

DECEMBER 2021

LITIGATION INSIGHTS

MOORE'S FEDERAL PRACTICE—TOP THREE HIGHLIGHTS

The following three summaries are this month's Editor's Top Picks from the dozens of decisions added to Moore's Federal Practice and Procedure.

CLASS ACTIONS

Coupon Settlements

McKinney-Drobnis v. Oreshack

2021 U.S. App. LEXIS 31524 (9th Cir. Oct. 20, 2021)

[Jump to full summary](#)

The Ninth Circuit held that the district court erred in finding that vouchers were not "coupons" under the Class Action Fairness Act, and that the district court abused its discretion in failing to apply the requisite heightened scrutiny for pre-certification settlements.

FORM OF PLEADINGS

Plaintiff's Use of Pseudonym Is Not Jurisdictional Defect

B.R. v. F.C.S.B.

2021 U.S. App. LEXIS 32621 (4th Cir. Nov. 2, 2021)

[Jump to full summary](#)

Summary. The Fourth Circuit holds that a plaintiff's filing of a complaint under a fictitious name without first obtaining leave of court to proceed pseudonymously is not a jurisdictional defect.

STANDING

Challenge to Prosecutorial Conduct

Lefebure v. D'Aquila

15 F.4th 650, 2021 U.S. App. LEXIS 29915 (5th Cir. Oct. 5, 2021)

[Jump to full summary](#)

The Fifth Circuit holds that the Equal Protection Clause does not confer standing on an individual who wishes to bring suit against a prosecutor for failure to prosecute another person.

Recommended Secondary Material

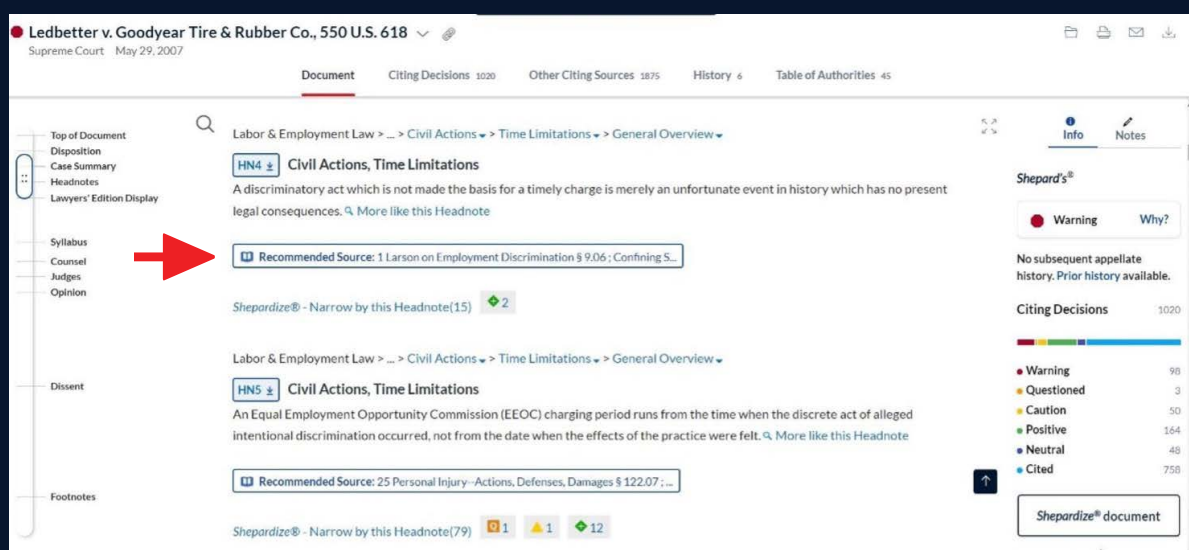
By Marisa Beirne, LexisNexis Solutions Consultant for the Federal Government

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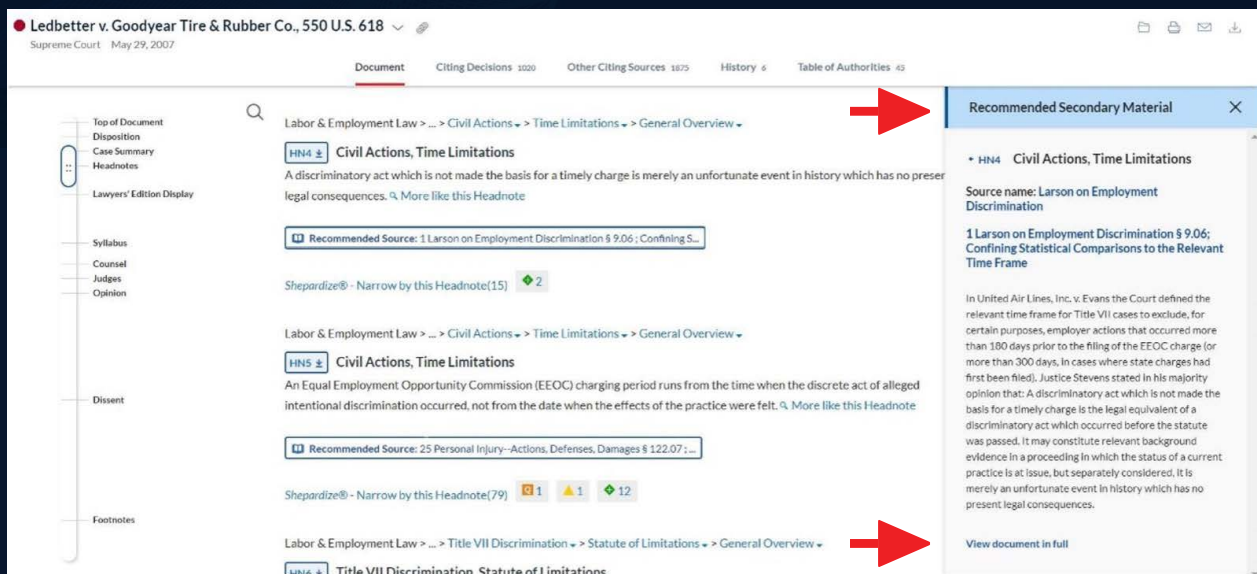
Follow the steps below to see how to utilize *Recommended Secondary Material*, while a user is viewing a case, a “Recommended Source” hyperlink will appear below headnotes.



The screenshot displays the LexisNexis interface for the case **Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618** (Supreme Court, May 29, 2007). The interface includes a sidebar with navigation options like 'Top of Document', 'Disposition', 'Case Summary', 'Headnotes', 'Lawyers' Edition Display', 'Syllabus', 'Counsel', 'Judges', 'Opinion', 'Dissent', and 'Footnotes'. The main content area shows the 'Civil Actions, Time Limitations' headnote (HN4) with the text: 'A discriminatory act which is not made the basis for a timely charge is merely an unfortunate event in history which has no present legal consequences. More like this Headnote'. Below this headnote, a red arrow points to a 'Recommended Source' link: '1 Larson on Employment Discrimination § 9.06; Confining S...'. The interface also shows 'Citing Decisions' (1020) and a 'Shepard's' warning section on the right.

When the user clicks on the Recommended Source link, the relevant section of the recommended source will appear in the preview pane on the right, as seen below. Users can then read a brief blurb about the source and what portion is directly related to the specific Headnote the user is viewing. The user can efficiently decide whether this is a secondary source that she or he wants to research deeper.

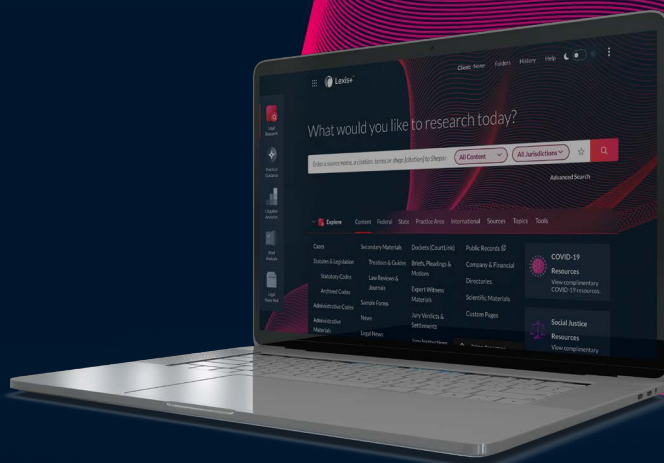
After a user identifies a source that she or he wants to dive deeper into she or he can hit the “view document in full” and Lexis+ will automatically open the secondary source in a new tab for the user to read and analyze.



The screenshot displays the Lexis+ interface for the case **Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618** (Supreme Court, May 29, 2007). The left sidebar shows document structure options like Top of Document, Disposition, Case Summary, Headnotes, and Footnotes. The main content area shows the document text with a search bar and navigation tabs. A 'Recommended Source' link is highlighted in the main content area. A red arrow points from this link to the 'Recommended Secondary Material' panel on the right. The panel shows the source name, a brief description, and a 'View document in full' link. Another red arrow points from a second 'Recommended Source' link in the main content area to the same panel.

This feature is rolling out throughout the month of December to users. Please contact your LexisNexis Solutions Consultant for more information or any help with this new Lexis+ Enhancement!

Resources on Ransomware on Lexis+®



Ransomware, a form of malicious software installed by hackers, can pose both legal and financial risks to individuals, companies, and federal government entities. And ransomware attacks have increased substantially in the past couple of years. Where can you go to find out more information about ransomware? Lexis+ is a great resource to turn to – here are three specific areas to consider in your ransomware research:

1. Secondary sources are a great place to start when you need an overview on subjects such as ransomware. Here are two titles that may provide you with some foundational knowledge:
 - [Cybersecurity Resilience Planning Handbook](#) provides guidance on understanding cyber threat and building more secure and resilience systems.
 - [Computer Law: A Guide to Cyberlaw and Data Privacy Law](#) is a treatise authored by David Bender and covers both US and international jurisdictions on privacy, data, and software protection.
2. Legal news provides coverage on emerging issues surrounding ransomware and other cybersecurity concerns. A great example is the following news article from Law360:
[17 Best Practices for Defending Against Ransomware Attacks](#)
3. Finally, Practice Guidance offers practice notes and expert guidance on nineteen areas of law, including data security and privacy. Here is a practice note on [Ransomware Planning and Response Best Practices](#).

CLASS ACTIONS

Coupon Settlements

McKinney-Drobnis v. Oreshack

2021 U.S. App. LEXIS 31524 (9th Cir. Oct. 20, 2021)

The Ninth Circuit held that the district court erred in finding that vouchers were not “coupons” under the Class Action Fairness Act, and that the district court abused its discretion in failing to apply the requisite heightened scrutiny for pre-certification settlements.

▼ **Background.** The plaintiffs were current and former members of a company that provided spa services. They brought suit against the company, alleging that it had periodically increased membership fees in violation of their membership agreements. The complaint alleged breach of contract, intentional interference with contractual relations, and state consumer-protection-law violations. After extensive discovery and other litigation, but before any motion for class certification, the parties reached a settlement.

Under the terms of the settlement agreement, class members could submit claims for vouchers for the defendant’s products and services. The voucher that each class member received would correspond to the fee increase the class member paid. The vouchers would expire after 18 months. The vouchers could be used at any of the defendant’s locations to purchase a variety of products, massage sessions, enhancements, and other services. They were not redeemable for cash and could not be used to pay monthly membership fees.

The settlement provided for a \$10 million floor for voucher payments; if class members did not claim enough vouchers to use up the full \$10 million fund, the settlement would increase voucher amounts to claimants pro rata until the \$10 million floor was reached. Further, the defendant also agreed to adopt a template membership agreement that mandated a 45-day advance written notice before membership fees could be increased. The agreement allowed each named plaintiff to request a \$10,000 incentive award without opposition. The parties also agreed to a “clear-sailing” provision for attorney’s fees: the defendant would not object to class counsel’s fee request of no more than \$3.3 million. Finally, the agreement contained a “reverter” or “kicker” provision: if the court awarded less than \$3.3 million in fees, the excess funds would revert to the defendant rather than to the class.

A total of 105,693 class members (about 6.2% of the class) submitted valid voucher requests. The requested vouchers amounted to under \$3 million in value, so each claimed voucher’s value was adjusted upward on a pro rata basis in proportion to the fee increase that the class member paid. After the adjustment, the vouchers ranged in value from \$36.28 to \$180.68. Class counsel sought the maximum \$3.3 million award.

After a fairness hearing, the district court overruled all objections, certified the class for settlement, approved the settlement, and granted most of class counsel’s requested fee award. The district court found that this was not a coupon settlement under the Class Action Fairness Act (CAFA) and therefore calculated fees based on the \$10 million face value of the vouchers. The district court applied a percentage-of-recovery method by adding the \$10 million value of the voucher relief with the expected \$450,000 in notice and administrative costs, and then awarding 25% of that total (\$2,612,500) as the attorney’s-fee award. This appeal followed.

- ▼ **Vouchers Were “Coupons.”** CAFA requires courts (1) to apply heightened scrutiny to settlements that award “coupons” to class members, and (2) to base fee awards on the redemption value of the coupons, rather than on their face value [see 28 U.S.C. § 1712]. CAFA does not define “coupon.” The Ninth Circuit has outlined three factors to guide the inquiry of whether settlement relief should be considered a coupon under CAFA: (1) whether class members have to hand over more of their own money before they can take advantage of a credit, (2) whether the credit is valid only for select products or services, and (3) how much flexibility the credit provides, including whether it expires or is freely transferrable [see *In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 934, 951 (9th Cir. 2015)]. The court of appeals made clear that whether a voucher is a “coupon” for CAFA purposes is a question of law reviewed de novo.

Here, the first factor favored the conclusion that the vouchers were coupons. Class members could purchase some products using vouchers alone without spending more of their own money. However, a voucher would not be enough to purchase most of the defendant’s products and spa services, including central services such as a massage. Factor two also suggested the vouchers were coupons, since they could be redeemed only for a relatively limited number of spa services and health and wellness products. Under factor three, the vouchers provided a good amount of flexibility, since they could be transferred, sold, and aggregated, and remained valid for 18 months. This factor favored not viewing the vouchers as coupons. In sum, however, considering all the factors, the court of appeals concluded that the vouchers were coupons and consequently subject to CAFA’s requirements for coupon settlements. The court of appeals therefore vacated the approval of the attorney’s-fee award and remanded for the district court to use the value of the redeemed vouchers in awarding fees, as required by 28 U.S.C. § 1712(a).

- ▼ **District Court Did Not Conduct Required Heightened Inquiry.** The court of appeals also concluded that the district court abused its discretion by failing to adequately investigate and substantively grapple with some of the potentially problematic aspects of the relationship between attorney’s fees and the benefit to the class. Before approving a class settlement, district courts must scrutinize the settlement and ensure that it is fair, reasonable, and adequate [see Fed. R. Civ. P. 23(e)(2)]. This decision is reviewed for abuse of discretion. Nevertheless, the district court must show it has explored comprehensively all factors, and must give a reasoned response to all non-frivolous objections. When a settlement precedes class certification, as it did here, the district court must apply an even higher level of scrutiny.

A district court must review a pre-certification settlement approval not only for whether the district court has explored comprehensively all factors, given a reasoned response to all non-frivolous objections, and adequately developed the record to support its final approval decision, but also for whether the district court has looked for and scrutinized any subtle signs that class counsel have allowed pursuit of their own self-interests to infect the negotiations. Three such signs, termed the *Bluetooth* factors [*In re Bluetooth Headset Products Liab. Litig.*, 654 F.3d 935 (9th Cir. 2011)] are (1) when counsel receives a disproportionate distribution of the settlement; (2) when the parties negotiate a clear-sailing arrangement, under which the defendant agrees not to challenge a request for an agreed-upon attorney’s fee; and (3) when the agreement contains a kicker or reverter clause that returns unawarded fees to the defendant, rather than the class.

All the *Bluetooth* warning signs were present in the settlement. With respect to the first factor, the court of appeals had determined that counsel fees would have to be reassessed on remand, so that

the district court would have to reconsider whether class counsel received a “disproportionate distribution of the settlement” in light of the adjusted fee award. The second and third factors—the clear-sailing and reverter provisions—were certainly present here, and the court of appeals agreed that the district court had not adequately investigated or addressed the implications of those provisions. These provisions are not forbidden, even in tandem, but the district court has a duty to scrutinize the agreement for signs that the fees requested by counsel are unreasonably high in relation to the relief provided to the class. When coupons are involved, the settlement value may be inflated because, if the likely redemption rate is low—which is to be expected in a consumer class action providing non-cash relief—then the defendant and class counsel can inflate the perceived settlement value while knowing that the defendant is unlikely to pay more than a fraction of that amount.

The district court had not conducted the required heightened inquiry of these matters and therefore had abused its discretion in granting approval of the settlement. The court of appeals vacated and remanded the district court’s approval of the settlement and its fee award, instructing the district court to use the value of the redeemed vouchers as required by CAFA and to analyze the pre-certification settlement agreement with heightened scrutiny. If the court again determined that the settlement was fair, it would need to provide the necessary explanations in support of its conclusions.

FORM OF PLEADINGS

Plaintiff's Use of Pseudonym Is Not Jurisdictional Defect

B.R. v. F.C.S.B.

2021 U.S. App. LEXIS 32621 (4th Cir. Nov. 2, 2021)

- ▼ **Summary.** The Fourth Circuit holds that a plaintiff's filing of a complaint under a fictitious name without first obtaining leave of court to proceed pseudonymously is not a jurisdictional defect.
- ▼ **Background.** The plaintiff in this case filed a complaint in which she referred to herself by the pseudonym "Jane Doe." She alleged multiple acts of sexual harassment and abuse, including rape, that were directed against her when she was in middle school in 2011 and 2012. She asserted claims under Title IX and state law, alleging that school administrators had deflected, minimized, and ignored her despite her repeated complaints, causing her to suffer "life-altering trauma." The complaint was filed in district court on July 12, 2019, shortly before the plaintiff attained age 20.

The defendants undoubtedly knew the plaintiff's identity from the extensive details set forth in the complaint. Still, the defendants moved to dismiss, contending that the plaintiff's failure to provide her true name to the court had deprived it of subject-matter jurisdiction and that this jurisdictional flaw could no longer be remedied because the statute of limitations for the plaintiff's federal claims had lapsed a few days after she filed her complaint. In response, the plaintiff disclosed her true name to the court in affidavits filed under seal, and she filed a motion to proceed under a pseudonym. The district court denied the defendants' jurisdictional motions, and because the sensitive nature of the allegations warranted "the utmost level of privacy," it allowed the action to proceed pseudonymously, with each party (including the defendants) referred to by initials. The court explained that although the plaintiff had violated Federal Rule of Civil Procedure 10(a), which requires that the title of a complaint include the names of all parties, that violation was immaterial to the court's subject-matter jurisdiction.

The district court certified its order for discretionary interlocutory appeal under the procedure prescribed by 28 U.S.C. § 1292(b), and the Fourth Circuit granted the defendants' request for permission to appeal "the question of whether a plaintiff's failure to obtain leave of court to file a complaint pseudonymously is a jurisdictional defect such that a later order granting leave to proceed pseudonymously does not relate back to the original filing for purposes of the statute of limitations."

The Fourth Circuit went on to affirm the district court's order, concluding that a plaintiff's use of a pseudonym without first obtaining leave to do so does not deprive the district court of jurisdiction.

- ▼ **Plaintiff's Use of Pseudonym Did Not Deprive District Court of Jurisdiction.** The defendants contended on appeal that the plaintiff's initial use of a pseudonym deprived the district court of jurisdiction, claiming that there is no "Case" or "Controversy" within the meaning of Article III when a plaintiff is not identified to the court with his or her true name. They argued that without the plaintiff's true name, the court cannot be sure that there is a real person behind the complaint. And based on that premise, the defendants reasoned that the district court in this case did not obtain jurisdiction until the plaintiff first disclosed her name to the court. At that point, the limitations period that the defendants contended was applicable to her Title IX claim had expired, rendering that claim untimely. And with no Title IX claim, the district court could not exercise supplemental jurisdiction over the state-law claims.

The Fourth Circuit rejected the defendants' contention. The court of appeals observed that although the term "jurisdiction" had been used somewhat loosely on occasion in the past, it is now

well established that it refers to the courts' statutory or constitutional power to adjudicate cases [see *United States v. Cotton*, 535 U.S. 625, 630, 122 S. Ct. 1781, 152 L. Ed. 2d 860 (2002)]. Federal courts are courts of limited jurisdiction, constrained to exercise only the authority conferred by Article III of the Constitution and affirmatively granted by federal statute [see *In re Bulldog Trucking, Inc.*, 147 F.3d 347, 352 (4th Cir. 1998)].

It was undisputed in this case that the plaintiff had asserted claims that fell within the district court's statutory subject-matter jurisdiction. The alleged violations of Title IX presented federal questions [see 28 U.S.C. § 1331], and the related state-law claims were within the court's supplementary jurisdiction [see 28 U.S.C. § 1367(a)]. The court of appeals therefore focused its analysis on whether the pseudonymous complaint fell outside the scope of the federal courts' constitutional power to adjudicate.

Article III of the Constitution provides that "[t]he judicial Power of the United States . . . shall extend to" nine specified categories of "Cases" and "Controversies" [U.S. Const., Art. III §§ 1, 2]. The Supreme Court has noted that by requiring a "Case" or "Controversy" for a federal court to act, Article III restricts the federal judicial power "to the traditional role of Anglo-American courts, which is to redress or prevent actual or imminently threatened injury to persons caused by private or official violation of law" [see *Summers v. Earth Island Inst.*, 555 U.S. 488, 492, 129 S. Ct. 1142, 173 L. Ed. 2d 1 (2009)]. In this manner, "the words 'cases' and 'controversies' . . . limit the business of federal courts to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process" [*Flast v. Cohen*, 392 U.S. 83, 94–95, 88 S. Ct. 1942, 20 L. Ed. 2d 947 (1968)]. Strict adherence to the case-or-controversy requirement thus ensures that federal courts do not intrude into areas committed to the other branches of government and is therefore essential to maintaining the Constitution's separation of powers [*Flast v. Cohen*, 392 U.S. 83, 95, 88 S. Ct. 1942, 20 L. Ed. 2d 947 (1968)].

The Fourth Circuit panel in this case found particularly significant a recent statement by the Supreme Court describing Article III's fundamental principles: "In sum, under Article III, a federal court may resolve only a real controversy with real impact on real persons" [*TransUnion LLC v. Ramirez*, 594 U.S. —, 141 S. Ct. 2190, 210 L. Ed. 2d 568, 583 (2021) (internal quotation marks omitted)]. The Fourth Circuit then gave its own summary of Article III's principles:

In short, the cases and controversies that Article III assigns to federal courts refer to real disputes among real persons, involving actual or threatened injuries that can be redressed in a judicial proceeding. It follows therefore that Article III does not assign to federal courts any power to address hypothetical circumstances, give advisory opinions, or resolve abstract disputes.

Based on these principles, the Fourth Circuit easily concluded that when the plaintiff initially filed her complaint, her civil action qualified as a "Case" or "Controversy" within the meaning of Article III. Although she did not include her real name in the complaint as required by Civil Rule 10(a), everything else about what she alleged was real. The complaint described actual historical incidents of rape and sexual abuse, not hypothetical ones, giving times and places for them. It described particular injuries the plaintiff suffered from the alleged misconduct, for which she sought damages that a court can award. And she alleged all the elements of a Title IX claim, over which federal courts have jurisdiction. As with any complaint, the allegations had to be proved before the plaintiff would be entitled to any recovery, but there was nothing in her complaint to suggest that what she alleged was fictitious. The dispute with the defendants therefore was a real case, a real controversy, that federal courts had jurisdiction to resolve.

The court of appeals also pointed out that the plaintiff's allegations showed that she possessed the kind of personal stake necessary for Article III standing: she suffered a concrete and particularized injury caused by the defendants and redressable by the court [see *TransUnion LLC v. Ramirez*, 594 U.S. —, 141 S. Ct. 2190, 210 L. Ed. 2d 568, 582–583 (2021)]. In these circumstances, therefore, there was no risk of the district court issuing an advisory or hypothetical opinion in resolving her claims. Instead, the only role the court was asked to serve was the quintessentially judicial one of using the adversarial process to resolve a genuine dispute between real parties with a real stake in the outcome of the proceedings—in other words, “the traditional role of Anglo-American courts” [see *Summers v. Earth Island Inst.*, 555 U.S. 488, 492, 129 S. Ct. 1142, 173 L. Ed. 2d 1 (2009)].

The Fourth Circuit concluded that a failure to disclose the plaintiff's name to the court at the time of filing a complaint is immaterial to whether that civil action qualifies as a case or controversy.

- ▼ **Historical Pleading Practice Does Not Override Constitutional Principles.** The Fourth Circuit rejected the defendants' argument that because historical pleading practice—the antecedent to Civil Rule 10(a)—required complaints to include the proper names of all parties, a pseudonymous lawsuit cannot qualify as a case or controversy. This argument relied largely on the Supreme Court's recent statement that “Article III's restriction of the judicial power to ‘Cases’ and ‘Controversies’ is properly understood to mean cases and controversies of the sort traditionally amenable to, and resolved by, the judicial process” [see *Uzuegbunam v. Preczewski*, 592 U.S. —, 141 S. Ct. 792, 209 L. Ed. 2d 94, 101 (2021) (some internal quotation marks omitted)].

The Fourth Circuit acknowledged that in analyzing whether a plaintiff possesses the requisite personal interest to make a dispute qualify as a “Case,” the Supreme Court has indeed looked to the common law. But, the court of appeals pointed out, the fact that the Court regularly relies on the common law in analyzing standing, an established Article III requirement, does not suggest that a common-law pleading requirement should be transformed into part of the irreducible constitutional minimum necessary for an Article III “Case” or “Controversy” to exist. In short, the mere fact that pseudonymous lawsuits were unknown at common law does not require the conclusion that a plaintiff who files such an action now fails to present the court with an Article III case or controversy.

- ▼ **Disclosure of Identity Is Not Necessary to Ensure That Plaintiff Is Real.** The Fourth Circuit also rejected an argument that disclosure of a plaintiff's identity to the court should be treated as a jurisdictional requirement because it is necessary to ensure that a real person stands behind the complaint. The court of appeals pointed out that when the plaintiff filed her pseudonymous complaint, she alleged that she was a real person— “an adult individual and citizen of the United States.” The court allowed that if that allegation turned out to be false, remedies were available [see, e.g., Fed. R. Civ. P. 11(c)]. But the court explained that the mere possibility that an unscrupulous attorney might file suit in the name of a nonexistent Jane or John Doe before securing a real plaintiff is no reason to declare that the disclosure of the plaintiff's name is dispositive of the court's power to adjudicate the dispute.
- ▼ **Compliance With Rule 10(a) Continues to Be Important.** The Fourth Circuit closed by emphasizing that in concluding that the plaintiff's pseudonymous filing had no effect on the district court's jurisdiction, the appellate panel did not intend to trivialize the importance of complying with Civil Rule 10(a). That rule plainly states that “[t]he title of the complaint must name all the parties” [Fed. R. Civ. P. 10(a)]. The court noted that this requirement serves the vital purpose of facilitating public scrutiny of judicial proceedings. Because pseudonymous litigation undermines the public's right of access to judicial proceedings, when a party seeks to litigate

under a pseudonym, a district court has an independent obligation to ensure that extraordinary circumstances support such a request, by balancing the party's stated interest in anonymity against the public's interest in openness and any prejudice that anonymity would pose to the opposing party [see *Doe v. Pub. Citizen*, 749 F.3d 246, 273–274 (4th Cir. 2014)].

In sum, a plaintiff's failure to disclose his or her name to the district court at the outset of the litigation does not deny the court the power to resolve the dispute. Rather, a district court that possesses jurisdiction over such an action also possesses, as a corollary, the inherent *power* to require the plaintiff to identify himself or herself under seal to the court and to the defendants [see *ACLU v. Holder*, 673 F.3d 245, 256 (4th Cir. 2011)].

- ▼ **Possible Conflict With Tenth Circuit.** The Fourth Circuit noted that the Tenth Circuit has held that “[a]bsent permission by the district court to proceed anonymously, and under such other conditions as the court may impose (such as requiring disclosure of their true identity under seal), the federal courts lack jurisdiction over the unnamed parties, as a case has not been commenced with respect to them” [see *Nat’l Commodity & Barter Ass’n v. Gibbs*, 886 F.2d 1240, 1245 (10th Cir. 1989)]. But the Fourth Circuit concluded that the Tenth Circuit’s decision represents the kind of drive-by jurisdictional ruling that was more common before Supreme Court decisions made clear that the term “subject-matter jurisdiction” means “the courts’ statutory or constitutional power to adjudicate the case” [*Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 89, 91, 118 S. Ct. 1003, 140 L. Ed. 2d 210 (1998)].

STANDING**Challenge to Prosecutorial Conduct*****Lefebure v. D'Aquilla***

15 F.4th 650, 2021 U.S. App. LEXIS 29915 (5th Cir. Oct. 5, 2021)

The Fifth Circuit holds that the Equal Protection Clause does not confer standing on an individual who wishes to bring suit against a prosecutor for failure to prosecute another person.

- ▼ **Background.** The plaintiff in this case was forced out of her Baton Rouge home during a flood. As a result of the flood, she temporarily relocated to the home occupied by her cousin and her cousin's husband. The cousin's husband, Barrett Boeker, was a deputy warden at the Louisiana State Penitentiary. Boeker and his family resided on the grounds of the penitentiary.

The plaintiff alleged that after she moved into the home, Boeker sexually assaulted her on multiple occasions. The plaintiff contacted the police and provided a detailed and disturbing description of the repeated assaults. Boeker was initially arrested, however no indictment was ever brought.

The plaintiff then filed suit in civil court, alleging that Boeker conspired with the district attorney, Samuel D'Aquilla (as well as Boeker's own counsel, a relative of D'Aquilla), to ensure that he would not be investigated or prosecuted for his crimes.

The defendants filed a motion to dismiss, which the district court denied in part. The district court found that the plaintiff had standing to bring her claims, but it dismissed some of the plaintiff's claims and also dismissed some of the defendants' defenses.

Defendant D'Aquilla appealed the order on the motion to dismiss. The plaintiff's counsel failed to file a responsive brief on appeal. Accordingly, the appellate court ruled on the defendant's brief alone, and held that the plaintiff did not have standing to pursue her claims. The plaintiff's counsel then requested a rehearing en banc, which the court denied.

- ▼ **Limits on Standing to Challenge Policies of Prosecuting Authority.** The three-judge panel of the Fifth Circuit began its opinion by stating that if anyone deserved a day in court, it was the plaintiff in this case. The panel stated that the details alleged in the plaintiff's complaint "are sickening." The appellate court went on to say, "It is difficult to imagine anyone who deserves justice more than [the plaintiff]. But her claim against D'Aquilla runs into a legal obstacle that the panel has no discretion to ignore."

The court explained that in *Linda R.S. v. Richard D.*, the Supreme Court held that a citizen does not have standing to challenge the policies of the prosecuting authority unless the citizen herself or himself is prosecuted or threatened with prosecution [*Linda R.S. v. Richard D.*, 410 U.S. 614, 617–619, 93 S. Ct. 1146, 35 L. Ed. 2d 536 (1973)]. Under the principle of standing established in the *Linda R.S.* case, every person has a legal interest in how they are treated by law enforcement—but not a legally cognizable interest in how *others* are treated by law enforcement. Therefore, people accused of a crime have an interest in being treated fairly by prosecutors. But victims do not have standing based on whether other people—including their perpetrators—are investigated or prosecuted.

The Fifth Circuit panel stated that the plaintiff in this case “suffered one of the most horrific crimes imaginable.” Accordingly, the fact that the plaintiff was injured was not in dispute. However, the court also stated that under longstanding Supreme Court precedent, a crime victim lacks standing to sue a prosecutor for failing to investigate or indict her or his perpetrator due to lack of causation and redressability. In other words, because the prosecutor himself did not perpetrate the attacks in this case, the injury could not be traced to him.

- ▼ **Standing Is Based in Part on Separation of Powers.** The plaintiff argued that the prosecutor injured her by letting her attacker go free. But the Fifth Circuit noted that a decision to prosecute is made by officials in the executive branch, not by judges or victims of crimes. Thus, the judiciary does not have control over which individuals will be subject to investigation or prosecution [see *United States v. Nixon*, 418 U.S. 683, 693, 94 S. Ct. 3090, 41 L. Ed. 2d 1039 (1974)].

In reaching that conclusion, the Fifth Circuit cited to a more recent Supreme Court opinion in which Chief Justice Roberts noted that “[o]ur entire criminal justice system is premised on the notion that a criminal prosecution pits the government against the governed, not one private citizen against another” [*Robertson v. Watson*, 560 U.S. 272, 278, 130 S. Ct. 2184, 176 L. Ed. 2d 1024 (2010) (Roberts, C.J., dissenting from dismissal of the writ of certiorari as improvidently granted)]. In other words, the Fifth Circuit held that allowing an aggrieved individual to bring suit against a prosecutor based on the prosecutor’s actions in her or his official capacity would amount to using the criminal justice system to pit one individual against another.

The Fifth Circuit panel noted that the plaintiff’s story was “particularly appalling” because her alleged perpetrator held a position of prominence in the criminal justice system as an assistant prison warden. The panel acknowledged, “We expect law enforcement officials to uphold the law, not to violate it—to protect the innocent, not to victimize them.” Citing *United States v. Taffaro* [919 F.3d 947, 949 (5th Cir. 2019) (Ho, J., concurring)], the panel stated that “having two different legal standards — one for the powerful, the popular, and the well-connected, and another for everyone else” undermines the public confidence in the criminal justice system. The court flatly stated that the “system failed [the plaintiff] — badly.” Nevertheless, the court held that it was bound by the Supreme Court precedent established in the *Linda R.S.* case.

- ▼ **Argument Based on Equal Protection.** The plaintiff did not contest the validity of the Supreme Court precedent. However, she did argue that courts had to be able to review her case — notwithstanding the Supreme Court precedent in *Linda R.S.* — because the decision not to prosecute Boeker may have been based on a broader, discriminatory non-prosecution policy.

In a dissent, Circuit Judge Graves agreed with the plaintiff’s argument on this point. He opined that the suit should have been allowed to proceed because “the Equal Protection Clause recognizes a right to equal enforcement of the law that encompasses equal protection for crime victims.” The dissent quoted Judge Easterbrook, who distilled the original meaning of the Equal Protection Clause as follows: “[I]f the police and prosecutors protect white citizens, they must protect black citizens too” [see *Del Marcelle v. Brown Cnty. Corp.*, 680 F.3d 887, 901 (7th Cir. 2012) (en banc) (Easterbrook, C.J., concurring)].

Nevertheless, the majority of the three-judge panel held that a plaintiff is not entitled to an order requiring arrest or prosecution of their assailants. The court concluded by reiterating, “We are horrified by the allegations in this case—the repeated acts of rape and sexual assault, followed

by grotesque acts of prosecutorial misconduct. But we have no authority to overturn Supreme Court precedent.”

The court acknowledged that the *Linda R.S.* decision has been heavily criticized, and the court further acknowledged that the opinion may be at odds with other cases finding standing when a plaintiff alleges lack of equal protection. However, as the Fifth Circuit stated, only the Supreme Court has the authority to revisit *Linda R.S.*