

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION**

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NICHOLAS K. MERIWETHER,	:
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Plaintiff,	:
	:
vs.	:
	:
THE TRUSTEES OF SHAWNEE STATE	:
UNIVERSITY, ET AL.	:
	:
Defendants.	:
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**REPLY MEMORANDUM IN SUPPORT OF
JANE DOE’S MOTION TO PROCEED PSEUDONYMOUSLY AND
TO REDACT REFERENCED TO HER NAME IN THE COMPLAINT AND EXHIBITS**

Jane Doe is a transgender woman who has taken care to keep her transgender status private. When Plaintiff referred to her using male pronouns during class, she waited until after class to express her concerns to him in a private conversation. After Plaintiff informed Ms. Doe that he would not use female pronouns, she expressed her concern in private conversations with Shawnee officials, including its Title IX coordinator. At no time did she publicize either her own status as transgender or Plaintiff’s conduct.

Plaintiff responded by a filing a complaint “outing” her as a transgender woman and publicizing her Title IX complaint, even though Plaintiff could have referred to her using a pseudonym without harming his interests in any way. Not only was publishing Ms. Doe’s name unnecessary, but it violated Shawnee’s confidentiality rules—as Plaintiff apparently does not dispute.

Now, in response to Ms. Doe’s motion to proceed pseudonymously, Plaintiff doubles down. Not only does Plaintiff continue to use Ms. Doe’s actual name—in an apparently deliberate

effort to sap the effect of any future court order permitting her to proceed pseudonymously—but he further violates Ms. Doe’s privacy by filing a public declaration opining that her appearance, in his view, is insufficiently feminine for her privacy as a transgender woman to be respected. Equally troubling, he contends that Ms. Doe’s confidential Title IX complaint somehow authorizes him to retaliate against her by exposing her identity and transgender status publicly. Finally, he offers to respect Ms. Doe’s privacy and use a pseudonym so long as she withdraws her motion to intervene—thus creating the Catch-22 that if Ms. Doe intervenes to protect her right to privacy, she loses it.

The Court should reject Plaintiff’s meritless arguments and enter an order permitting Ms. Doe to proceed pseudonymously and removing documents revealing her name from the public docket. Plaintiff should be directed to refile those documents in a manner that does not disclose Ms. Doe’s identity.

Given Plaintiff’s fast-approaching deadline for responding to Shawnee’s motion to dismiss, Ms. Doe also requests that this Court issue an interim order requiring the parties to either refer to Ms. Doe by her requested pseudonym or file their pleadings under seal until this Court is able to rule on Ms. Doe’s motion to proceed under a pseudonym.

I. Plaintiff’s Continued Invocation of Ms. Doe’s Name in His Response Brief Is Improper, and the Brief Should Be Removed from the Docket and Redacted.

Jane Doe filed a motion requesting that she be referred to under a pseudonym because she wishes to keep her transgender status private. In his response brief and declaration, both of which were publicly filed, Plaintiff used Ms. Doe’s real name 80 times. This was both unnecessary and improper. As Plaintiff is undoubtedly aware, the more public filings that contain Ms. Doe’s real name, the more public exposure Ms. Doe will get—even if the Court does ultimately grant Ms. Doe’s motion to proceed pseudonymously. Out of respect for Ms. Doe and the Court’s orderly

processes, Plaintiff should have refrained from using Ms. Doe's real name until the Court has the opportunity to rule on Ms. Doe's motion to proceed pseudonymously. Instead, he has deliberately undermined the effectiveness of an order granting Ms. Doe's motion before the Court has even had a chance to rule, by unnecessarily placing Ms. Doe's name in the public record as often as possible before this motion is decided.¹

If the Court grants Ms. Doe's motion, it should also remove Plaintiff's response brief and supporting declaration from the public record and direct Plaintiff to use pseudonyms, as he should have done in the first place.

II. Ms. Doe May Proceed Pseudonymously Because Revealing Her Name Would Require Her to Disclose Information of the Utmost Intimacy.

A court may permit a litigant to proceed pseudonymously if revealing her real name would compel her to "disclose information of the utmost intimacy." *Doe v. Porter*, 370 F.3d 558, 560 (6th Cir. 2004). Here, Ms. Doe seeks to proceed pseudonymously to protect the privacy of her transgender status. Several courts have held that this is a sufficient basis to litigate under a pseudonym. *See, e.g., Doe v. City of Detroit*, No. 18-cv-11295, 2018 WL 3434345, at *2 (E.D. Mich. July 17, 2018) ("[T]he fact that she previously presented as male . . . qualifies as information 'of the utmost intimacy.'"); *Bd. of Educ. of the Highland Local Sch. Dist. v. U.S. Dep't of Educ.*, No. 2:16-CV-524, 2016 WL 4269080 (S.D. Ohio Aug. 15, 2016) ("[M]any courts have found Jane's circumstances to be the kind in which a plaintiff would be required to disclose information 'of the utmost intimacy' throughout the course of litigation."); Mot. at 5 n.1, Doc. 19, PageID 532 (collecting additional cases).

¹ As explained in Ms. Doe's motion Plaintiff's unilateral repetition of Ms. Doe's name in public filings does not moot Ms. Doe's motion. Mot. at 10-11, Doc 19, PageID 537-38. Plaintiff does not dispute this point.

Plaintiff does not cite a single case in which a court has ever rejected a transgender litigant's request to proceed pseudonymously, and Ms. Doe is aware of none. The Court should follow the unanimous weight of authority and permit Ms. Doe to proceed pseudonymously.

Protecting Ms. Doe's privacy is particularly warranted because of the psychological distress she has experienced by being publicly identified and thus "outed" as a transgender woman. Ms. Doe's declaration explains that she never consented to being "outed," that being "outed" caused her significant emotional distress, and that she is concerned "about the potential that future employers, future landlords, acquaintances, and others may know private, intimate details about my life that I would not have otherwise disclosed." *See* Doe Decl. ¶ 9, Doc. 19-1, PageID 543-44. As Ms. Doe explains, proceeding under a pseudonym "will help reduce my psychological distress and worries about being discriminated against or mistreated for being transgender so that I can continue focusing on my academics and social life, like the other students at Shawnee." *Id.* ¶ 11, Doc. 19-1, PageID 544.

Plaintiff's primary response to this point is to state that Ms. Doe's appearance is insufficiently feminine to have a privacy interest in her transgender status. He goes as far as to submit a declaration to the Court opining that Ms. Doe "gave every appearance of being male" and "upon seeing [her], no one would have assumed that [she] was female (*i.e.*, that [she] was born female." Meriwether Decl. ¶¶ 8-9, Doc. 27-1, at PageID 638-39. In addition to being a further breach of Ms. Doe's privacy, that declaration has no basis in anything other than Plaintiff's subjective opinion; Plaintiff cannot assume that everyone perceives Jane Doe as he did. In fact, Jane Doe lives her life as a young woman and is accepted as such in her daily life, including in all of her other classes at Shawnee. In addition, Plaintiff's declaration is irrelevant. Not everyone who interacts with Ms. Doe does so face to face. If Ms. Doe applies for a job or a lease online, no

one would know she is transgender—except as a result of Plaintiff’s decision to “out” her by putting her transgender status in a public filing. More fundamentally, whether and on what terms to come out as transgender should be Ms. Doe’s decision. It is inappropriate for Plaintiff to unilaterally decide that Ms. Doe is insufficiently feminine to have a privacy interest in her transgender status, such that he can “out” her involuntarily in public filings—especially in response to a motion in which Ms. Doe submits a declaration explaining that she is *not* “out” and wants to disclose her transgender identity on her own terms.

Plaintiff cites no authority in which a person’s subjective assessment of another person’s transgender identity is grounds to expose them. Instead, his lead citation is a case in which a court held that a sex offender could not proceed under a pseudonym because his sex crimes were publicly known. Opp. at 6, Doc. 27, PageID 624 (citing *Rowe v. Burton*, 884 F. Supp. 1372, 1387 (D. Alaska 1994)). To state the obvious, Ms. Doe’s transgender status is not comparable to a criminal conviction in a public court record. The rest of Plaintiff’s cases (Opp. at 6, Doc. 27, PageID 624) similarly involve circumstances in which the identity of the plaintiff seeking to litigate anonymously had previously been reported publicly. See *Doe v. Shakur*, 164 F.R.D. 359, 361 (S.D.N.Y. 1996) (before filing of complaint, “the press had known [plaintiff’s] name for some time,” and “ha[d] been aware of both her residence and her place of employment”); *Doe v. F.B.I.*, 218 F.R.D. 256, 260 (D. Colo. 2003) (“[N]ewspaper reports furnished to the Court since the argument indicate that this cat has been out of the bag for quite a while.”); *Doe v. Fedcap Rehabilitation Servs., Inc.*, No. 17-CV-8220, 2018 WL 2021588, at *2 (S.D.N.Y. Apr. 27, 2018) (before filing of complaint, Plaintiff had “voluntar[ily] participat[ed] in a news story for a major news outlet” in which “Plaintiff used their real name, identified as genderqueer, and revealed other details about their gender non-conformity,” and “the picture specifically illustrated Plaintiff’s non-

conformance with gender norms”). By contrast, both Ms. Doe’s transgender identity and the Title IX investigation were confidential until this complaint was filed.

III. The Fact That Ms. Doe Was Involuntarily “Outed” Weighs Powerfully in Favor of Protecting Her Privacy.

There is another powerful reason to permit Ms. Doe to proceed pseudonymously. She did not voluntarily invoke the jurisdiction of the federal courts. Rather, she has always kept her interactions with Plaintiff confidential. She had a confidential discussion after class with Plaintiff, being careful not to raise the issue in front of her classmates. She then had a confidential discussion with a trusted administrator and Title IX official at Shawnee. Shawnee’s dispute resolution procedures operated as designed to resolve Ms. Doe’s complaint confidentially. It was Plaintiff who chose to “out” Ms. Doe in a public filing to which Ms. Doe did not consent.

That fact distinguishes this case from virtually every case Plaintiff cites, in which the courts emphasized that the *plaintiff* was filing suit and unilaterally exposing the *defendants’* names, and therefore should not hide behind a pseudonym. *See, e.g., Doe v. Hartz*, 52 F. Supp. 2d 1027, 147 (N.D. Iowa 1999) (“[T]here is considerable appeal to the defendants’ argument that they should not be held up to public ridicule while their accuser remains anonymous, when it is their accuser who has focused public attention on the circumstances she finds embarrassing.”); *Doe v. Ind. Black Expo, Inc.*, 923 F. Supp. 137, 141 (S.D. Ind. 1996) (“[T]hese are private claims, primarily for damages, that the plaintiff himself has chosen to bring to this court. Unlike, for example, the victim in a criminal case, he has not been caught up unwillingly in litigation in public courts but has instead chosen to initiate this action.”). That reasoning does not apply here, where Ms. Doe sought to keep her complaint confidential until Plaintiff publicized it. Thus, this is an even stronger case for permitting Ms. Doe to proceed pseudonymously than *City of Detroit*, in which the district court allowed a transgender *plaintiff* to proceed under a pseudonym. Given that Ms. Doe is

intervening in this case to defend her privacy—which Plaintiff violated—she should have the right to proceed under a pseudonym.

Further, not only did Plaintiff involuntarily “out” Ms. Doe, but the purpose of Ms. Doe’s intervention is to protect her privacy. As Ms. Doe’s motion explained, courts consistently permit parties asserting privacy claims to proceed pseudonymously. Mot. at 9, Doc. 19, PageID 536 & n.11. Indeed, as noted in *Doe v. Frank*, 951 F.2d 320 (11th Cir. 1992), a case Plaintiff cites repeatedly, a plaintiff may be permitted to proceed under a pseudonym where “the injury litigated against would be incurred as a result of the disclosure of the plaintiff’s identity.” *Id.* at 324. That reasoning applies here: one reason that Shawnee’s policy, which Ms. Doe seeks to defend, requires employees to use transgender students’ requested pronouns is that the use of incorrect pronouns will disclose their transgender identity to any listeners in earshot.

Yet another reason for protecting Ms. Doe’s privacy is that using Ms. Doe’s real name in the complaint violated Shawnee’s rules. As Ms. Doe’s opening brief explained, Plaintiff’s disclosure of her Title IX complaint violated Shawnee’s confidentiality policies. Mot. at 5-6, Doc. 19, PageID 532-33. Plaintiff does not dispute this point—making it all the more improper that his response brief continues to use Ms. Doe’s real name.

Against all this, Plaintiff makes a remarkable argument in defense of his breach of Ms. Doe’s privacy. Plaintiff contends that because Ms. Doe filed a confidential Title IX complaint that was vindicated by Shawnee, she *deserved* to have her name publicized. Plaintiff suggests that it was somehow wrongful for Ms. Doe to have a private conversation with him and then file a confidential Title IX complaint. Opp. at 1, Doc. 27, PageID 619 (“He [sic] confronted an esteemed professor, threatened to get him fired, and then accused him formally of violating federal law in a serious and deliberate fashion.”). In view of that, Plaintiff insists that it is fair not only to defend

himself, but to publicize her name and transgender status—despite Ms. Doe’s efforts to keep these matters confidential. To Plaintiff, outing Ms. Doe as a transgender woman and publicizing this case in press releases, in retaliation for Ms. Doe’s confidential complaint, is a matter of “basic fairness.” Opp. at 15, Doc. 27, PageID 633 (“Now that Dr. Meriwether must pursue federal litigation to clear his name and protect his career, basic fairness dictates that [Doe] publicly stand behind his [sic] accusations.”). He asserts that he would be at a “serious disadvantage” if he is “forced to defend himself publicly” while Ms. Doe makes her “accusations from behind a cloak of anonymity.” *Id.* (quoting *Shakur*, 164 F.R.D. at 361).

Plaintiff’s assertions are irreconcilable with the facts of this case. First, Ms. Doe is not making any public accusations; she filed a confidential Title IX complaint and never disclosed this incident, or Plaintiff’s name, publicly. Second, Plaintiff is not “defend[ing]” himself against Ms. Doe’s “accusations,” in the sense of arguing they are false. Plaintiff *admits* in his complaint that Ms. Doe’s core “accusations”—that he referred to her with male pronouns, and then referred to her (and only her) by her last name alone—are accurate. Indeed, the whole point of his complaint is to establish that he has a constitutional right to engage in the conduct Ms. Doe accused him of engaging in. Third, there was no public report that required Plaintiff to “clear his name”—rather, Plaintiff received a “letter of warning” that was placed in his “personnel file.” Compl. ¶¶ 234-235, Doc. 1, PageID 30. Fourth, Ms. Doe is not making accusations from “behind a cloak of anonymity.” Plaintiff knows exactly who she is. For the same reason, Plaintiff’s statement that Ms. Doe’s secrecy will give her “settlement leverage,” *id.*, makes no sense.

More fundamentally, Plaintiff’s premise that “basic fairness” gives him the right to publicize Ms. Doe’s confidential Title IX complaint using Ms. Doe’s real name, and “out” her as

transgender, is deeply misguided. As explained above, Plaintiff's conduct violates Shawnee's confidentiality policy. Plaintiff's own sense of fairness cannot outweigh that rule.

Plaintiff's assertion that confidential educational records can be released without a student's consent as a matter of "basic fairness" is also inconsistent with federal law. The Family Educational Rights and Privacy Act of 1974 (FERPA) and its implementing regulations prohibits the release of a student's educational records that contain "personally identifiable information" without prior written consent. 34 C.F.R. § 99.30(a)-(b). The scope of covered records is broad and includes any records that are "[d]irectly related to a student" and "[m]aintained by an educational agency or institution." *Id.* § 99.3. Thus, a professor cannot unilaterally release student records merely because the professor believes this would be "fair." Indeed, Plaintiff's filing of the complaint almost certainly violated FERPA: several of the exhibits attached to Plaintiff's complaint, such as Shawnee's formal Investigation Report and Report of Dean's Findings, identify Ms. Doe by her real name, disclose her transgender status, and plainly qualify as educational records under FERPA. *See* Doc. 1-13, PageID 254; Doc. 1-17, PageID 279.

Moreover, there are good reasons that Title IX complaints are kept confidential. In the sensitive context of a Title IX complaint, confidentiality protects both the accuser and the accused. Confidentiality protects the privacy of victims and encourages them to step forward. It also protects the accused from reputational harm while investigations are ongoing.

Under Plaintiff's theory, if a student confidentially complains that a professor raped or sexually harassed her, the professor should be able to drag her name into a public filing, accompanied by press releases to publicize the complaint. To be clear, Shawnee vindicated Ms. Doe's complaint, and Plaintiff admits that Ms. Doe's factual account of his refusal to use female pronouns is true. Plaintiff's position is that if a student files a confidential complaint and is

vindicated, publicizing that complaint—including the complainant’s name—is a matter of “basic fairness.” Or, in this case, publicizing a transgender student’s identity, effectively in retaliation for filing a confidential Title IX complaint that was vindicated, is a matter of “basic fairness.” Accepting this argument would both infringe the privacy of students and deter future victims from coming forward. The Court should not endorse this extraordinary position.

Plaintiff also states that he will agree to use pseudonyms *only if* Ms. Doe agrees to withdraw her motion to intervene (or it is denied). Opp. at 16, Doc. 27, PageID 634. This is illogical—Ms. Doe’s privacy should not turn on whether she is an intervenor or merely a witness. Moreover, Plaintiff’s suggestion would create a Catch-22. If Ms. Doe intervenes to protect her privacy as a transgender woman, this privacy would be lost by Plaintiff gratuitously using her name in public filings. Only if Ms. Doe withdraws her motion to protect her privacy would Plaintiff agree to respect it. The Court’s should reject Plaintiff’s proposal. Plaintiff should not be using threats to continue unnecessarily publicizing Ms. Doe’s transgender identity as leverage to persuade her to withdraw her motion to intervene. Ms. Doe does not accept Plaintiff’s offer that she abandon her defense of her legally and constitutionally protected interests in exchange for him respecting her privacy.

IV. The Fact that Plaintiff Is in a Position of Authority, and That Ms. Doe Faces the Risk of Discrimination, Further Supports Granting Ms. Doe’s Motion.

Plaintiff asserts that Ms. Doe is not “challenging the government,” faces no “risk of criminal prosecution” or comparable “infamy,” and is over the age of 18. Opp. at 3-4, 8-13, Doc. 27, PageID 621-22, 626-31. That is true, but the policies underlying those additional bases for confidentiality support granting Ms. Doe’s motion here. Courts protect the anonymity of litigants challenging the government, or litigants who may face criminal prosecution, because such litigation may “subject them to considerable harassment” or force them to make “revelations about

their personal beliefs and practices” that may invite “opprobrium.” *Porter*, 370 F.3d at 560. There is considerable empirical evidence that transgender people face discrimination in housing and employment. Mot. at 8-9, Doc. 19, PageID 535-36. If Ms. Doe’s name is publicized, her ability to find housing and employment may be jeopardized. Plaintiff casts these harms as “speculative,” Opp. at 12, Doc. 27, PageID 630, but does not dispute these facts or present contrary evidence. Plaintiff points to the fact that there are public figures who are openly transgender, such as Caitlyn Jenner and Jazz Jennings, Opp. at 7, Doc. 27, PageID 625, but it is naïve to suggest that the existence of these public figures implies that Ms. Doe faces no risk of discrimination.

Further, as Ms. Doe’s motion recounts, Ms. Doe has faced a torrent of abuse on the Internet, including threats of violence. See Mot. at 7-8 & n.10, Doc. 19, PageID 534-35. The Court may take “judicial notice of the increased threat of violence to which transgender individuals are exposed.” *City of Detroit*, 2018 WL 3434345, at *2. At a minimum, the Internet comments directed as Ms. Doe demonstrate extraordinary hostility to Ms. Doe, which in turn supports her request to proceed under a pseudonym. In *Doe v. Porter*, the Sixth Circuit cited hostile letters to the editor as a basis for granting a motion to proceed pseudonymously. See 370 F.3d at 560-61 (quoting a letter stating “I would love to come face to face with you because yes I would tell you what I thought of you and I would let my sons tell you too.”). Those letters were mild in comparison to the Internet comments directed at Ms. Doe. If those letters supported permitting the plaintiff to proceed under a pseudonym, Ms. Doe should be able to do so as well.

Finally, there is a power imbalance between Plaintiff and Ms. Doe. Plaintiff is a public employee who discriminated against Ms. Doe in his capacity as a tenured professor at a public university. Although Ms. Doe is not a child, she is a college student who will have to find a job after graduation. Plaintiff emphasizes that there were hostile Internet comments about him on

“LGBT and left-leaning outlets.” Opp. at 11, Doc. 27, PageID 629. But he was the one who chose to publicize this dispute—and he was able to do so precisely because, as a tenured professor, he enjoys job protections that Ms. Doe lacks. The Court should not permit Plaintiff to abuse that position and unilaterally expose her to the threat of vilification and discrimination.

V. Plaintiff Will Not Be Prejudiced If Ms. Doe Proceeds Pseudonymously.

Plaintiff’s assertions that he will be prejudiced if Ms. Doe proceeds pseudonymously are meritless. First, he speculates that some unspecified person third party might have “heard something” relevant or might “undermine[] [Doe’s] credibility.” Opp. at 14, Doc. 27, PageID 632. But Plaintiff knows the identity of every student in his own philosophy class, and those students are aware of who Plaintiff is. Thus, he already knows the full set of witnesses to his communications with Ms. Doe. If any of those students have information to share, they can tell him. Plaintiff apparently thinks that by publicizing Ms. Doe’s real name, some unnamed third party might step forward with unpleasant information on Ms. Doe on some unrelated matter, which Plaintiff would attempt to insert into the public record in an effort to make her look bad. Any such information would be wholly irrelevant to Plaintiff’s claim that his religious liberties and free speech rights were violated—especially given that Plaintiff admits Ms. Doe’s accusation that he refused to use female pronouns to refer to her in class.

Plaintiff also appeals to “basic fairness.” Opp. at 14-15, Doc. 27, PageID 632-33. As previously explained, this appeal to “basic fairness” is wholly meritless. Moreover, Plaintiff does not identify any actual unfairness in this litigation that would result if Ms. Doe’s motion is granted. Plaintiff alleges that this case presents issues of fact. Opp. at 15-16, Doc. 27, PageID 633-34. But Plaintiff does not dispute Ms. Doe’s core allegations that he refused to respect her gender identity in class, so Ms. Doe’s credibility on that issue is not in question. Plaintiff offers no concrete

explanation about how attacks on Ms. Doe’s “credibility” will support his claim that *Shawnee* violated his First Amendment rights. In any event, for the reasons stated in the motions to dismiss filed by Shawnee and Ms. Doe, Plaintiff’s suit fails as a matter of law.

CONCLUSION

For the foregoing reasons, Jane Doe respectfully requests that this Court grant her Motion to Proceed Pseudonymously. In addition, the Court should remove the complaint and exhibits as well as Plaintiff’s response to this motion and supporting declaration from the public docket and direct Plaintiff to refile redacted versions. Finally, the Court should enter an interim order requiring the parties to use Ms. Doe’s pseudonym pending this Court ruling on Ms. Doe’s motion.

Date: January 21, 2019

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 21, 2019, a copy of the foregoing pleading was filed electronically. Notice of this filing will be sent to all parties for whom counsel has entered an appearance by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

/s/ Asaf Orr
Attorney for Jane Doe