

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION**

RICHARD ROE and VICTOR VOE,

Plaintiffs,

v.

JAMES N. MATTIS, ET AL.,

Defendants.

CIVIL ACTION NO. 1:18-cv-01565

**MEMORANDUM IN SUPPORT OF PLAINTIFF ROE'S AND PLAINTIFF VOE'S
MOTION TO PROCEED UNDER PSEUDONYMS AND FOR ALL OF PLAINTIFF
ROE'S AND PLAINTIFF VOE'S IDENTIFYING INFORMATION TO BE REDACTED
FROM DOCUMENTS FILED IN THE PUBLIC RECORD**

Plaintiffs Richard Roe and Victor Voe are enlisted members of the United States Air Force. They are also individuals living with HIV. Plaintiffs are challenging the Air Force's decision to separate them because of their HIV status. This litigation therefore concerns information of an extremely personal and highly sensitive nature. Identifying Plaintiffs Roe and Voe in the public record as individuals living with HIV also exposes them to a risk of various harms. Additionally, Plaintiffs' identities are known to Defendants, so they will not be prejudiced in defending against Plaintiffs' claims. And because the government does not have a reciprocal interest regarding reputational harm, there is little risk of unfairness to Defendants by allowing Plaintiffs Roe and Voe to proceed anonymously. Accordingly, Plaintiffs Roe and Voe should be allowed to proceed under pseudonyms in this matter.

Although there is a "presumption of openness in judicial proceedings that generally requires disclosure of the identities of the parties to litigation," *Candidate No. 452207 v. CFA Inst.*, 42 F. Supp. 3d 804, 806 (E.D. Va. 2012), courts have the discretion to allow parties to proceed under pseudonyms. *James v. Jacobson*, 6 F.3d 233, 238 (4th Cir. 1993). In deciding whether to

permit a party to proceed under pseudonym, courts generally consider five factors: (1) “whether the justification asserted...is to preserve privacy in a matter of sensitive and highly personal nature;” (2) “whether identification poses a risk of retaliatory physical or mental harm to the requesting party;” (3) “the ages of the persons whose privacy interests are sought to be protected;” (4) “whether the action is against a governmental or private party;” and (5) “the risk of unfairness to the opposing party from allowing an action against it to proceed anonymously.” *Id.* See also *Doe v. The Rector and Visitors of George Mason Univ.*, 179 F. Supp. 3d 583, 592-93 (E.D. Va. 2016) (quoting *Jacobson*, 6 F.3d at 238). Not every factor will be relevant in every case. See *Jacobson*, 6 F.3d at 238 (noting the factors “that have relevance to this case,” implying that not all factors will be relevant in every case); see also *Doe v. Tenenbaum*, 127 F. Supp. 2d 426, 469 (D. Md. 2012) (stating that the enumerated factors from *Jacobson* are not relevant in every case). Here, the relevant factors weigh in favor of permitting Plaintiffs to proceed under pseudonyms.

1. The litigation concerns information of a sensitive and highly personal nature.

First, courts consider “whether the justification asserted by the requesting party is merely to avoid the annoyance and criticism that may attend any litigation or is to preserve privacy in a matter of sensitive and highly personal nature[.]” *Jacobson*, 6 F.3d at 238. With this factor, the Court is concerned with preventing the disclosure of information that “can invite harassment and ridicule.” *The Rector and Visitors of George Mason Univ.*, 179 F. Supp. 3d at 593 (allowing a plaintiff to proceed by pseudonym because of the “significant social stigma” associated with his conduct). The “personal intimate information justifying anonymity for litigating parties have typically involved such intimate personal matters as birth control, abortion, [and] homosexuality...” *Candidate No. 452207*, 42 F. Supp. 2d at 808-09 (quoting *Doe v. Merten*, 219 F.R.D. 387, 392 (E.D. Va. 2004)).

This Court has already recognized that an HIV-positive diagnosis is personal intimate information, that plaintiffs living with HIV suffer from significant social stigma, and that they therefore have “a substantial privacy interest in being protected from the general public knowing.” *Patient v. Corbin*, 37 F. Supp. 2d 433, 434 (E.D. Va. 1998) (allowing plaintiff to proceed under pseudonym to prevent the public from discovering that her husband was living with HIV). Such plaintiffs should be permitted to proceed under pseudonym because public disclosure of their identity “could subject them to public vilification.” *Id.*

Other courts have similarly found that the social stigma associated with HIV is a compelling reason to allow plaintiffs living with HIV to proceed under pseudonym. *See Jones v. OSS Orthopaedic Hosp.*, No. 1:16- cv-1258, 2016 WL 3683422, at *1 (M.D. Pa. July 12, 2016) (allowing plaintiff living with HIV to pursue litigation under a pseudonym, and noting that “courts have frequently found that the social stigma...associated with an HIV-positive diagnosis is a factor which strongly weighs in favor of allowing a litigant to proceed under a pseudonym.”); *Doe v. Griffon Mgmt. LLC*, No. 14-2626, 2014 WL 7040390, at *2 (E.D. La. Dec. 11, 2014) (finding that plaintiff has an interest in maintaining the confidentiality of her HIV-positive status and could therefore proceed under pseudonym); *S.G. v. Mears Transp. Grp., Inc.*, No. 14-917, 2014 WL 4637139, at *1 (M.D. Fla. Aug. 12, 2014) (granting a motion to proceed under pseudonym because “Plaintiff’s HIV-related privacy interests outweigh the need for disclosure.”); *Roe v. City of New York*, 151 F. Supp. 2d 495, 510 (S.D.N.Y. 2001) (allowing a plaintiff to proceed anonymously because “HIV-positive plaintiffs are in a highly sensitive position.”); and *W.G.A. v. Priority Pharmacy, Inc.*, 184 F.R.D. 616, 617 (E.D. Mo. 1999) (allowing plaintiff to proceed under pseudonym because plaintiff’s HIV status is a “personal matter of the utmost intimacy.”).

Although great progress has been made in the treatment and prevention of HIV, such that those living with HIV can live normal lives,¹ the social stigma associated with an HIV-positive diagnosis remains. As recently as 2012, in a national survey of young people aged 15 to 24, one-third said that there is “a lot” of stigma around HIV/AIDS in the U.S., and 51% percent said that there is at least “some” stigma.² When pressed on their own personal feelings, 42% said they would not be comfortable having a close friend who is HIV-positive; 46% said they would not be comfortable working with someone who is HIV-positive; 62% percent said they would not be comfortable having a roommate who is HIV-positive; and 68% percent said they would not be comfortable having food prepared by someone who is HIV-positive.³ Given the significant social stigma still associated with HIV, Plaintiffs in this case clearly have a substantial privacy interest, and should, based on this factor alone, be permitted to proceed under pseudonyms.

2. Identification of Plaintiffs poses a risk of retaliatory physical or mental harm.

Courts also consider whether identification of a plaintiff poses a risk of retaliatory physical or mental harm. *Jacobson*, 6 F.3d at 238. Courts have recognized that psychological harm can stem from the widespread disclosure of sensitive information, especially “in today’s Internet age,” where such information may be “made permanently available to anyone with Internet access.” *E.E.O.C. v. Spoa, LLC*, No. CCB-13-1615, 2013 WL 5634337, at *3 (D. Md. Oct. 15, 2013). If Plaintiffs Roe and Voe are forced to reveal their identities in order to proceed with this litigation, a quick internet search will forever reveal their status as individuals living with HIV. Thus,

¹ See Centers for Disease Control and Prevention, *Treatment as Prevention*, www.cdc.gov/hiv/risk/art/ (last updated May 7, 2018).

² Kaiser Family Foundation, NATIONAL SURVEY OF TEENS AND YOUNG ADULTS ON HIV/AIDS 2 (2012), <https://kaiserfamilyfoundation.files.wordpress.com/2013/01/8386-f.pdf>.

³ *Id.*

Plaintiffs may be permanently and indefinitely subjected to the stigma associated with HIV-positive status, including harassment and alienation from unsupportive peers, colleagues at work, and from the public at large. Such long lasting and inescapable stigma and potential discrimination certainly poses a risk of psychological harm. Accordingly, this factor weighs in favor of Plaintiffs being permitted to proceed under pseudonyms.

3. The action is against governmental parties.

In general, courts “are less likely to grant a plaintiff permission to proceed anonymously when the plaintiff sues a private individual than when the action is against a governmental entity seeking to have a law or regulation declared invalid.” *Doe v. Merten*, 219 F.R.D. at 394. Although an action against a private party poses a risk of damage to the defendant’s reputation and wellbeing, challenging “government activity generally involves no injury to the Government’s reputation.” *Id.* Thus, although there is, as a matter of fairness, a strong interest in open judicial proceedings where a plaintiff is suing a private defendant, there is no such interest where the defendant is the government. *E.W. v. N.Y. Blood Ctr.*, 213 F.R.D. 108, 111 (E.D.N.Y. 2003) (“[T]he government is viewed as having a less significant interest in protecting its reputation from damaging allegations than the ordinary individual defendant.”). Here, Plaintiffs are challenging government regulations and activity. This factor therefore weighs in favor of allowing Plaintiffs to proceed under pseudonyms.

4. There is no risk of unfairness to Defendants.

Allowing a plaintiff to proceed under a pseudonym creates a risk of unfairness to the defendant where doing so would impact the defendant’s ability to defend against the plaintiff’s allegations. *The Rector and Visitors of George Mason Univ.*, 179 F. Supp. 3d at 594 (finding that there was no unfairness to defendants because they “failed to show convincingly any prejudice to

their ability to defend themselves.”). But where a plaintiff’s identity is known to the defendant, and the motion to proceed pseudonymously is made for the purpose of concealing the plaintiff’s identity only from the *public*, “there is little risk of unfairness” to the defendant. *Sandberg v. Vincent*, 319 F. Supp. 3d 422, 430 (D.D.C. 2018). *See also Doe v. Virginia Polytechnic Inst. and State Univ.*, No. 7:18-cv-170, 2018 WL 5929647, *4 (W.D. Va. Nov. 13, 2018) (agreeing that there was no risk of unfairness to defendants because they were aware of plaintiffs’ true identities); *Doe v. Alger*, 317 F.R.D. 37, 41 (W.D. Va. 2016) (finding that there was no unfairness to defendants because they were already fully aware of the plaintiff’s identity); *Spoa*, 2013 WL 5634337, at *3 (ruling that allowing plaintiff to proceed under pseudonym will not prejudice the defendant because defendant knows who the plaintiff is). Here, Plaintiffs Roe and Voe will reveal their true names to Defendants—they merely request to proceed under pseudonym in public filings. Furthermore, the Air Force is in possession of and has access to all records related to Plaintiffs’ claims. Thus, concealing Plaintiffs’ identities from the public does not cause any unfairness to the Defendants in this suit. *See, e.g., Doe v. The New Ritz, Inc.*, No. RBD-14-2367, 2016 WL 454940, at *2 (D. Md. Feb. 5, 2016) (allowing plaintiff to proceed under pseudonym in any public document submitted to the court, but requiring plaintiff to reveal her true name to defendants so that they could fully investigate her claims). Accordingly, this factor also weighs in favor of allowing Plaintiffs Roe and Voe to proceed under pseudonyms.

5. Plaintiffs’ ages do not weigh against allowing them to proceed under pseudonym.

Courts generally take a plaintiff’s age into consideration when a minor plaintiff is requesting anonymity, and grant anonymity to prevent a violation of the privacy rights of children. *Candidate No. 452207*, 42 F. Supp. 3d at 809. But a plaintiff’s status as a legal adult, while not weighing in favor of granting anonymity, also does not weigh *against* it. Although adults may not

have a blanket privacy right, they may nevertheless have a privacy right in specific circumstances due to the sensitive and personal nature of the subject matter of the litigation, or the risk of stigmatization, harassment, or harm. Plaintiffs' ages are therefore not relevant to this determination.

6. The public's interest in open judicial proceedings does not outweigh any of these considerations.

Finally, the Fourth Circuit has made clear that in evaluating the *Jacobson* factors, the court must give "explicit consideration to the public's interest in open judicial proceedings." *Doe v. Public Citizen*, 749 F.3d 246, 274 (4th Cir. 2014). Here, although the public may have a general interest in litigation against the United States Department of Defense and Air Force, the public does *not* have a strong interest in the *identities* of the particular plaintiffs. The resolution of the constitutional and legal issues in this case—whether the Air Force violates the Equal Protection provisions of the United States Constitution or the Administrative Procedure Act by discharging physically and medically capable individuals living with HIV—will be open to the public. Court orders and opinions regarding the merits of this case will be available for public inspection. All Plaintiffs Roe and Voe ask is that they not be subjected to the social stigma, harassment, and alienation that often accompanies living openly and publicly as a person living with HIV.

For the foregoing reasons, Plaintiffs Roe and Voe respectfully request that this Court grant their Motion To Proceed Under Pseudonyms and for All of Plaintiff Roe's and Plaintiff Voe's Identifying Information To Be Redacted from Documents Filed on the Public Record.

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Respectfully submitted,

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**Pro hac vice* application forthcoming

**Application for admission to the Eastern
District of Virginia forthcoming