New York County Clerk's Index No. 158505/18

New York Supreme Court

APPELLATE DIVISION—FIRST DEPARTMENT

JANE DOE,

Plaintiff-Appellant,

—against—

JOHN DOE,

Defendant-Respondent.

CASE NO. 2020-01554

MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* BY LEGAL MOMENTUM AND THE NATIONAL CRIME VICTIM LAW INSTITUTE [FILED UNDER SEAL]

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REPRODUCED ON RECYCLED PAPER

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST DEPARTMENT

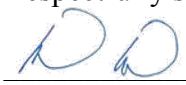
JANE DOE, Plaintiff, - against - JOHN DOE, Defendant.	New York County Index No. 158505/18

NOTICE OF MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* BY LEGAL MOMENTUM AND THE NATIONAL CRIME VICTIM LAW INSTITUTE

PLEASE TAKE NOTICE that, upon the accompanying affirmation of Amanda Kramer, dated September 9, 2020, and upon all prior pleadings and proceedings herein, the undersigned, attorneys for Legal Momentum and the National Crime Victim Law Institute, will move this Court upon these papers and without oral argument, at the Courthouse located at 27 Madison Avenue, New York, New York 10010, on October 5, 2020 at 10 a.m., or as soon thereafter as counsel can be heard, for an order (1) granting Legal Momentum and the National Crime Victim Law Institute leave to file their accompanying brief as *amici curiae* in the above-captioned case, and (2) accepting in this appeal the brief that has been filed under seal and served along with this motion.

Dated: September 9, 2020

Respectfully submitted,



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SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST DEPARTMENT

JANE DOE, Plaintiff, - against - JOHN DOE, Defendant.	New York County Index No. 158505/18

AFFIRMATION OF AMANDA KRAMER IN SUPPORT OF MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE*

Amanda Kramer, an attorney duly admitted to practice before the Courts of the State of New York, hereby affirms the following to be true under penalties of perjury:

1. I am a partner with the law firm of Covington & Burling LLP, counsel for the proposed *amici curiae* Legal Momentum and the National Crime Victim Law Institute, and am fully familiar with the facts, circumstances, and proceedings herein. I make this affirmation in support of the motion for leave to file a brief as *amici curiae*.

2. The *amici curiae* brief, attached hereto as Exhibit 1, concerns the application of New York Civil Rights Law § 50-b to civil cases with no underlying or parallel criminal cases, as well as the standard for proceeding anonymously in any New York state case.

3. Proposed *amici* Legal Momentum and the National Crime Victim Law Institute have a strong interest in the resolution of these issues. Legal Momentum is the nation's first and oldest civil rights organization dedicated to advancing the rights of women and girls. For 50 years, Legal Momentum has worked to achieve gender equality through impact litigation, policy advocacy, and education. The National Crime Victim Law Institute is a legal education and

advocacy organization, focused on promoting balance and fairness in the justice system through legal advocacy, education, and resource sharing. The National Crime Victim Law Institute is dedicated to ensuring that everyone in the justice system respects and enforces the legal rights of crime victims, and that every right of every crime victim is honored in every case.

4. As addressed more fully in the attached brief, Legal Momentum and the National Crime Victim Law Institute ask this Court to overturn the lower court's decision to the extent it allowed Defendant-Respondent to proceed under a pseudonym and sealed the docket.

5. In light of their history and expertise, Legal Momentum and the National Crime Victim Law Institute can be of special assistance to the Court. Legal Momentum and the National Crime Victim Law Institute advocate for the rights of sex crimes victims in criminal and civil cases, and represent a perspective distinct from that of the current parties to this dispute.

6. The motion for leave and attached brief are being offered under seal pursuant to 22 NYCRR § 1250.1(e), which states that "[r]ecords, briefs and other submissions filed in matters deemed confidential by law shall not be available to the public except as provided by statute or rule," and in light of the lower court's order sealing this docket.

7. The undersigned respectfully requests that this Court grant the motion for leave to file a brief as *amici curiae* in the above-captioned matter.

Dated: September 9, 2020

Amanda Kramer

Exhibit 1

New York County Clerk's Index No. 158505/18

New York Supreme Court

APPELLATE DIVISION—FIRST DEPARTMENT

JANE DOE,

Plaintiff-Appellant,

—against—

JOHN DOE,

Defendant-Respondent.

CASE NO. 2020-01554

BRIEF OF *AMICI CURIAE* LEGAL MOMENTUM AND THE NATIONAL CRIME VICTIM LAW INSTITUTE IN SUPPORT OF PLAINTIFF-APPELLANT [FILED UNDER SEAL]

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INTEREST OF AMICI CURIAE

Legal Momentum and the National Crime Victim Law Institute are legal advocacy groups dedicated to, *inter alia*, advancing the rights of women and crime victims in the criminal justice system. Legal Momentum is the nation's first and oldest civil rights organization dedicated to advancing the rights of women and girls. For 50 years, Legal Momentum has worked to achieve gender equality through impact litigation, policy advocacy, and education. The National Crime Victim Law Institute ("NCVLI") is a legal education and advocacy organization, focused on promoting balance and fairness in the justice system through legal advocacy, education, and resource sharing. NCVLI is dedicated to ensuring that everyone in the justice system respects and enforces the legal rights of crime victims, and that every right of every crime victim is honored in every case.

Legal Momentum and NCVLI are devoted to advocating for the rights of sex crimes victims in criminal and civil cases, and therefore have a vested interest in how New York's courts interpret and apply Civil Rights Law § 50-b and the common law presumption of openness of the courts.

INTRODUCTION

Survivors of sexual assault who bravely choose to publicly speak out do so in the face of significant potential consequences: stigma, disbelief, victim-blaming, and threats of physical harm. Those who report their assaults may never see justice in a criminal court due to the under-prosecution of sex crimes. Against this backdrop, it is tragically unsurprising that the vast majority of victims do not report their assailants or seek redress in civil court. Several states, including New York, have sought to mitigate the underreporting and under-prosecution of sex crimes by enhancing privacy protections for victims. Respondent's arguments and the lower court's decision threaten to undermine the progress New York has made in recognizing the fundamental rights of sex crime victims and providing them with meaningful recourse in the courts.

When Appellant filed a civil action alleging sexual assault under a pseudonym, she appropriately sought to avail herself of the privacy rights explicitly provided to sexual assault victims by the Legislature in Civil Rights Law § 50-b, as supported by precedent. Respondent's argument that § 50-b does not apply to this case, and that it would be unfair to allow only Appellant to proceed anonymously, is not supported by law or policy. The lower court's decision to seal the docket from the public and allow *both* parties—not just Appellant—to proceed

under pseudonyms disregards open courts principles and civil rights protections, and must be reversed.

It is well-established that the public's right of access to open courts can only be overcome in limited circumstances. When the Legislature passed § 50-b, which prohibits public officials and institutions from identifying the victims of sex offenses, it created a statutory right for victims to file civil cases under a pseudonym, overcoming the strong presumption of transparency and public access to the judicial system. Moreover, there are strong policy reasons supporting the broad protections provided by § 50-b. The public benefits when plaintiff-victims in sexual assault cases are permitted to proceed under a pseudonym, because anonymity provides important protections that allow survivors to seek redress in the courts. At the same time, the public suffers when defendant-perpetrators in sexual assault cases are not publicly identified. In recent years, the Legislature has recognized this issue by clearly establishing a public policy of promoting transparency around sexual misconduct claims and building a public record of accused perpetrators of such conduct.

The lower court abused its discretion in approaching the question of litigant anonymity as a matter that is subject to "compromise" and "negotiation." Rather, the open court presumption may only be overcome by statute or through the rigorous application of New York's common law balancing test. Here, Appellant

is permitted to use a pseudonym pursuant to § 50-b. Respondent, however, is not eligible for § 50-b's protections and the record is void of any specific facts or circumstances that would allow him to proceed anonymously under the common law balancing test.

Furthermore, Respondent is incorrect in claiming that § 50-b does not apply to civil cases with no underlying or parallel criminal proceeding. The unambiguous language of § 50-b creates no such exception, and courts are bound to enforce clear statutes as written. Even if, *arguendo,* it were appropriate for a court to consider legislative history when interpreting an unambiguous statute, the history of § 50-b does not support Respondent's reading.

In sum, § 50-b unambiguously applies to the instant case, permitting Appellant—and not Respondent—to proceed under a pseudonym. Absent a statutory right to proceed anonymously, Respondent must overcome the strong presumption that the public is entitled to open courts, and he has failed to do so. Accordingly, this Court should overturn the lower court's decision to the extent it allowed Respondent to proceed under a pseudonym and sealed the docket.

FACTS

On September 12, 2018, Appellant filed a civil complaint against Respondent, alleging assault, sexual assault, gender-motivated violence, and gross negligence. (R. 39-45). Appellant filed the action under a pseudonym ("Jane

Doe"), along with a proposed order to show cause as to why she should not be able to proceed under a pseudonym pursuant to § 50-b. (R. 36 ¶ 5). Upon receipt of the complaint and order to show cause, the lower court *sua sponte* altered the case caption, replacing Respondent's name with a pseudonym ("John Doe"). (R. 36 ¶ 6). At that time, the lower court did not create any record of the reasoning behind this decision.

Respondent opposed Appellant's request to use a pseudonym, arguing that § 50-b's statutory anonymity protection does not apply to civil cases with no underlying criminal action, but suggesting that Appellant and Respondent could both proceed under a pseudonym as a "compromise." (R. 64-73).

On November 1, 2018, the lower court conducted a hearing on the order to show cause, and commented that the parties appeared to be "negotiating with regards to the naming of [the parties] in the caption[,]" and that it "[did not] understand why that [negotiation] didn't go further[.]" (R. 10). Notably, the judge agreed with Appellant that § 50-b *does* apply to this case and permitted Appellant to proceed anonymously. (R. 13 (Appellant stated that "[§ 50-b] is only for victims of sexual assault and rape[, and] it is not limited to a criminal proceeding," and the court agreed: "[u]nderstood[,] I read it"); R. 16 (the court replied to Appellant's argument regarding the applicability of § 50-b, "I am not trouncing on [Appellant's] rights to proceed anonymously")). However, the judge questioned

why Respondent, too, could not proceed anonymously. (R. 15-16). Appellant argued that any humiliation Respondent might face is not comparable to the stigma and re-traumatization experienced by sex crimes victims, such as herself. The court reserved decision, but encouraged the parties "to go to the negotiation table." (R. 18).

On February 22, 2019, the lower court issued an order (1) directing that both parties be identified by pseudonyms in the case caption, and (2) sealing the entire docket. (R. 87-92). Once again, the court did *not* hold that § 50-b does not apply to this case. Rather, it concluded that Respondent "should be afforded the same opportunity to be shielded from public scrutiny as [Appellant]." (R. 89). In support of this conclusion, the court noted that the Manhattan District Attorney had not brought criminal charges against Respondent, the violent conduct alleged in Appellant's complaint remains unproven, and this case "implicate[s] the privacy rights of both [Appellant] and [Respondent] and outweigh[s] the presumption of openness in court proceedings." (R. 87-89). "Such compromise protects the privacy rights of each party until this matter concludes." (R. 89). The court did not make written findings of good cause, and provided no analysis or explanation for its decision to seal the entire docket.[1]

[1] The lower court's sealing of the docket necessitated the filing of this brief under seal, perpetuating the deprivation of the public's access to open courts in this case.

Appellant subsequently moved to vacate the lower court's February 22 order (R. 33), Respondent opposed (R. 111), and, on September 19, 2019, the court held a hearing on the motion (R. 20). During that hearing, the court again characterized its February 22 anonymity decision as a "compromise." (R. 22).

The lower court proceeded to read its decision into the record, which was later issued in writing. (R. 4). Once again, the judge did *not* hold that § 50-b is inapplicable in this case. Rather, the judge held that Respondent, too, is entitled to proceed anonymously, because "both parties have significant privacy rights at issue." (R. 5). It is this decision from which the Appellant brings the instant appeal.

APPLICABLE LAW

The public's right of access to open courts is a well-established constitutional and common law presumption that can only be overcome in limited circumstances. The identity of litigants is a critical element of this open court system. *See, e.g.*, *Anonymous v. Anonymous*, 27 A.D.3d 356, 361 (1st Dept. 2006); *Anonymous v. Lerner*, 124 A.D.3d 487, 487 (1st Dept. 2015); *cf. J. Doe No. 1 v. CBS Broad. Inc.*, 24 A.D.3d 215, 215 (1st Dept. 2005).

Accordingly, as this Court has made clear, party anonymity is not a matter up for "negotiation" or "compromise." *Anonymous*, 27 A.D.3d at 361 ("[E]ven where the parties seek to stipulate to [proceeding anonymously], the trial court . . .

should exercise its discretion to limit the public nature of judicial proceedings sparingly and then, only when unusual circumstances necessitate it."). Rather, when a party seeks to litigate under a pseudonym, courts must begin with "the broad constitutional proposition, arising from the First and Sixth Amendments . . . that the public . . . is generally entitled to have access to court proceedings." *Danco Labs. v. Chem. Works*, 274 A.D.2d 1, 6 (1st Dept. 2000). Because the public's right to access judicial proceedings is rooted in the Constitution, "any order denying access must be *narrowly tailored* to serve compelling objectives, such as a need for secrecy that outweighs the public's right to access." *Id.* at 6.

Against this background of open court principles, litigants may proceed under a pseudonym *only* if permitted to do so by statute, *or* under New York's common law balancing test.

Under Civil Rights Law § 50-b, sexual assault victims may not be publicly identified in any court record: "The identity of any victim of a sex offense . . . shall be confidential. No . . . court file . . . in the custody or possession of any public officer or employee, which identifies such a victim shall be made available for public inspection." N.Y. Civ. Rights Law § 50-b. Because a civil complaint and docket are "court file[s]" in the possession of a "public officer or employee," § 50-b applies to civil litigation. *See, e.g.*, *Doe v. New York Univ.*, 6 Misc. 3d 866, 877 (Sup. Ct. 2004). Accordingly, courts must keep confidential the identity of any

victim of a sex offense—including a plaintiff alleging sexual assault—which necessarily includes identification in a civil case caption.

In addition to statutory anonymity provisions, New York law permits litigants to proceed anonymously in certain limited circumstances pursuant to a common law balancing test. Under the balancing test, courts use their discretion in balancing "whether the [party] has a substantial privacy right which outweighs the customary and constitutionally-embedded presumption of openness in judicial proceedings." *New York Univ.*, 6 Misc. 3d at 879; *see also Lerner*, 124 A.D.3d at 487; *Stevens v. Brown*, 2012 WL 2951181, at *1 (Sup. Ct. July 2, 2012). Courts consider a number of factors when conducting this analysis, including "whether identification poses a risk of mental or physical harm, harassment, ridicule, or personal embarrassment; . . . the magnitude of the public interest in maintaining confidentiality or knowing the party's identity; . . . [and] whether the other side will be prejudiced by use of the pseudonym." *Id.* It is well-established that, standing alone, "[c]laims of public humiliation and embarrassment . . . are not sufficient grounds for allowing a [litigant] to proceed anonymously." *Lerner*, 124 A.D.3d at 488.

ARGUMENT

The lower court abused its discretion by directing both parties to proceed pseudonymously as a "compromise," (R. 22, 89), in lieu of analyzing whether each

party is entitled to anonymity under a statute or the common law balancing test. Any order limiting public access to open courts must be narrowly tailored to serve compelling objectives, and the lower court failed to appropriately tailor its order under the legal standards for anonymity. Instead, the lower court should have (1) recognized the presumption of openness; (2) permitted Appellant to proceed anonymously pursuant to her statutory right under § 50-b; (3) denied Respondent's request to proceed anonymously under the common law balancing test; and (4) allowed the docket to remain open to the public.[2]

I. Appellant May Proceed Anonymously Pursuant to § 50-b

Here, the complaint clearly identifies Appellant as the victim of a sex offense. Accordingly, under the plain language of § 50-b, Appellant's identity cannot be made public, and she is entitled to proceed under a pseudonym. No further analysis is necessary or permitted under § 50-b.[3]

[2] The Uniform Rules for Trial Courts provides: "Except where otherwise provided by statute or rule, a court *shall not* enter an order in any action or proceeding sealing the court records, whether in whole or in part, except upon a written finding of good cause, which shall specify the grounds thereof." 22 NYCRR § 216.1 (emphasis added). A finding of "good cause" requires the court to "consider the interests of the public as well as of the parties." *Id*.

[3] To the extent Respondent contends that § 50-b does not apply to this case because Appellant's allegations are "unproven," that argument is without merit. Under this reasoning, § 50-b would only apply to the small number of cases where a judge or jury has adjudicated a perpetrator's guilt, which is plainly not the case. *Cf. Brown v. New York City Police Dep't*, 264 A.D.2d 558, 561 (1st Dept. 1999) (agreeing that § 50-b may apply even where the accused perpetrator of the sex offense was acquitted in a criminal proceeding).

A. Section 50-b Does Not Limit its Protections to Criminal Cases

Respondent has argued that § 50-b does not apply to civil cases where there is no related charged criminal case. The lower court did not agree with this interpretation of § 50-b, (R. 4-5, 13, 16, 87-92), and neither should this Court.

"It is fundamental that . . . where the statutory language is clear and unambiguous, the court should construe it so as to give effect to the plain meaning of the words used." *Patrolmen's Benev. Ass'n v. City of New York*, 41 N.Y.2d 205, 208 (1976). Where the relevant statutory language is unambiguous, courts are "limited to giving effect to the language of the statute," *In re Heller*, 23 A.D.3d 61, 68 (2d Dept. 2005), *aff'd*, 6 N.Y.3d 649 (2006). Accordingly, it is "inappropriate" for a court to search for additional or different meaning in an unambiguous statute's legislative history. *Schiffer v. Schiffer*, 33 Misc. 3d 795, 798 n.4 (Sup. Ct. 2011).

Here, the language of § 50-b is unambiguous. It states that "no . . . court file or other documents, in the custody or possession of any public officer or employee, which identifies [the] victim [of a sex offense] shall be made available for public inspection." N.Y. Civ. Rights Law § 50-b. Given that a civil complaint and docket are "court file[s]" in the possession of a "public officer or employee," § 50-b plainly applies to civil litigation. *See, e.g.*, *New York Univ.*, 6 Misc. 3d at 877, 881 (applying § 50-b to a civil case without considering whether a parallel criminal

action existed). This language says nothing to indicate that there may be an exception for civil cases with no underlying criminal proceeding, nor is there any language that could create ambiguity about *any* exception to this statute whatsoever. *Cf. Washington Post Co. v. N.Y. State Ins. Dep't*, 61 N.Y.2d 557, 566 (1984). If the Legislature intended to include such an exception, it could have done so. It is not the Court's role to re-write a clear statute; rather, it must give effect to the fact that § 50-b unambiguously contains no exceptions.

1. *Doe v. Kidd* and its Progeny Were Wrongly Decided

The line of cases supporting Respondent's reading of § 50-b, stemming from *Doe v. Kidd*, 19 Misc. 3d 782 (Sup. Ct. 2008), were wrongly decided.[4] In *Kidd*, the court concluded that § 50-b contained an unexpressed exception for civil cases with no underlying criminal proceeding based on three fundamentally flawed premises: First, the court claimed that the First Department came to the same conclusion in *Brown v. New York City Police Dep't*, 264 A.D.2d 558 (1999). Not so. In *Brown*, this Court concluded that § 50-b did not apply to a case where the victim testified that she was *not* sexually assaulted, and the sex offense charges against the alleged perpetrator were subsequently dismissed. *Id.* at 561. In that case, § 50-b was inapplicable because there was no victim of a sex offense in the

[4] The other cases Respondent cites in support of this proposition are federal cases where § 50-b was not at issue.

first place, *not* because of the disposition of a related criminal proceeding. Furthermore, the court in *Brown* acknowledged that an individual may be a victim of a sex crime even if a criminal prosecution is unsuccessful. *Id.* ("Respondent's argument that the not guilty verdict on the rape and sodomy charges is not necessarily a finding that the complainant was not the victim of a sex offense has merit. However, it does not prevail under the unique facts of this case [where the victim testified that she was not sexually assaulted].").

Second, *Kidd* observed that several cases in which "courts . . . have afforded victims of a sexual offense protection under [§] 50-b involved circumstances under which the victim's cooperation during the course of a prosecution of an alleged sex crime was necessary." *Kidd*, 19 Misc. 3d at 786. This is irrelevant. Even if true, such a pattern does not alter the plain meaning of the statute, nor does it shed light on the legislative intent animating the statute.

Third, *Kidd* cited a single paragraph in § 50-b's legislative history to justify its holding. The language cited by *Kidd* does not support the conclusion that the Legislature intended for there to be an entirely unexpressed exception to § 50-b. Rather, it simply states that "a victim of a sex crime who is required to testify in a criminal proceeding . . . is entitled to protection from public disclosure," and such protection "encourages victims to cooperate in the prosecution of sexual offenses . . . ." *Id.* at 787. While this language describes one of many policy reasons behind

§ 50-b, to say that this single paragraph is evidence that the Legislature intended for § 50-b to apply *only* in cases relating to a criminal proceeding is not a fair reading of the statute or legislative history. If anything, this language reflects the fact that the Legislature considered various applications of § 50-b and chose not to include any limiting language regarding criminal proceedings in the statute. Further, even if it were appropriate for a court to consider legislative history in interpreting an unambiguous statute (it is not), the broader legislative history clearly indicates that the Legislature did not intend to limit the applicability of § 50-b. *See infra* Section I.B.2.

For the foregoing reasons, *Doe v. Kidd* and its progeny[5] were wrongly decided and should not be endorsed by this Court.

B. Section 50-b Recognizes that the Public Benefits When Survivor-Victims Are Permitted to Proceed in Court Under a Pseudonym

Compelling public policy reasons undergird § 50-b and support the difference in anonymity standards governing victims and accused perpetrators. New York's passage of § 50-b recognizes that anonymity encourages sexual assault survivors to report their assailants, bolstering public safety.

[5] *See, e.g.*, *Doe v. Good Samaritan Hosp.*, 65 Misc. 3d 987, 990 (Sup. Ct. 2019) (citing *Kidd* without further analysis).

1. Societal Stigma and Victim-Blaming Prevent Accurate Reporting and Prosecution of Sexual Assault

Victims must weigh their right to see their assailant brought to justice against the heart-wrenching reality that if the victims' identities become known to the public, they will likely be stigmatized, disbelieved, and subjected to intense public scrutiny, humiliation, and victim-blaming. This intense cultural stigma and shaming deters victims from pursuing legal remedies for sexual misconduct. For this reason, among violent crimes, sexual assault is one of the most underreported, with federal government reports showing that only 230 of 1000, or approximately one out of every four, sexual assaults are reported to the police. *The Criminal Justice System: Statistics*, Rape, Abuse & Incest Nat'l Network, https://www.rainn.org/statistics/criminal-justice-system (last accessed Sept. 8, 2020) (citing reports issued by the Department of Justice and Federal Bureau of Investigation). This underreporting, in turn, leads to under-prosecution. Due partially to low reporting rates, less than 1% of sexual assaults are prosecuted, and less than 0.5% of rapists will be incarcerated. *Id.*

One reason why victims of sexual assault may be reluctant to report is that they are often disbelieved and accused of fabrication or opportunism, even though studies show that false reports in sexual assault cases are exceedingly rare.[6] As a

[6] According to a report by the National Sexual Violence Resource Center, studies estimate that the prevalence of false reporting on sexual assault is between 2% and 10%, and those numbers

result, victims have stated that they are unlikely to seek police assistance in the wake of an assault because even police are unlikely to believe their claims. *See* Deborah Tuerkheimer, *Incredible Women: Sexual Violence and the Credibility Discount*, 166 U. Pa. L. Rev. 1, 28-32 (2017). This sad reality is borne out in numbers: in one survey of almost nine hundred police officers, the majority of respondents believed that 10-50% of sexual assault complainants are lying. Amy Dellinger Page, *Gateway to Reform? Policy Implications of Police Officers' Attitudes Toward Rape*, 33 Am. J. Crim. Just. 44, 55 (2008). Another 10% of respondents believed that 51-100% of sexual assault complainants are lying. *Id.*

Moreover, even when believed, victims of sexual assault are particularly likely to be blamed when compared to victims of other crimes. Sexual assault victims are often accused of "asking for it," whether because of their choice of dress or their consumption of drugs or alcohol. For example, a review of studies on acquaintance rape found that in eleven of sixteen studies, researchers found that intoxicated victims were blamed more for acquaintance rape than sober victims. Claire R. Gravelin et al., *Blaming the Victim of Acquaintance Rape: Individual, Situational, and Sociocultural Factors*, 9 Front Psychol. 2422 (2019). However, studies found that the opposite effect emerged for evaluations of the perpetrator—

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are likely inflated. *False Reporting: Overview*, Nat'l Sexual Violence Resource Ctr. (Mar. 2012), https://www.nsvrc.org/sites/default/files/2012-03/Publications_NSVRC_Overview_False-Reporting.pdf.

the more drunk the perpetrator, the more respondents *excused* his behavior. *Id.* This example illustrates the disproportionately high level of scrutiny and public castigation of character that victims are forced to endure. In fact, in a survey of victims of workplace sexual harassment, over 50% refrained from reporting sexual misconduct because they feared being perceived as a troublemaker and losing their jobs as a consequence. *New CareerBuilder Survey Finds 72 Percent of Workers Who Experience Sexual Harassment at Work Do Not Report It*, CareerBuilder (Jan. 19, 2018), http://press.careerbuilder.com/2018-01-19-New-CareerBuilder-Survey-Finds-72-Percent-of-Workers-Who-Experience-Sexual-Harassment-at-Work-Do-Not-Report-it.

Finally, survivors of sexual violence who report their assault frequently face threats of future harm and retaliation. Several high-profile instances of rape allegations illustrate the horrific threats of physical danger that reporters must endure. In the Supreme Court case *Florida Star v. B. J. F.*, a victim who reported a rape "received several threatening phone calls from a man who stated that he would rape [her] again." 491 U.S. 524, 528 (1989). As a result, she was forced to relocate from her home and seek police protection. In the highly publicized sexual assault case against Kobe Bryant, the victim received death threats. *People v. Bryant*, 94 P.3d 624, 636 n.12 (Colo. 2004). It is no wonder that fear of reprisal is one of the most common factors survivors cite for not reporting a sexual assault.

Reporting Sexual Assault: Why Survivors Often Don't, Md. Coalition Against Sexual Assault (June 18, 2013), https://ocrsm.umd.edu/files/Why-Is-Sexual-Assault-Under-Reported.pdf. A U.S. Department of Justice study showed that of the sexual violence crimes not reported to police from 2005-2010, 20% of victims stated that fear of retaliation was the reason for not reporting. Bureau of Just. Stat., Dep't of Just., *Female Victims of Sexual Violence*, 1994-2010 (2013).

2. New York and Other State Governments Have Recognized the Public Benefits of Providing Anonymity to Sexual Assault Survivors

Because "the state has a strong interest in ensuring that sex offenses are duly and promptly reported," and because protecting the privacy rights of sexual assault victims can contribute to this reporting, state legislatures have recognized their "extremely strong and fully justified" interest in protecting victims' identities. *People v. Ramirez*, 64 Cal. Rptr. 2d 9, 13 (Cal. Ct. App. 1997). According to a National Women's Study report, 86% of women surveyed thought that rape victims "would be less likely to report rapes if they felt their names would be disclosed by the news media." D.G. Kilpatrick et al., *Rape in America: A Report to the Nation* 6 (1992). As such, legislatures across the country have statutorily recognized a limited exception to the presumption of open courts to account for the fact that "the fear of further notoriety or abuse deters many [sexual exploitation] victims from pursuing legal remedies. This fear can be mitigated by clear

procedures allowing victims to use pseudonyms." Unif. Civ. Remedies For Unauthorized Disclosures Of Intimate Images Act § 5 Cmt. (Unif. Law Comm'n 2018). For example, California enacted legislation specifically allowing plaintiffs in civil proceedings to proceed under a pseudonym in "revenge pornography" cases. Cal. Civ. Code § 1708.85(f). Texas also protects the identity of under-aged plaintiffs in civil sexual assault cases. Tex. Civ. Prac. & Rem. Code § 30.013(c).

Like many other states, New York has enacted legislation to allow sexual assault victims to proceed in court under pseudonyms. The Legislature passed § 50-b to recognize the stigma and psychological toll associated with being publicly identified as the victim of a sex crime, and to encourage victims to report assaults and vindicate their rights.

The legislative history of § 50-b shows that the Legislature considered the chilling effect of victim publicity on sexual assault reporting, both when the law was unanimously adopted in 1979 (then applicable only to minors), and when it was later expanded in 1991 to protect victims of all ages. For example, when § 50-b was introduced, the City of Rochester Police Department, Victim Assistance Program, commented that out of the victims they dealt with, "[t]he victims of sex offense crimes seem to be the most traumatized. The possibility of having her name splashed all over the news media certainly adds an added dimension of fear to the victim." S. Assemb. 4061-A, 1979 Leg. (N.Y. 1979). When the 1991

amendment was introduced, the New York Executive Chamber stated, "[t]he release of [a victim's] identifying information does not serve the interest of justice. Indeed, it does a gross disservice to both the victim and the public. Concerns pertaining to privacy sometimes result in the victim failing to report a sexual offense. In its final report, the Governor's Task Force on Rape and Sexual Assault documented that sexual offenses are vastly underreported." S. Assemb. 5240, 1991 Leg. (N.Y. 1991).

3. The Public Policy Concerns that § 50-b Seeks to Address Are Equally Pertinent to Civil Cases as to Criminal Cases

To fully effectuate the public policy concerns addressed by § 50-b, § 50-b *must* apply to the civil context. Applying § 50-b solely to the criminal context, or to civil cases with a charged underlying or parallel criminal action, strips necessary privacy protections from an enormous swath of victims.

a) Civil Actions Can Be the Only Avenue for Victims of Sexual Assault to Obtain Justice, and Such Actions Contribute to Public Safety

In many cases, bringing a civil suit is the only way for sexual assault victims to hold perpetrators accountable. First and foremost, whether to charge and prosecute sexual misconduct criminally is entirely up to prosecutors; sexual assault victims exercise no control. Such cases are under-prosecuted: statistics show that for every 1000 sexual assaults, only nine cases are referred to prosecutors. *The Criminal Justice System: Statistics*, Rape, Abuse & Incest Nat'l Network,

https://www.rainn.org/statistics/criminal-justice-system (last accessed Sept. 8, 2020). Prosecutors may decline to prosecute credible sexual assault cases for many reasons, "ranging from bias to resource shortages to concern about conviction rates," especially when prosecutors take into account potential jury bias against victims of sexual assault. Deborah Tuerkheimer, *Incredible Women: Sexual Violence and the Credibility Discount*, 166 U. Pa. L. Rev. 1, 36-38, 38 n.220 (2017). Under-prosecution leaves many sexual assault victims with civil remedies as their only recourse.

Second, the civil system has the power to address the broader social structures giving rise to sexual misconduct, thus protecting possible future victims. Victims in civil cases can name as defendants not only perpetrators but also other individuals and institutions who facilitated or failed to prevent the sexual assault. Because such suits prompt third-party defendants to transform their safeguarding protocols and procedural responses, they can function as a stronger deterrent and remedial mechanism than criminal cases brought solely against the perpetrator. Transformations spurred by civil suits have included improvements to housing and building security, changes in workplace recruitment processes, and increased transparency around sexual misconduct reporting. *See* Tom Lininger, *Is It Wrong to Sue for Rape*? 57 Duke L.J. 1557, 1576-77 (2008). Thus, civil remedies for sexual assault are crucial to addressing public safety: the public has a strong

interest not only in bringing the direct perpetrator of a sexual assault to justice, but also dismantling dangerous and enabling environments in which future assaults may occur.

Finally, sexual assault victims often face overwhelming financial burdens as a result of the trauma and suffering caused by their assaults, and redress for these financial burdens cannot be fully achieved in criminal court. A 1996 U.S. Department of Justice study estimated that the cost of rape to a sexual assault victim, factoring in both tangible and intangible losses, was $87,000—approximately $144,000 in today's dollars. *See* Nat'l Inst. of Justice, U.S. Dep't of Justice, Research Report: Victim Costs and Consequences 9 (1996). As another study explained, victims often experience psychosomatic symptoms, chronic pain disorders, or psychiatric problems after their sexual assault, and victims thus "suffer financial loss from medical expenses, loss of property, and loss of income due to the recovery period and subsequent participation in the reporting and courtroom process." Patrick J. Hines, *Bracing the Armor: Extending Rape Shield Protections to Civil Proceedings*, 86 Notre Dame L. Rev. 879, 885-86 (2011). "While criminal law can serve as an important deterrent and expression of social condemnation, civil law is better suited to compensate victims for the harm they have suffered." Unif. Civ. Remedies For Unauthorized Disclosures Of Intimate Images Act at 2 (Unif. Law Comm'n 2018). For these reasons, the U.S.

Department of Justice has encouraged victims to pursue civil remedies, recognizing that "[c]ivil suits brought by victims serve both to exact damages from perpetrators and to encourage potential third parties to adopt adequate crime prevention measures. These effects combine to deter potential crime, thereby contributing greatly to a safer society." Victoria O. Brien, *Civil Legal Remedies for Crime Victims*, OVC Bulletin, Dec. 1992, at 3 (publication of the U.S. Department of Justice's Office for Victims of Crime).

b) Conditioning the Use of Victim Pseudonyms in Civil Cases on the Status of Parallel Criminal Proceedings Is Not Administrable and Would Deter Reporting and Vindication of Rights

To effectively protect victims of sexual misconduct from abuse and thus encourage reporting and vindication of rights, anonymity protections must attach *ex ante* and apply uniformly to both criminal and civil cases—that is, anonymity cannot be conditioned on achieving a certain result in a criminal case, or even on making a report to criminal authorities in the first place. Victims may, for example, bring civil suits before parallel criminal cases are resolved, or even begun. And as explained above, if a victim does make a report to law enforcement, the police may refuse to investigate or make an arrest, while prosecutors may decline to bring charges for any number of reasons, many of which are unrelated to the victim's credibility or the defendant's guilt. Introducing an element of conditionality into this variable terrain—for example, by starting

with anonymity in a civil case but losing it if parallel criminal charges are dropped, or by starting without anonymity but gaining it if a parallel criminal report is made or a guilty verdict obtained—would be both impracticable and inequitable, and would strip anonymity of its worth. Conferring or withdrawing anonymity midstream would be similarly absurd in a criminal case. The Legislature, in trying to protect victims and foster reporting, plainly did not contemplate such a hollow protection, nor did its statutory scheme condition anonymity in the civil context but not in the criminal. Instead, through § 50-b's broad protection for victims, the Legislature recognized that uniform, *ex ante*, anonymity protection in both criminal and civil contexts was necessary to give sexual assault victims the assurance they need to risk reporting to law enforcement or vindicating their rights through civil actions in the first place.

II. Respondent Is Not Entitled to Proceed Anonymously Under § 50-b or the Common Law Balancing Test

After concluding that Appellant is entitled to anonymity under § 50-b, the lower court should have considered whether Respondent is entitled to anonymity under a statute or the common law balancing test. Under either analysis, he is not.

A. As a Person Accused of Sexual Assault, Respondent Is Not Protected Under § 50-b

As an initial matter, it is undisputed that § 50-b provides anonymity protections only to *victims* of sexual assault, not to persons accused of *perpetrating*

a sexual assault. Accordingly, Respondent may not proceed anonymously under § 50-b or any other statute. He may, therefore, proceed anonymously only if he meets the high threshold of the common law balancing test.

B. The Common Law Balancing Test Would Not Justify Allowing Respondent to Proceed Anonymously

There is no common law rule that defendants in civil cases alleging sexual assault may overcome the presumption of openness simply due to the nature of these claims. Indeed, litigants accused of sexual misconduct are routinely identified in civil and criminal case captions, including civil cases without parallel criminal proceedings. Respondent—like all other litigants—was required to set forth specific facts and circumstances justifying the use of a pseudonym in his particular case. Here, Respondent has not established the necessary factual record. His argument for anonymity centers around generalized concerns of possible humiliation that would apply to any other person accused of sexual misconduct (*see, e.g.*, R. 71-72)—and, for that matter, a wide variety of other allegations that could be at issue in civil cases. As this Court has made clear, humiliation alone is not sufficient to overcome the presumption of openness. *See Lerner*, 124 A.D.3d at 488 (rejecting request to proceed anonymously because "[c]laims of public humiliation and embarrassment . . . are not sufficient grounds" to overcome the presumption of open courts).

Without any particularized factual showing from Respondent, the lower court had nothing to weigh against the public's right to open courts other than the fact that Respondent has been accused (but not convicted) of sexual misconduct, which may cause him embarrassment. Further, the court did not properly consider the common law balancing factors, including "the magnitude of the public interest in . . . knowing the party's identity." *Stevens*, 2012 WL 2951181 at *1. As explained below, there is a strong public interest in identifying alleged perpetrators of sexual assault—a policy issue that the Legislature has embraced in recent years, and which is reflected in the deliberately victim-centered language of § 50-b. *See infra* Section II.C. Accordingly, even if the court had properly applied the common law balancing test instead of attempting to strike a "compromise," it would have been an abuse of discretion to permit Respondent to proceed anonymously.

C. As New York Has Recognized in Recent Legislation, the Public Suffers When Defendant-Perpetrators in Sexual Assault Cases Are Not Publicly Identified

As explained above, privacy guarantees for *victims* of sexual assault merit an exception to the presumption of open courts. However, the public greatly benefits from increased transparency around incidents of sexual harassment and assault, and in fact, the New York legislature has established a clear policy of publicly identifying perpetrators, creating a record of sexual misconduct. Allowing

incidents of sexual misconduct to evade public scrutiny only serves the interests of serial abusers, who will repeatedly engage in sexual misconduct without being held accountable for their actions.[7]

In recent years, the Legislature has recognized this issue by clearly establishing a public policy of promoting transparency around sexual harassment claims and building a public record of the identities of perpetrators. In 2018, New York enacted legislation prohibiting employers from including non-disclosure provisions in settlement agreements that prevent the disclosure of the underlying facts and circumstances of discrimination claims, including sexual harassment, "unless the condition of confidentiality is the complainant's preference." N.Y. C.P.L.R. § 5003-b. That same year, the Legislature also prohibited mandatory arbitration to resolve allegations or claims of sexual harassment and other forms of discrimination. *Id.* § 7515. The passage of these laws is a clear indication that, as a matter of New York public policy, there has been a marked shift towards increasing transparency and accountability surrounding accused perpetrators of sexual misconduct.

[7] Indeed, studies show that perpetrators of rape are often serial criminals. As the Rape, Abuse & Incest National Network has reported, "[o]ut of every 1,000 suspected rape perpetrators referred to prosecutors[,] 370 have at least one prior felony conviction, including 100 who have 5 or more[.] 520 will be released—either because they posted bail or for other reasons—while awaiting trial[, and] 70 of the released perpetrators will be arrested for committing another crime before their case is decided." *Perpetrators of Sexual Violence: Statistics*, Rape, Abuse & Incest Nat'l Network, https://rainn.org/statistics/perpetrators-sexual-violence (last visited Sept. 8, 2020).

In line with this public policy, defendants should not be granted anonymity in sexual assault cases outside of exceptional circumstances. Granting defendants anonymity would stifle public discourse and awareness around sexual misconduct, while creating conditions under which repeat offenders may flourish. Moreover, in contrast to the policy interests supporting victim anonymity, there are no corresponding interests on the defendant side. For example, false reports are rare, and even then libel and defamation suits allow falsely accused defendants to recover for damage to their reputation.[8] And as the United States District Court for the Southern District of New York recently emphasized in a sexual harassment suit in which the plaintiff-victim proceeded under a pseudonym but the defendant-perpetrator was identified by name, "permitting Plaintiff to proceed anonymously should not prejudice Defendants. They will be able to defend the action equally as well [as] if Plaintiff proceeded under his real name." *Doe v. Landry's Inc.*, No. 1:18-cv-11501-LAP, slip op. at 2 (S.D.N.Y. Jan. 2, 2019) (ECF No. 21). Section 50-b plays an important role in furthering New York's vision of transparency and accountability—it encourages victims to pursue their rights in civil cases, and in doing so build a public record of perpetrators of sexual violence.

[8] In New York, plaintiffs in defamation-of-character cases can sue for injurious claims regarding sexual morality as defamatory *per se*. *See, e.g.*, *Rejent v. Liberation Publ'ns, Inc.*, 197 A.D.2d 240, 245 (1st Dept. 1994), *Gallo v. Alitalia-Linee Aeree Italiane-Societa per Azioni*, 585 F. Supp. 2d 520, 550-51 (S.D.N.Y. 2008).

CONCLUSION

For the foregoing reasons, the Court should reverse the lower court's "compromise" decision, permit the Appellant to proceed anonymously under § 50-b, hold that the Respondent is not entitled to proceed anonymously under New York's common law balancing test, unseal the docket, and unseal this brief, which was filed under seal only in respect of the lower court's sealing of the docket below.

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