case to proceed without named parties based on nothing more than a conclusory attorney affidavit would turn the public's presumptive right of access on its head. It is "the exceptional case in which a plaintiff may proceed under a fictitious name." *Doe v. Univ. of Rhode Island*, No. 93-CV-560B (RWL), 1993 WL 667341, at *2 (D.R.I. Dec. 28, 1993) (citation omitted). This is not such a case.

CONCLUSION

For the foregoing reasons, and those in set forth in the Motion to Unseal Plaintiffs' Identities, Media Intervenors respectfully move this Court for an order unsealing Plaintiffs' names and prohibiting Plaintiffs from continuing to proceed under pseudonyms in this matter.

DATED at Portland, Maine this 14th day of March, 2022.

Respectfully submitted,

/s/ Sigmund D. Schutz

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