

**UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

Case No. 17-3113

JOEL DOE, a minor; by and through his Guardians JOHN DOE and JANE DOE;
MARY SMITH; JACK JONES, a minor; by and through his Parents JOHN
JONES and JANE JONES; and MACY ROE,

Appellants

v.

BOYERTOWN AREA SCHOOL DISTRICT; DR. BRETT COOPER, in his
official capacity as Principal*; DR. E. WAYNE FOLEY, in his official capacity as
Assistant Principal*; DAVID KREM, Acting Superintendent*,

Appellees

and

PENNSYLVANIA YOUTH CONGRESS FOUNDATION,
Appellee-Intervenor

**UNCONTESTED MOTION TO ADD PARTIES
AND TO PROCEED PSEUDONYMOUSLY**

APPEAL FROM THE ORDER DATED AUGUST 25TH, 2017 OF THE UNITED
STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF
PENNSYLVANIA AT DOCKET NO. 5:17-CV-01249-EGS DENYING
APPELLANTS' MOTION FOR PRELIMINARY INJUNCTION

Cathy R. Gordon, PA 56728
Jacob Kratt, PA 316920
Litchfield Cavo LLP
420 Fort Duquesne Blvd., Suite 600
Pittsburgh, PA 15222
412-291-8246
412-586-4512 Fax
gordonc@litchfieldcavo.com
kratt@litchfieldcavo.com

Randall L. Wenger, PA 86537
Jeremy L. Samek, PA 205060
Independence Law Center
23 North Front St.
Harrisburg, PA 17101
(717) 657-4990
(717) 545-8107 Fax
rwenger@indlawcenter.org
jsamek@indlawcenter.org

Kellie Fiedorek, DC 1015807 FL
74350
Christiana Holcomb, CA 277427
Alliance Defending Freedom
440 First St. NW, Suite 600
Washington, DC 20001
(202) 393-8690
kfiedorek@ADFlegal.org
cholcomb@ADFlegal.org

Gary S. McCaleb, AZ 018848
Alliance Defending Freedom
15100 N. 90th St.
Scottsdale, AZ 85260
(480) 444-0020
(480) 444-0028 Fax
gmccaleb@ADFlegal.org

**The District Court dismissed the individual Defendants/Appellees from the case on November 7, 2017, pursuant to agreement of the parties.*

Pursuant to Rule 27 of the Federal Rules of Appellate Procedure, Appellants and Chloe Johnson and James Jones, through their parents, move this Court for leave to add Johnson and Jones as Plaintiff-Appellants to this case including the present appeal and to allow the proposed Plaintiff-Appellants to proceed pseudonymously. In support of this motion, Appellants, Johnson, and Jones aver as follows:

I. INTRODUCTION

1. Starting in the 2016-17 school year, the Boyertown Area School District determined which bathrooms and locker rooms the students could use based on a student's gender identity without regard to the student's biological sex. *See* J.A. 982 (Cooper Dep. 26).

2. As a result, Joel Doe, Mary Smith, Jack Jones, and Macy Roe, students at the Boyertown Area High School, brought suit, claiming violation of their right to bodily privacy, sexual harassment, and intrusion upon seclusion.

3. One of these four students graduated last year, and the remaining three graduate this year. *See* J.A. 35, 46, 55, 63 (Op. ¶¶ 105, 169, 227, 278).

4. Additional students desire to join this suit in order to seek the same relief.

5. Caselaw indicates that additional plaintiffs-appellants can be added on appeal.

6. Proposed Plaintiff-Appellants should benefit from the same anonymity protections that the other Plaintiff-Appellants were granted in the District Court.

7. Appellees do not contest the relief sought by this motion.

II. FACTS

a. Claims of Proposed Plaintiff-Appellant, Chloe Johnson.

8. Appellants seek to add, Chloe Johnson as Plaintiff-Appellant to this case.

9. Johnson is an 11th grade student at the Boyertown Area High School. *See* Johnson Decl., attached as Ex. A.

10. The facts pertaining to Johnson are contained in the attached declaration.

11. Johnson seeks the same relief sought by the existing students.

b. Claims of Proposed Plaintiff-Appellant, James Jones.

12. Appellants seek to add, James Jones as Plaintiff-Appellant to this case.

13. Jones is an 8th grade student at the Boyertown Area School District and will be attending the Boyertown Area High School starting in August of 2018. *See* Jones Decl., attached as Ex. B.

14. The facts pertaining to Jones are contained in the attached declaration.

15. Jones seeks the same relief sought by the existing students.

III. ARGUMENT

a. This Court has a well-recognized and long standing authority to add parties on appeal.

16. Rule 21 of the Federal Rules of Civil Procedure provides as follows:

Misjoinder of parties is not a ground for dismissing an action. On motion or on its own, the court may at any time, on just terms, add or drop a party. The court may also sever any claim against a party.

Fed. R. Civ. P. 21.

17. “Although the Federal Rules of Civil Procedure strictly apply only in the district courts, the policies informing Rule 21 may apply equally to the courts of appeals.” *Balgowan v. State of N.J.*, 115 F.3d 214, 215 (3d Cir. 1997) (quoting *Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 832 (1989)).

18. *Newman-Green* held that the Court of Appeals “may do what a district court can do” and would not need to remand to the district court to dismiss a party pursuant to Rule 21. 490 U.S. at 833.

19. In support, the Court cited *Mullaney v. Anderson*, 342 U.S. 415 (1952), in which the Court relied “explicitly upon Rule 21” in allowing a union to add two members as parties. 490 U.S. at 833.

20. The Court recognized that “[r]equiring the plaintiffs to start over in the District Court ‘would entail needless waste and runs counter to effective judicial administration.’” *Id.*

21. In *Mullaney v. Anderson*, 342 U.S. 415, 416 (1952), the Alaska Fishermen’s Union brought an action against the Alaska Tax Commissioner on behalf of its 3,200 nonresidential union members challenging the constitutionality of a fishing license fee that was higher for nonresidential fishermen than for residents. 342 U.S. at 416. On review by the Supreme Court, the Tax Commissioner challenged, for the first time, the union’s standing. *Id.* The union then moved, pursuant to Rule 21, for leave to add two of its members as Plaintiffs. *Id.* at 416-417.

22. The Court granted the motion to add the members and explained its rationale as follows:

To grant the motion merely puts the principal, the real party in interest, in the position of his avowed agent. The addition of these two parties plaintiff can in no wise embarrass the Appellees. Nor would their earlier joinder have in any way affected the course of the litigation. To dismiss the present petition and require the new plaintiffs to start over in the District Court would entail needless waste and runs counter to effective judicial administration.

Id. at 417. (emphasis added).

23. In *Newman-Green, Inc.*, the Supreme Court, reflecting on its decision in *Mullaney*, described this appellate power as one “that long predates the enactment of the Federal Rules.” 490 U.S. at 834.

24. In *Balgowan*, the Third Circuit stated that “Rule 21 and an appellate power that long predates the enactment of the Federal Rules have been relied upon by appellate courts to both dismiss and add parties.” 115 F.3d, at 217 (quotation omitted) (emphasis added).

25. Rule 21 “provides that plaintiffs may be permitted to add parties at any stage of the action, including in the court of appeals.” *Balgowan*, 115 F.3d at 217.

26. “Resort to Rule 21 is appropriate where ‘requiring dismissal after years of litigation would impose unnecessary and wasteful burdens on the parties, judges, and other litigants waiting for judicial attention.’” *Id.* at 215.

27. In *Rogers v. Paul*, 382 U.S. 198 (1965), two students brought suit to desegregate Ft. Smith, Arkansas’ schools. *Id.* Because one student had already graduated and the other was nearing graduation, the Supreme Court itself granted a motion to add two additional students as parties. *Id.*

b. The joinder of Johnson and Jones at an earlier stage would not have affected the course of this litigation.

28. The *Newman-Green* Court, quoting *Mullaney*, 342 U.S. at 417, considered whether the new parties would have “‘affected the course of the litigation’ if it had occurred at some earlier point.” 490 U.S. at 833.

29. The *Rogers* Court relied on the fact that the new parties were “seeking the same relief” for “all the reasons offered by the original party plaintiffs.” 382 U.S. at 198.

30. Johnson and Jones seek the same relief for all the same reasons as the existing Appellants as set forth in their Amended Complaint, filed in the District Court on April 18, 2017.

31. As Johnson and Jones are requesting the same relief as the existing parties and for the same reasons, the presence of Johnson and Jones at an earlier stage would not have changed the nature of the rights at issue, the need for discovery, or any rulings thus far.

32. Appellees will not suffer any prejudice.

33. Accordingly, the earlier addition of Johnson and Jones would not have affected the course of the litigation. *Mullaney*, 342 U.S. at 417.

c. The addition of Johnson and Jones will conserve judicial and party resources.

34. In *Mullaney*, 342 U.S. at 417, new plaintiffs were added after certiorari had been granted because dismissal of the matter due to lack of subject matter jurisdiction would have required the new plaintiffs to start over in the District Court, resulting in “needless waste and runs counter to effective judicial administration.”

35. This appellate power has “been relied upon by appellate courts to both dismiss and add parties in order to maintain *jurisdiction and standing*.” *Balgowan*, 115 F.3d at 217 (citation omitted, emphasis added).

36. All of the current student Appellants will graduate from high school in the spring of 2018.

37. Dismissal of the current appeal on the basis of mootness following Appellants’ graduation would result in Johnson and Jones being forced to reinitiate proceedings in the District Court, resulting in a waste of judicial and party resources.

38. Even in this case, Appellees have substituted parties even after the District Court’s opinion was rendered. *See* September 12, 2017, Order.

39. In order to preserve judicial and party resources, the addition of Johnson and Jones is proper.

d. Johnson and Jones should be granted the same opportunity to proceed under pseudonyms as the other Appellants.

40. On April 18, 2017, Appellants filed Plaintiffs' Unopposed Amended Motion to Proceed Pseudonymously, which was granted on May 24, 2017.

41. The District Court's Order stated, "The plaintiffs and their guardians may proceed in this case using the pseudonyms ascribed to them in the amended complaint."

42. Johnson and Jones are minors. *See* Johnson Decl.; Jones Decl.

43. They wish to proceed under pseudonym and have their parents do so as well so that they and their siblings may avoid embarrassment, harassment and retaliation from peers and members of the public. *See* Johnson Decl.; Jones Decl.

44. They need anonymity because this is politically and emotionally charged and of a highly sensitive subject matter. *See* Johnson Decl.; Jones Decl.

45. The identity of other students in this case, including the student who encountered Mary Smith in a bathroom and the student who encountered Joel Doe and later, Jack Jones in the locker room, were kept confidential from the public.

46. While they seek public anonymity, they are not requesting anonymity from counsel for Appellees. *See* Johnson Decl.; Jones Decl.

47. Courts will allow plaintiffs to proceed anonymously where they can show "both (1) a fear of severe harm, and (2) that the fear of severe harm is reasonable." *Doe v. Megless*, 654 F.3d 404, 408 (3d Cir. 2011) (quoting *Doe v.*

Kamehameha Sch./Bernice Pauahi Bishop Estate, 596 F.3d 1036, 1043 (9th Cir. 2010)).¹

48. Such a showing has been made in cases involving controversial social issues like the one here. *See id.* (citing *Doe v. Borough of Morrisville*, 130 F.R.D. 612, 614 (E.D. Pa. 1990) (stating that motions to proceed with pseudonyms were granted in cases involving “abortion, birth control, transexuality, mental illness, welfare rights of illegitimate children, AIDS, and homosexuality”).

49. Appellants hereby incorporate their Unopposed Amended Motion to Proceed Pseudonymously, attached with the brief in support, as Exhibits C and D.

IV. CONCLUSION

50. Johnson and Jones are requesting the same remedy as existing Plaintiff-Appellants and for the same reasons. The addition of Johnson and Jones at an earlier stage would not have affected the course of the litigation. Appellees will suffer no prejudice as additional discovery would not have been relevant due to Johnson and Jones raising no new factual issues in a controversy that turns on legal rather than factual issues. Finally, the addition of Johnson and Jones as parties will preserve judicial and party resources in that they will not be forced to return to the District Court and start anew should the existing Appellants graduate

¹ Appellees do not agree that Johnson and Jones have a reasonable fear of severe harm, but do not oppose their motion to proceed by pseudonym.

prior to a final ruling in this matter. Accordingly, the addition of Johnson and Jones is proper.

51. Johnson and Jones also request the same ability as existing Appellants so that they and their parents can proceed using pseudonyms. They should be able to benefit from the same protection afforded under the District Court's May 24, 2017, Order.

52. Appellees do not contest the relief sought by this motion.

WHEREFORE, Appellants, Johnson, and Jones respectfully request that this Court grant this motion and permit them to join this case. In addition, Appellants, Johnson, and Jones respectfully request that this Court allow Johnson and Jones and their parents to proceed pseudonymously.

Respectfully submitted, this 29th day of March, 2018.

By: /s/ Randall L. Wenger

CATHY R. GORDON, PA 56728
JACOB KRATT, PA 316920
LITCHFIELD CAVO LLP
420 Fort Duquesne Blvd., Suite 600
Pittsburgh, PA 15222
412-291-8246
gordonc@litchfieldcavo.com
kratt@litchfieldcavo.com

KELLIE FIEDOREK, DC 1015807 FL
74350
CHRISTIANA HOLCOMB, CA 277427
ALLIANCE DEFENDING FREEDOM
440 First St. NW, Suite 600

RANDALL L. WENGER, PA 86537
JEREMY L. SAMEK, PA 205060
INDEPENDENCE LAW CENTER
23 North Front St.
Harrisburg, PA 17101
(717) 657-4990
(717) 545-8107 Fax
rwenger@indlawcenter.org
jsamek@indlawcenter.org

GARY S. MCCALED, AZ 018848
ALLIANCE DEFENDING FREEDOM
15100 N. 90th St.
Scottsdale, AZ 85260

Washington, DC 20001
(202) 393-8690
kfiedorek@ADFlegal.org
cholcomb@ADFlegal.org

(480) 444-0020
gmccaleb@ADFlegal.org

Attorneys for Appellants

CERTIFICATION OF BAR MEMBERSHIP,
ELECTRONIC FILING AND WORD COUNT

I hereby certify that I am a member in good standing of the Bar of the United States Court of Appeals for the Third Circuit.

The electronic copy of the motion has been scanned for viruses using Trend Micro Virus Protection.

I further certify that this motion complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A) because it contains 1,931 words as calculated by the word processing program used in the preparation of this motion, excluding the parts of the motion exempted by Fed. R. App. P. 27(a)(2)(B).

I further certify that this brief complies with the typeface requirements of Fed. R. App. P. (32)(a)(5) and type style requirements of Fed. R. App. P. 32(a)(6) because this motion has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14 point Times New Roman font.

/s/ Randall L. Wenger

RANDALL L. WENGER, PA 86537

INDEPENDENCE LAW CENTER

23 North Front St.

Harrisburg, PA 17101

(717) 657-4990

(717) 545-8107 Fax

rwenger@indlawcenter.org

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on March 29, 2018, the foregoing was filed electronically and served on the other parties via the court's ECF system.

/s/ Randall L. Wenger

Randall L. Wenger

INDEPENDENCE LAW CENTER

23 North Front St.

Harrisburg, PA 17101

rwenger@indlawcenter.org

**UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

Case No. 17-3113

JOEL DOE, a minor; by and through his Guardians JOHN DOE and JANE DOE; MARY SMITH; JACK JONES, a minor; by and through his Parents JOHN JONES and JANE JONES; and MACY ROE,

Appellants

v.

BOYERTOWN AREA SCHOOL DISTRICT; DR. BRETT COOPER, in his official capacity as Principal*; DR. E. WAYNE FOLEY, in his official capacity as Assistant Principal*; DAVID KREM, Acting Superintendent*,

Appellees

and

PENNSYLVANIA YOUTH CONGRESS FOUNDATION,

Appellee-Intervenor

**CHLOE JOHNSON DECLARATION IN SUPPORT OF MOTION TO
ADD PARTIES AND PROCEED PSEUDONYMOUSLY**

I, "Chloe Johnson," and my mother on my behalf, declare the following:

1. I am an 11th grade student at the Boyertown Area High School.
2. The bathrooms and locker rooms at Boyertown Area High School have signs which indicate they are either for girls or for boys.

3. I have always used the locker room and bathrooms designated for girls because my sex is female.
4. I have a reasonable expectation of privacy in the locker rooms and bathrooms of the school from viewing members of the opposite sex or from being viewed by members of the opposite sex.
5. I do not object to students of the same sex using private facilities with me regardless of what gender they identify with, and I have no expectation of privacy from members of the same sex.
6. I will be taking gym class again during my senior year.
7. If a member of the opposite sex is allowed to use the girls' locker room, I will not use the girls' locker room.
8. I will not use the girls' restrooms if members of the opposite sex are using those facilities.
9. I am at risk of someone of the opposite sex sharing the facility with me or being effectively forced out of the bathroom or locker room corresponding to my sex unless the school's policy is enjoined.

10. Were I to share the locker room or restroom with a person of the opposite sex, I would feel violated, humiliated, and embarrassed by the invasion of my privacy.
11. I am a minor.
12. I wish to proceed under a pseudonym and have my mother do so as well so that I and my siblings may avoid embarrassment, harassment and retaliation from peers and members of the public.
13. We need anonymity because this is politically and emotionally charged and of a highly sensitive subject matter.
14. While we seek public anonymity, we are not requesting anonymity from the school or counsel for Appellees.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Executed on February 3, 2018,



(redacted), under the pseudonym Chloe Johnson



(redacted), under the pseudonym Jane Johnson

**UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

Case No. 17-3113

JOEL DOE, a minor; by and through his Guardians JOHN DOE and JANE DOE; MARY SMITH; JACK JONES, a minor; by and through his Parents JOHN JONES and JANE JONES; and MACY ROE,

Appellants

v.

BOYERTOWN AREA SCHOOL DISTRICT; DR. BRETT COOPER, in his official capacity as Principal*; DR. E. WAYNE FOLEY, in his official capacity as Assistant Principal*; DAVID KREM, Acting Superintendent*,

Appellees

and

PENNSYLVANIA YOUTH CONGRESS FOUNDATION,

Appellee-Intervenor

**JAMES JONES DECLARATION IN SUPPORT OF MOTION TO
ADD PARTIES AND PROCEED PSEUDONYMOUSLY**

I, "James Jones," and my parents on my behalf, declare the following:

1. I am an 8th grade student at the Boyertown Area School District and will be attending the Boyertown Area High School starting in August of 2018.
2. The bathrooms and locker rooms at Boyertown Area High School have signs which indicate they are either for girls or for boys.

3. I have always used the locker room and bathrooms designated for boys because my sex is male.

4. I expect privacy in the locker rooms and bathrooms in the high school from viewing members of the opposite sex or from being viewed by members of the opposite sex.

5. I do not object to students of the same sex using private facilities with me regardless of what gender they identify with, and I have no expectation of privacy from members of the same sex no matter what they believe about their gender.

6. I would feel violated, humiliated, and embarrassed if a member of the opposite sex were to share a locker room or restroom with me.

7. The possibility of running into a person of the opposite sex in the restroom is stressful, and I plan to avoid using the boys' restroom in the high school as much as possible. I'm already concerned about what I will do next year.

8. I will be required to take PE in high school, and I will face either the inability to use the boy's locker room or risk the violation, humiliation, and embarrassment of someone of the opposite sex using that facility with me.

9. I already have anxiety, stress, apprehension, distress, and distraction caused by this policy because I will be unable to use the multi-user

privacy facilities as designed to be used, without member of the opposite sex present.

10. I am a minor.

11. I wish to proceed under a pseudonym and have my parents do so as well so that I and my siblings may avoid embarrassment, harassment and retaliation from peers and members of the public.

12. We need anonymity because this is politically and emotionally charged and of a highly sensitive subject matter.

13. While we seek public anonymity, we are not requesting anonymity from the school or counsel for Appellees.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Executed on February 3, 2018,

[REDACTED]

[REDACTED] (redacted), under the pseudonym James Jones

[REDACTED]

[REDACTED] (redacted), under the pseudonym Jane Jones

[REDACTED]

[REDACTED] (redacted), under the pseudonym John Jones

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

JOEL DOE, a minor; by and through his
Guardians JOHN DOE and JANE DOE;
MARY SMITH; JACK JONES, a minor;
by and through his Parents JOHN
JONES and JANE JONES; and MACY
ROE,

Plaintiffs,

vs.

BOYERTOWN AREA SCHOOL
DISTRICT; DR. RICHARD FAIDLEY,
in his official capacity as
Superintendent of the Boyertown Area
School District; DR. BRETT COOPER,
in his official capacity as Principal; and
DR. E. WAYNE FOLEY, in his official
capacity as Assistant Principal.

Defendants.

Case No. 17-1249-EGS

**PLAINTIFFS' UNOPPOSED
AMENDED MOTION TO PROCEED
PSEUDONYMOUSLY**

**PLAINTIFFS' UNOPPOSED AMENDED MOTION TO PROCEED
PSEUDONYMOUSLY**

Plaintiffs hereby respectfully move this Court for an order permitting them and their family members to proceed in this case using the pseudonyms ascribed to them in Plaintiffs' Amended Verified Complaint.

1. Plaintiffs make this request to protect themselves and their family members from publicly revealing their identities so that they and other minor family members may avoid embarrassment, harassment and retaliation from peers and members of the public.

See Dec. ¶¶ 5-7.

2. Counsel for Plaintiffs and Defendants conferred and Defendants do not oppose this Motion.

3. The need for anonymity from the public is particularly acute given the contentious and politically charged nature of this case and the highly sensitive subject matter of the Plaintiffs' testimony.

4. While Plaintiffs seeks public anonymity, they are not requesting anonymity from Defendants.

5. Plaintiffs' motion is supported by Plaintiffs' contemporaneously filed memorandum of law and accompanying declaration.

Respectfully submitted this 18th day of April, 2017.

By: /s/ Randall L. Wenger

CATHY R. GORDON, PA 56728*
JACOB KRATT, PA 316920
LITCHFIELD CAVO LLP
420 Fort Duquesne Blvd., Suite 600
Pittsburgh, PA 15222
412-291-8246
412-586-4512 Fax
gordonc@litchfieldcavo.com
kratt@litchfieldcavo.com

RANDALL L. WENGER, PA 86537
JEREMY L. SAMEK, PA 205060
INDEPENDENCE LAW CENTER
23 North Front St.
Harrisburg, PA 17101
(717) 657-4990
(717) 545-8107 Fax
rwenger@indlawcenter.org
jsamek@indlawcenter.org

JORDAN LORENCE, MN 0125210**
KELLIE FIEDOREK, DC 1015807 **
CHRISTIANA HOLCOMB, CA 277427**
ALLIANCE DEFENDING FREEDOM
440 First St. NW, Suite 600
Washington, DC 20001
(202) 393-8690
jlorence@ADFlegal.org
kfiedorek@ADFlegal.org
cholcomb@ADFlegal.org
Attorneys for Plaintiffs

GARY S. MCCAULEB, AZ 018848***
ALLIANCE DEFENDING FREEDOM
15100 N. 90th St.
Scottsdale, AZ 85260
(480) 444-0020
(480) 444-0028 Fax
gmccaleb@ADFlegal.org

*Application for Admission Forthcoming
** *Pro Hac Vice* Applications Forthcoming
***Admitted *Pro Hac Vice*
Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on Tuesday, April 18, 2017, the foregoing was filed electronically and served on the other parties via the court's ECF system.

The undersigned hereby certifies that counsel for Plaintiffs has also delivered an electronic copy of the foregoing to counsel for Defendants and is sending the same by regular mail to:

David W. Brown, Esq.
LEVIN LEGAL GROUP, P.C.
1301 Masons Mill Business Park
1800 Byberry Road
Huntingdon Valley, PA 19006
dbrown@levinlegalgroup.com

/s/ Jacob Kratt
Jacob Kratt
LITCHFIELD CAVO LLP
420 Fort Duquesne Blvd., Suite 600
Pittsburgh, PA 15222
kratt@litchfieldcavo.com

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

JOEL DOE, a minor; by and through his
Guardians JOHN DOE and JANE DOE;
MARY SMITH; JACK JONES, a minor;
by and through his Parents JOHN
JONES and JANE JONES; and MACY
ROE,

Plaintiffs,

vs.

BOYERTOWN AREA SCHOOL
DISTRICT; DR. RICHARD FAIDLEY,
in his official capacity as
Superintendent of the Boyertown Area
School District; DR. BRETT COOPER,
in his official capacity as Principal; and
DR. E. WAYNE FOLEY, in his official
capacity as Assistant Principal.

Defendants.

Case No. 17-1249-EGS

**PLAINTIFFS' BRIEF IN SUPPORT
OF AMENDED MOTION TO
PROCEED PSEUDONYMOUSLY**

**PLAINTIFFS' BRIEF IN SUPPORT OF
AMENDED MOTION TO PROCEED PSEUDONYMOUSLY**

INTRODUCTION

Plaintiffs seek leave to proceed in this case using the pseudonyms ascribed to them and their family members in Plaintiffs' Amended Verified Complaint. Plaintiffs make this request to protect themselves and their family members from publicly revealing their identities so that they and other minor family members may avoid embarrassment, harassment, and retaliation from peers and the public. *See* Dec. ¶¶ 5-7.

The need for anonymity from the public is particularly acute given the

contentious and politically charged nature of this case and the highly sensitive subject matter of the events experienced by Plaintiffs. Accusations and unkindness towards those seeking to protect bodily privacy are legion. Therefore, Plaintiffs and their family members seek the protection provided by proceeding using the names ascribed to them in Plaintiffs' Amended Verified Complaint. *See id.* ¶¶ 10-13. The Defendants are not burdened by protecting the names from public disclosure since they are not requesting anonymity from Defendants. Plaintiffs only seeks public anonymity.

ARGUMENT

Courts will allow plaintiffs to proceed anonymously where they can show “both (1) a fear of severe harm, and (2) that the fear of severe harm is reasonable.” *Doe v. Megless*, 654 F.3d 404, 408 (3d Cir., 2011) (quoting *Doe v. Kamehameha Sch./Bernice Pauahi Bishop Estate*, 596 F.3d 1036, 1043 (9th Cir. 2010)). Such a showing has been made in cases involving controversial social issues like the one here. *See id.* (citing *Doe v. Borough of Morrisville*, 130 F.R.D. 612, 614 (E.D. Pa. 1990) (stating that motions to proceed with pseudonyms were granted in cases involving “abortion, birth control, transexuality, mental illness, welfare rights of illegitimate children, AIDS, and homosexuality”).

In order to “determine whether a litigant has a reasonable fear of severe harm that outweighs the public's interest in open litigation” courts must balance multiple factors. *Id.* at 409. Courts consistently permit litigants to proceed pseudonymously when the litigants' privacy interests outweigh the public's interest in disclosure of

the litigants' identities and any prejudice to the defendants. *See Sealed Plaintiff v. Sealed Defendant*, 537 F.3d 185, 189 (2d Cir. 2008); *Does I thru XXIII v. Advanced Textile Corp.*, 214 F.3d 1058, 1068 (9th Cir. 2000).¹ District courts are given discretion to perform this analysis by looking at “the circumstances of [a] particular case[],” and considering several guiding factors. *James*, 6 F.3d at 238; *see also Frank*, 951 F.2d at 323.

While each circuit sets forth different factors, there is no “conflict as a result of the different factors” because “each court has agreed that their list of factors is not exhaustive. *Megless*, 654 F.3d at 409. Among the factors most relevant here are 1) Plaintiffs and their minor family members face a substantial risk of harm if their privacy is jeopardized, 2) Plaintiffs' identity has been kept confidential, 3) the public interest is that confidentiality be maintained so that cases like this one are litigated,

¹ *See also Lindsey v. Dayton-Hudson Corp.*, 592 F.2d 1118, 1125 (10th Cir. 1979) (discussing interests of defendants and holding that “identifying a plaintiff only by a pseudonym is . . . to be allowed only where there is an important privacy interest to be recognized”); *c.f. Doe v. Frank*, 951 F.2d 320, 323 (11th Cir. 1992) (explaining “[t]he ultimate test” balances a plaintiff’s “substantial privacy right” against the “presumption of openness in judicial proceedings.”); *Doe v. Stegall*, 653 F.2d 180, 186 (5th Cir. 1981) (same); *James v. Jacobson*, 6 F.3d 233, 238 (4th Cir. 1993) (recognizing “that privacy or confidentiality concerns are sometimes sufficiently critical that parties or witnesses should be allowed” anonymity); *see also Roe v. Wade*, 410 U.S. 113 (1973) (permitting suit to be prosecuted under pseudonym); *R.K.N. v. Holder*, 701 F.3d 535, 537 n.2 (8th Cir. 2012) (granting motion to proceed pseudonymously without analysis where government did not oppose motion and appellant was seeking asylum based on his membership in a political group and being HIV positive); *Doe v. Blue Cross & Blue Shield United of Wisconsin*, 112 F.3d 869, 872 (7th Cir. 1997) (recognizing “exceptions” to “the principle that” [i]dentifying the parties . . . is an important dimension” of public proceedings, including “protect[ing] the privacy of children.”).

4) the issues are largely legal and apply to the community at large, 5) the proceedings are against the government, not persons in their individual capacities, and 6) there is no risk of prejudice to Defendants. Here, the circumstances strongly favor permitting Plaintiffs to proceed pseudonymously because balancing the factors demonstrates that the significant privacy interests of Plaintiffs and the minor family members in a case involving embarrassing facts and highly charged social issues outweigh the public benefit in disclosure. Besides, there is no risk of prejudice to the Defendants because the Plaintiffs will not be anonymous to the Defendants.

I. Plaintiffs and their minor family members face a substantial risk of harm if their privacy is jeopardized.

Courts routinely recognize that litigants have a substantial risk of harm if their privacy is not maintained through use of pseudonyms. Factors that are relevant to Plaintiffs' privacy interests here include the following: 1) Plaintiffs and their family members are minors attending the same school district, 2) the case involves highly charged social issues, and 3) the issues involving locker rooms and restrooms are matters of utmost intimacy.

A. Plaintiffs are particularly vulnerable as child-litigants as are their minor family members attending the same school district.

Courts heavily weigh the privacy interests of children when assessing whether to provide anonymity. *Stegall*, 653 F.2d at 186 (finding “*especially persuasive . . .* the fact that plaintiffs are children” and noting “the special status and vulnerability of the child-litigants.”) (emphasis added). This is appropriate because the Federal Rules of Civil Procedure themselves expressly recognize that unique privacy interests are

at stake in cases involving child-litigants. *See* Fed. R. Civ. P. 5.2(a) (requiring as a “privacy protection” that “a party or nonparty making [an electronic or paper filing with the court] may include only: . . . the minor’s initials.”). The Second Circuit has held that “this rule [requiring only the use of initials] extends to the child’s parents.” *S.F. v. Archer Daniels Midland Co.*, 594 F. App’x 11, 12 n.1 (2d Cir. 2014) (citing with approval *P.M. v. Evans–Brant Cent. Sch. Dist.*, No. 08–CV–168A, 2008 WL 4379490, at *3 (W.D.N.Y. Sept. 22, 2008)); *see also* *Boyce v. Moberly Pub. Sch. Dist.*, No. 2:06CV00044ERW, 2007 WL 1378427, at *1–2 (E.D. Mo. May 7, 2007) (sealing record where “counsel claims that even if the children’s names are substituted with initials, the names would still remain easily identifiable”).

Plaintiffs Joel Doe and Jack Jones are minors with minor family members. Plaintiff Mary Smith was a minor at the time of her incident, and also has minor family members. Plaintiff Macy Roe has minor family members. Plaintiffs fear that use of initials will identify them and their minor family members because Boyertown Area School District is a small community. Plaintiffs fear retaliation from some peers and from some members of the public if their identities are discovered. *See* Dec. ¶ 6. Given the vulnerability of the child-litigants and minor family members and that identification of the Guardians would likely lead to the disclosure of the children’s identities, this Court should approve the use of pseudonyms.²

² Providing Plaintiffs with a pseudonym will benefit all students, and Plaintiffs would not object to any other potential intervening student from proceeding in a similar fashion. Other courts have granted such protections. In *Bd. of Educ. v. Highland Local Sch. Dist.*, No. 2:16-cv-00524 (S.D. Ohio), the court granted an intervening transgender student’s unopposed motion to proceed pseudonymously. *See Order*, ECF No. 28 (Aug. 15, 2016).

B. Access to private facilities and personal privacy from persons of the opposite sex is a hotly debated and politically charged issue.

Litigating a “highly charged subject[]” often provides a justification for permitting litigants to use pseudonyms. *Luckett v. Beaudet*, 21 F. Supp. 2d 1029, 1030 (D. Minn. 1998) (noting that courts have allowed pseudonyms in matters involving abortion or artificial insemination); *Doe v. Poelker*, 515 F.2d 541, 542 n.1 (8th Cir. 1975), *rev’d on other grounds*, 432 U.S. 519 (1977) (“Jane Doe’ is a pseudonym . . . utilized throughout this litigation . . . due to the controversial nature of . . . this action[,]” which involved abortion); *Stegall*, 653 F.2d at 186 (permitting pseudonyms in “suit to vindicate establishment clause rights” in part because of the risk of “serious social ostracization based upon militant religious attitudes.”). *See also Megless*, 654 F.3d at 408 (quoting *Borough of Morrisville*, 130 F.R.D. at 614) (recognizing that pseudonyms were allowed in cases involving “abortion, birth control, transexuality, mental illness, welfare rights of illegitimate children, AIDS, and homosexuality”).

Courts have recognized that “whether identification poses a risk of retaliat[ion]” is a factor that should be considered. *James*, 6 F.3d at 238–39; *Sealed Plaintiff*, 537 F.3d at 190. Plaintiffs and their minor family members here fear harassment and retaliation from some peers and from the public, *see* Dec. ¶ 6, due to the contentious and politically charged nature of this case, which intensifies the need to protect the privacy interests of Plaintiffs, their Guardians, and family members through disguising their identities from public disclosure.

C. Issues involving locker rooms and restrooms are matters of “utmost intimacy.”

Courts similarly give substantial weight to suits that require litigants to “divulge[] personal information of the utmost intimacy.” *S. Methodist Univ. Ass’n of Women Law Students*, 599 F.2d at 713; *Milavetz, Gallop & Milavetz P.A.*, 355 B.R. at 762–63 (D. Minn. 2006); *Lockett*, 21 F. Supp. 2d at 1029. Involvement in this litigation forces Plaintiffs to convey information about their personal hygiene practices (changing and personal restroom needs), their bodily and emotional development, their personal beliefs concerning bodily privacy and sexual modesty, and information about how they were impacted by a policy that allowed opposite-sex students to enter restrooms and locker rooms while they were using them. As to Joel Doe and Jack Jones, it would also require them to convey information about how they were impacted by a policy that allowed an opposite-sex student to see them in their underwear. Clearly this information is of a highly personal nature and deserving of privacy protection.

II. Plaintiffs’ identity has been kept confidential.

Though Plaintiffs have been hurt by Defendants’ policy, Plaintiffs and their Guardians have been careful to keep out of the public eye. Since Plaintiffs and those affected have exercised care to protect their anonymity, the court should maintain that protection. *See Megless*, 654 F.3d at 409 (listing “the extent to which the identity of the litigant has been kept confidential” as a factor in whether to allow a pseudonym).

III. The public interest is in maintaining confidentiality.

Because this is an issue of public concern, confidentiality should be maintained so that cases like this one are encouraged. *See id.* (recognizing that “the magnitude of the public interest in maintaining the confidentiality of the litigant's identity” should be considered in a motion like this one). This case is one of public concern affecting everyone in the school district, and similar issues are being raised nationally. Allowing pseudonyms to be used here will encourage others to raise and vindicate their rights through the courts.

IV. The public interest in disclosure is weak since the issues are largely legal ones affecting everyone in the school district.

This case involves issues common to all persons in the school district because they turn on the legality of the school’s policy as to private facilities like locker rooms and restrooms. The public interest in disclosure is particularly weak given that the overriding issues are largely legal, *Sealed Plaintiff*, 537 F.3d at 189–90, and “the public[] interest” is best served by “enabling [the lawsuit] to go forward” through the use of pseudonyms, *Advanced Textile Corp.*, 214 F.3d at 1073.

The public interest in knowing litigants’ identities is not served where legal issues predominate because “disguising plaintiffs’ identities” does not “obstruct public scrutiny of the important issues in this case.” *Id.* at 1072. The issues here involve constitutional, statutory, and common law rights to bodily privacy, and the public interest is not advanced through public knowledge of the identity of these litigants or their family members.

V. Plaintiffs' claims are asserted against governmental entities not persons in their individual capacities.

Courts give “considerable weight,” *Stegall*, 653 F.2d at 186, to whether the litigants are “challeng[ing] governmental activity.” *Milavetz, Gallop & Milavetz P.A. v. United States*, 355 B.R. 758, 762–63 (D. Minn. 2006); *Luckett*, 21 F. Supp. 2d at 1029. This is because challenges to the “constitutional, statutory or regulatory validity of government activity . . . involve no injury to the Government’s ‘reputation,’” whereas suits against private parties may create reputational injury or economic hardship, such that “[b]asic fairness” will often require “the defendants’ accusers” to use their real names. *S. Methodist Univ. Ass’n of Women Law Students v. Wynne & Jaffe*, 599 F.2d 707, 713 (5th Cir. 1979). Here, Plaintiffs are challenging the propriety of government activity as they seek to vindicate constitutional and statutory rights. Thus this factor weighs substantially in favor of permitting use of pseudonyms. Where the only anonymity requested is from the public, as opposed to Defendants themselves, those factors weigh even more in favor of permitting Plaintiffs to proceed using a pseudonym.

VI. Defendants will not be prejudiced by this Court granting relief.

In this case, there is no risk of prejudice to Defendants by allowing Plaintiffs and their Guardians to proceed pseudonymously. To be clear, Plaintiffs and their Guardians are seeking to protect their identities and those of their minor family members from harassment that may arise from some fellow students and from the public at large, *see* Dec. ¶ 6-7. They are not seeking protection from Defendants.

CONCLUSION

The privacy interests of Plaintiffs, their Guardians and minor family members demonstrably outweigh any countervailing consideration favoring public disclosure of their identities. For all the foregoing reasons, Plaintiffs ask this Court to enter an order permitting Plaintiffs and their Guardians to proceed in this case using the pseudonyms ascribed to them in Plaintiffs' Amended Verified Complaint.

Respectfully submitted this 18th day of April, 2017.

By: /s/ Randall L. Wenger

CATHY R. GORDON, PA 56728*
JACOB KRATT, PA 316920
LITCHFIELD CAVO LLP
420 Fort Duquesne Blvd., Suite 600
Pittsburgh, PA 15222
412-291-8246
412-586-4512 Fax
gordonc@litchfieldcavo.com
kratt@litchfieldcavo.com

JORDAN LORENCE, MN 0125210**
KELLIE FIEDOREK, DC 1015807 **
CHRISTIANA HOLCOMB, CA 277427**
ALLIANCE DEFENDING FREEDOM
440 First St. NW, Suite 600
Washington, DC 20001
(202) 393-8690
jlorence@ADFlegal.org
kfiedorek@ADFlegal.org
cholcomb@ADFlegal.org
Attorneys for Plaintiffs

RANDALL L. WENGER, PA 86537
JEREMY L. SAMEK, PA 205060
INDEPENDENCE LAW CENTER
23 North Front St.
Harrisburg, PA 17101
(717) 657-4990
(717) 545-8107 Fax
rwenger@indlawcenter.org
jsamek@indlawcenter.org

GARY S. MCCALED, AZ 018848***
ALLIANCE DEFENDING FREEDOM
15100 N. 90th St.
Scottsdale, AZ 85260
(480) 444-0020
(480) 444-0028 Fax
gmccaleb@ADFlegal.org

*Application for Admission Forthcoming
** *Pro Hac Vice* Applications Forthcoming
*** Admitted *Pro Hac Vice*

Attorneys for Plaintiffs

